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SPECIAL MEASURES TO ENSURE MINORITY POLITICAL PARTICIPATION IN POST-CONFLICT SCENARIOS

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I. Introduction

Situations of conflict create unique challenges in addressing human rights concerns. The mandate of the United Nation's Independent Expert on Minority Issues addresses these challenges as they apply to minorities, stating "persons belonging to minorities often suffer disproportionately from the effects of conflict, resulting in the violation of their human rights."¹ The right of minorities to meaningfully participate in their state's political process is foundational to addressing such human rights violations. Laws guaranteeing universal suffrage alone are usually insufficient to address longstanding and entrenched disenfranchisement resulting from sustained conflicts or a history of minority rights abuse. As a result, special measures are fundamental in promoting genuine equality and ensuring a democratic government that adequately reflects the diverse viewpoints of its constituency. This paper will outline how post-conflict scenarios necessitate the implementation of special measures aimed at ensuring minorities and members of minority communities effectively partake in their state's political process. The following sections examine the legal foundations for political participation and special measures as they apply to minorities, challenges facing minority political participation following instances of conflict and recommendations to states and the Human Rights Council.

II. Legal Foundation

The right to effective participation in public affairs and the use of special measures to combat de facto inequality are principles firmly rooted in human rights law and reflected in regional and international human rights instruments. The right to effective political participation includes, among others, the right to vote and be voted for as well as the right to take part in the government of one's country. Article 21(3) of the Universal Declaration of Human Rights

¹ Human Rights Council Res. 16/6, Mandate of the Indep. Expert on Minority Issues, 16th Sess., 28 Feb. 25-March 2011, 2011, A/HRC/RES/16/6 at 2 (April 8, 2011). Available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/125/13/PDF/G1112513.pdf?OpenElement>

(UDHR) establishes these rights, stating “[e]veryone has the right to take part in the government of his country” and that “[t]he will of the people shall be . . . expressed in periodic and genuine elections which shall be by universal and equal suffrage.”² Similar guarantees are found in Article 25 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of Protocol I of the European Convention on Human Rights, (ECHR), Article 23 of the American Convention on Human Rights, Article 13 of the African Charter on Human and People’s Rights (Banjul Charter), and Article 24 of the Arab Charter on Human Rights.

Additionally, the International Convention on the Elimination of Racial Discrimination (ICERD) holds that states not only have a duty to end discriminatory laws and practices that disenfranchise minority populations or members of minority communities, but maintain an affirmative obligation to ensure their full and equal enjoyment of the right to political participation.³ Specifically, ICERD requires states to guarantee equality in “political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level.”⁴ Such guarantees entail conferring temporary benefits to individuals and groups that face a disparate enjoyment of human rights with the aim of curing such imbalances.⁵ The Committee on the Elimination of Racial Discrimination (CERD) has emphasized that the conferral of temporary benefits in light of persistent disparities is part of a state’s obligations

² Universal Declaration of Human Rights art. 21, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. Available at: <http://www.un.org/en/documents/udhr/index.shtml>.

³ Comm. For the Elimination of Racial Discrimination. General Recommendation No. 32, ¶ 13 CERD/C/GC/32 (Sept. 24, 2009) [hereinafter General Recommendation No. 32]. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/GC32_English.pdf

⁴ International Convention on the Elimination of Racial Discrimination art. 5(c), Mar. 7, 1966, 660 U.N.T.S. 195. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

⁵ General Recommendation No. 32 *supra* note 3 at ¶ 11.

under ICERD.⁶ Such obligations are also established in Article 2 of the ICCPR and Article 4 of UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (UN Declaration on Minorities).

At the regional level, the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) recognizes the duty of states to impose affirmative measures to promote minority political participation, declaring that states "shall create the conditions necessary for the effective participation of persons belonging to national minorities . . . in public affairs, in particular those affecting them."⁷ Article 6 of the Draft Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance also obligates states to undertake affirmative measures to ensure the human rights of marginalized persons or groups with the specific aim of "promoting equitable conditions for equal opportunity, inclusion, and progress for such persons or groups."⁸

Despite the preferential treatment special measures grant minority groups, such actions are not considered discriminatory if they are implemented with the sole purpose of remedying discrimination in fact, are proportional in achieving this purpose and are applied only for the duration necessary to cure such disparities.⁹ In addition, proving historic discrimination of vulnerable groups is not necessary to validate the legality of special measures. Rather such programs need only to address fixing present disparities and preventing inequalities from arising

⁶ Id. at ¶ 30.

⁷ Council of Europe, *Framework Convention for the Protection of National Minorities* art. 15 (Feb. 1 2009). [Hereinafter FCNM]. Available at: <http://www.conventions.coe.int/Treaty/en/Treaties/Html/157.htm>

⁸ OAS *Draft Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance*, 7, OAS Doc. No. CAJP/GT/RDI-179/11 rev. 8 (2012). Available at: <http://www.oas.org/consejo/cajp/RACISM.asp>

⁹ General Recommendation No. 32 *supra* note 3 at ¶ 19.

in the future.¹⁰ These principles are reflected in various international and regional human rights instruments that mandate the use of special measures as a tool to promote genuine equality.

Finally, although there is exists no internationally agreed upon definition of minorities, this report will rely on factors provided by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹¹

This report takes the widely held position that self-identification is also a necessary criterion in determining an individual's minority status.¹²

III. Challenges Facing Minority Post-Conflict Political Participation

While several challenges exist in promoting minority political participation following instances of conflict, the proceeding sections focus particularly on challenges in the electoral process, governing process and the process of assessing the need and efficacy of special measures. Ultimately, without addressing such obstacles, post-conflict states fail to satisfy their obligation to guarantee equal enjoyment of political rights.

A. Participation in the Electoral Process

The right to vote is foundational in realizing other fundamental human rights. Yet post-conflict dynamics often threaten the personal security of minorities, subject them to fraud,

¹⁰ Id. at ¶ 22.

¹¹ U.N. Office of the High Comm. for Human Rights, *Minority Rights: Int'l. Standards and Guidance for Implementation* 3, HR/PUB/10/3 (2010). [Hereinafter *Minority Rights*]. Available at: http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf Cites to Special Rapporteur of the Cub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979). Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL7/903/66/PDF/NL790366.pdf?OpenElement>

¹² Id.

coercion and intimidation and leave minorities facing structural inequalities that inhibit their ability to partake in elections. General Comment 25 to the ICCPR mandates the implementation of special measures in such contexts in order “to overcome specific difficulties . . . which prevent persons entitled to vote from exercising their rights effectively.”¹³

With respect to threats against personal security, instances of conflict often give way to a culture of impunity, creating an atmosphere that allows non-state actors to threaten the safety of minorities. Such an environment often leaves members of minority communities largely disenfranchised. General Recommendation 32 to the ICERD clarifies that the protective aims of special measures apply to remedy not only the inequitable practices of states but human rights violations emanating from private actors as well.¹⁴ In Iraq’s first post-conflict parliamentary elections in 2005, minority communities were subject to widespread voting irregularities. Reports identify how lack of adequate policing and administrative safeguards in districts subject to territorial dispute between Iraqi Kurdistan and the federal government allowed political factions to prevent ballot boxes from passing to predominantly Assyrian villages.¹⁵ Targeted campaigns of deadly violence orchestrated by non-state actors intending to intimidate minorities from voting were successful in deterring non-Muslim communities from turning out to polls in subsequent elections.¹⁶ In such instances, the application of special measures aimed at safeguarding minority-heavy regions with security forces reflective of local demographics,

¹³ Human Rights Comm., General Comment 25, ¶ 12, CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter General Comment 25]. Available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument)

¹⁴ General Recommendation No. 32 *supra* note 3 at ¶ 23.

¹⁵ *2005 Country Reports on Human Rights Practices: Iraq*, U.S. State Dept. (March 8, 2006).

<http://www.state.gov/j/drl/rls/hrrpt/2005/61689.htm>

¹⁶ *Minorities in Iraq fear for their safety ahead of election*, Minority Rights Group Int’l (March 6, 2010).

<http://www.minorityrights.org/9756/press-releases/minorities-in-iraq-fear-for-their-safety-ahead-of-elections.html>

particularly during election periods, can serve as an essential tool to help ensure that all groups are afforded an equal ability to participate in the electoral process.

Members of minority communities commonly represent a disproportionate number of individuals displaced by conflict.¹⁷ In 2008, nearly two-thirds of all armed conflicts included an ethnic component.¹⁸ Campaigns of ethnic cleansing, forced relocation and other similar acts of transgression are regularly executed with the goal of displacing individuals based on their minority status. When attempting to exercise their right to vote, minorities displaced by conflict risk being subject to voter fraud, coercion and intimidation by virtue of their status as internally displaced people (IDP). General Comment 25 to the ICCPR bans State Parties from engaging in such “undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will.”¹⁹

Nevertheless, post-conflict states often exploit the vulnerability of minority IDPs to coerce their vote. In Georgia, the violent and protracted secessionist efforts in South Ossetia and Abkhazia have caused thousands of residents to be displaced.²⁰ Despite being able to take part in national elections, the electoral law deterred IDPs, including many minority ethnic Georgians escaping the conflict region, from casting ballots in local elections where they temporarily resided within Georgia proper.²¹ Many of those displaced feared the electoral law would

¹⁷ Elizabeth Ferris & Kimberly Stoltz, *Minorities, Displacement and Iraq's Future*, p. 1, The Brookings Institution-University of Bern Project on Internal Displacement, (December 2008), *available at* http://www.brookings.edu/~media/research/files/papers/2008/12/23%20minorities%20ferris/1223_minorities_ferris.pdf

¹⁸ *Id.* at 3.

¹⁹ General Comment 25 *supra* note 15 at ¶ 19.

²⁰ Although Georgians comprise a majority throughout Georgia, they constitute a minority in the breakaway regions. See *One year after war over South Ossetia, minorities still at risk*. Minority Rights Group Int'l, (August 7, 2009). Available at: <http://www.minorityrights.org/8026/comment-amp-analysis/one-year-after-war-over-south-ossetia-minorities-still-at-risk.html>

²¹ Jeff Fisher, Jeremy Grace & Bruce Hatch, *Electoral Displacement in the Caucasus: Georgia and Azerbaijan – Final Report*, p. 13, Int'l Org. for Migration (September 19, 2003), *available at*

normalize their IDP status if they registered to vote in local elections, causing them to forfeit certain benefits, including the possibility of returning home in the future.²² Reports indicate that Georgian officials evaded integrating displaced ethnic Georgians within undisputed areas of Georgia in order to avoid acquiescing to separatist claims and preserving territorial right over South Ossetia and Abkhazia.²³

Similarly in Iraq, reports indicate that the election-related rights of minority IDPs were violated when the disbursement of humanitarian aid for displaced Assyrians residing in disputed territories was conditioned on the support for ruling Kurdish political party vying to annex the area into Iraqi Kurdistan.²⁴ NGOs claimed IDPs concentrated in such disputed regions avoided speaking openly about political officials or taking part in elections.²⁵ Leveraging aid in order to manipulate the votes of minority IDPs exploits their vulnerable disposition and directly contravenes the international principles enshrined within the ICCPR and other human rights instruments. Recommendations following the Second Session of the UN Forum on Minority Issues recognize the necessity of special measures to “secure the right of minorities to political participation . . . particularly with regard to refugees and internally displaced persons” during a country’s transition from armed conflict.²⁶ To ensure displaced minorities participate in the

http://www.geneseo.edu/~iompress/Archive/Outputs/Electoral_Displacement_in_the_Caucasus1.pdf [Hereinafter *Electoral Displacement*]

²² Erin Mooney & Balkees Jarrah, *Displaced and Disenfranchised: Internally Displaced Persons and Elections in the OSCE Region*, p. 32, The Brookings Institution (March 2005), *available at* http://www.brookings.edu/~media/Projects/idp/2005_mooney%20jarrah.PDF

²³ *Id.* See also *Electoral Displacement supra* note 31

²⁴ *On Vulnerable Ground: Violence against Minority Communities in Nineveh Province’s Disputed Territories*, p. 26, Human Rights Watch (November 10, 2009), *available at* <http://www.hrw.org/reports/2009/11/10/vulnerable-ground-0>

²⁵ *Id.*

²⁶ Forum on Minority Issues, Nov. 12-13, 2009, *Minorities and Effective Political Participation*, ¶ 24, U.N. Doc. A/HRC/13/25 (Feb. 3, 2010). Available at: <http://daccess-ods.un.org/TMP/4056295.45450211.html>

electoral process on an equal basis, an examination of possible special measures is necessary to determine what safeguards are available to prevent such unjust influence.

Finally, efforts to educate voters are vital to ensuring their engagement in post-conflict democracies where public confidence in the election process has not fully matured.²⁷ For minorities, language barriers exacerbate the difficulty of learning about their state's political affairs and prevent them from becoming familiar with the election process. Providing election material in minority languages and encouraging members of minority groups to join election administration bodies can help to not only cure structural inequalities that disenfranchise minorities but promote political consciousness and instill or restore their proficiency in the state's public affairs.

The experience in Georgia illustrates the positive impact such special measures have in encouraging minority participation in the state's post-conflict electoral process. Reports published in 2004 by the Organization for Security and Cooperation in Europe (OSCE) documented how poor proficiency in the Georgian language among the country's two sizeable national minorities, Azeris and Armenians, created de facto barrier to their full participation in the work of election commissions and limited their access to election related information.²⁸ Following specific initiatives to produce various voting resources in minority languages, subsequent reports show that understanding of the electoral process among members of minority communities appears to have increased.²⁹ Furthermore, delivering voting resources in Azeri,

²⁷ Ako Minashvili & Sandro Chiaureli *Voter Information and Education*, in Council of Europe and OSCE Mission to Georgia 90 (1990), available at <http://www.coe.int/t/dgap/tbilisi/archives/downloads/Books/Local%20Elections%202006%20-%20Lessons%20learned%20Eng.pdf>

²⁸ *Georgia Parliamentary Election OSCE/ODIHR Election Observation Mission Report Part 1*, 15, OSCE (January 28, 2004) available at <http://www.osce.org/odihr/elections/georgia/22206>

²⁹ *Georgia Extraordinary Presidential Election OSCE/ODIHR Election Observation Mission Report*, 15, OSCE (February 28, 2004) available at <http://www.osce.org/odihr/elections/georgia/24600>

Armenian and other languages furthered Georgia's compliance with its obligations under the ICCPR, which mandates that "[i]nformation and materials about voting should be available in minority languages."³⁰ Other initiatives like multilingual training sessions have also helped cure disproportional representation of minorities in election commissions, including commissions administering minority-heavy regions.³¹ Ultimately, such access to information helps create a competent minority electorate and encourages their active and meaningful participation in the electoral process. For these reasons, such initiatives should be common practice during elections occurring within other post-conflict societies.

B. Participation in the Governing Process

Alongside the right to vote, the right to partake in the government of one's country is critical in ensuring the issues of minorities are addressed at the local and national level. This right is enshrined in the Declaration on the Rights of Minorities, which grants persons belonging to minorities "the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live."³² In post-conflict states, various obstacles preclude minority representatives from substantively participating in the state's governing process. These obstacles include, among others, the lack of political will to genuinely consult all minority communities on pertinent issues during the state's critical post-conflict transition.

Prior consultation with minority communities on laws and policies directly affecting them is one of the principles methods states employ to promote minority participation in the

³⁰ General Comment 25 *supra* note 15 at ¶ 12.

³¹ *Georgia Parliamentary Election OSCE/ODIHR Election Observation Mission Final Report*, 23, OSCE (Dec. 21, 2011) available at <http://www.osce.org/odihr/elections/98399>

³² Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities art. 47 G. A. Res. 135, U.N. Doc., A/RES/47/135 (Dec. 18, 1992) [Hereinafter UN Declaration on Minorities]. Available at: <http://www.un.org/documents/ga/res/47/a47r135.htm>

decision-making process. The Office of the UN High Commissioner for Human Rights (OHCHR) reports that supporting meaningful and informed consultation “by minorities of matters directly affecting them . . . is an effective means for promoting stability and integration in [post-conflict] societies.”³³ During a country’s transition from conflict, the integration of minority viewpoints is critical to ensuring that their interests are represented in the long term. Often this phase is characterized by nation building efforts in which political agreements are arranged and new constitutions are drafted that help define the future identity of the post-conflict state.

However, even when consultative mechanisms are in place, minorities are often marginalized from meaningfully influencing the development of these new political and legal frameworks that directly affect them. In Kosovo, six of the country’s non-Serbian national minorities were left to fill just three seats reserved for “others” in the Constitutional Commission, which was responsible for drafting Kosovo’s post-independence constitution.³⁴ As a result, Roma, Ashkali and Egyptian civil society claim they were entirely unrepresented on the Commission and that none of their comments to the draft constitution were incorporated.³⁵ Without granting all minority communities an opportunity to have their community’s contributions heard, Kosovo’s Constitutional Commission failed to ensure that such groups effectively participated in the political process during a critical juncture in their state’s post-conflict development. As the OSCE High Commissioner on National Minorities’ (HCNM) Lund Recommendations on Effective Participation of National Minorities in Public Life clarifies, in

³³ *Minority Rights supra* note 11 at 41.

³⁴ Georgina Stevens, *Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo* 16, Minority Rights Group International (May 26, 2009) available at <http://www.minorityrights.org/7856/reports/filling-the-vacuum-ensuring-protection-and-legal-remedies-for-minorities-in-kosovo.html>

³⁵ *Id.*

order for consultative bodies to serve their purpose, they must allow opportunities for minorities to contribute substantively to decision-making processes and ensure their contributions to actually have effect.³⁶

C. Process of assessing the need and efficacy of special measures

The implementation of special measures alone is usually insufficient to ensure minorities effectively participate in the political process. In order for special measures to be both effective and non-discriminatory, they must be grounded in realistic assessment of the obstacles facing minorities. However, post-conflict scenarios create a dynamic that impedes the requisite collection of disaggregated data on minorities. Such challenges include the reliance on pre-conflict census information and the political sensitivities that deter governments from collecting statistics based on ethnicity, religion or other demographic attributes that are to used to define minority status.

In allocating reserved seats, post-conflict states often rely on pre-conflict census data, which tends to underrepresent minority populations. In Bosnia and Herzegovina (BiH), communities not belonging to the defined “constituent groups” (i.e. Bosniaks, Croats and Serbs), including the 17 recognized national minorities, are granted seats in municipal governments if they represent at least 3 percent of the municipal population.³⁷ The apportionment of reserved seats is determined by the 1991 census conducted just prior to the Bosnian War.³⁸ The report of the Independent Expert on Minority Issues following her recent country visit to BiH recognizes

³⁶ Org. For Security and Cooperation in Europe [OSCE], *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, at 10 (Sept. 2009). Available at:

<http://www.osce.org/hcnm/32240?download=true>

³⁷ 22nd Session of the Human Rights Council, Feb. 25-March 22, *Report of the independent expert on minority issues Addendum – Mission to Bosnia and Herzegovina*, ¶ 30 U.N. Doc. A/HRC/22/49/Add.1 (Nov. 28, 2011) Available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC2249Add.1_English.pdf

³⁸ *Id.* at ¶ 4.

that the “census significantly undercounted the Roma, many of whom are thought to have identified as Yugoslavs.”³⁹ Only 8,864 self-identified as Roma despite estimates that their actual number may now be as high as 100,000.”⁴⁰

Similarly, in states like Rwanda where inter-ethnic tensions escalated into genocide, political sensitivities can prevent officials from collecting current data on minorities.⁴¹ The lack of accurate demographic information in Rwanda prevents an objective assessment of whether parliamentary quotas and other positive measures aimed at supporting the country’s recognized “historically marginalized peoples,” like the Batwa minority, are sufficient to ensure their ability to influence laws and policies affecting them.⁴² As a result, accurate statistics are crucial in analyzing the efficacy of special measures aimed at ensuring equality in the political process.

IV. Recommendations

Failure to protect the rights of minorities to participate in the political process following situations of conflict prevents them from being part of the state’s social, political and economic redevelopment. To promote these rights, Human Rights Advocates urges:

1. The Human Rights Council to request the Independent Expert on Minority Issues to study best practices for implementing special measures to ensure minorities participate in the political process after conflict.

2. States emerging from conflict to:

³⁹ Id.

⁴⁰ Id.

⁴¹ 22nd Session of the Human Rights Council, Feb. 27-March 23, *Report of the independent expert on minority issues Addendum – Mission to Rwanda*, ¶ 23 U.N. Doc. A/HRC/19/56/Add.1 (Nov. 28, 2011). Available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-56-Add1_en.pdf

⁴² Id. at ¶ 52.

- a. Implement, as early as possible, appropriate measures that ensure minorities, including displaced minorities, have a genuine voice in their state's decision-making process.
- b. Ensure the security of minorities and other vulnerable groups, especially during election periods.
- c. Maintain statistics on minority political participation, surveying public opinion, and assessing the efficacy of special measures in place.