

IRAQ'S CONSTITUTIONAL CHALLENGE

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IRAQ'S CONSTITUTIONAL CHALLENGE

EXECUTIVE SUMMARY AND RECOMMENDATIONS

As attacks against the occupying forces and suicide bombs against civilian targets intensify, the need for a new political formula that will increase the powers, legitimacy and representative quality of Iraqi governing institutions is becoming more urgent than ever. The response to date, reflected in United Nations Security Council Resolution 1511, has been to tie the transfer of the exercise of sovereignty to the drafting of an Iraqi constitution, its adoption in a referendum and ensuing national elections.

This logic presents the unenviable choice of either unduly rushing the constitutional process, or unduly postponing the transfer of political power. Both would be destabilising. The transfer of authority is pressing, as is the broadening of the Iraqi Governing Council's political base. But the constitution-making process must be done deliberately or it will be done poorly, and dangerously. Decoupling the immediate governance issue (the transfer of powers to a broader based Iraqi government working under a transitional mandate) from the constitutional process (the creation of a permanent democratic system) is the best pathway toward a stable Iraq.

As to constitution-making, all indicators on the ground are that this process will require considerable time if it is to succeed. Interviews with members of the Interim Governing Council and the Constitutional Preparatory Committee as well as other political actors in Iraq make clear that Iraqis are only just beginning to contemplate and discuss the desired content of, and the steps required for, a new constitution.

Iraqis are sharply divided over the most fundamental issues relating to the nature of their future state and the governmental system that is to rule it. One of the principal sources of discord involves the distribution

of power between the centre and the regions: whether Iraq should be a unitary or federal republic; if it is the latter, what the boundaries of the different regions would be; and, in particular, whether the Kurdish region will be defined ethnically or territorially and whether it will include Kirkuk. Equally sensitive is the question of what kind of guarantees of religious freedom will be incorporated into the constitution and what role Islam will be given in the system of government.

The first battle in the preparation of a new constitution has flared in the debate over how to write one. Political actors have already begun to raise procedural demands as a means of tilting the eventual substance of the constitution in their favour. Iraq's most senior Shiite cleric, Grand Ayatollah Ali Sistani, has called for direct elections to a constituent assembly, which would likely result in a Shiite-dominated assembly. The Kurds have expressed a preference for a careful selection of constitution drafters, hoping that such a procedure will compensate for their smaller numbers and allow them to capitalise on their comparative advantage – a thorough familiarity with constitutional intricacies. The Iraqi National Congress, a group that has had over a decade in exile to prepare itself for a role in a new Iraq but has yet to demonstrate significant popular support among Iraqis, has argued that elections to a constituent assembly would be “too unwieldy” and that the Interim Governing Council should select the drafters.

This battle offers only a glimpse of the profound issues that Iraqis must confront before reaching a national consensus on a vision for their country. It is, therefore, important that the debate over the constitution, currently limited to a small circle of the new political and intellectual elites, be

broadened to offer an opportunity to larger sectors of Iraqis to weigh in on matters that will have an enduring impact on their own lives and those of future generations.

As to the immediate governance issue, pressures have been building rapidly in the U.S. and in Iraq to accelerate the transition toward genuine Iraqi rule. This was first reflected in United Nations Security Council Resolution 1511 which, embodying a U.S. preference, requested by 15 December 2003 from the Interim Governing Council (which presently 'embodies' Iraqi sovereignty but does not exercise it) a precise timetable and program for a constitution to be drafted and elections to be held under it, on the premise that only a permanent constitution could give Iraq the legitimate government it needs to enjoy full sovereignty.

Unfortunately, the protracted political bargaining at the Security Council has translated into barely perceptible changes on the ground, with UNSCR 1511 doing little or nothing to increase the legitimacy or powers of the Interim Governing Council; transfer civilian authority from the CPA to the UN; or come up with a realistic constitutional time-frame - all steps that are necessary to try to stabilise the situation. For the U.S. and the international community as a whole, it is back to the drawing board.

Regardless of the chosen political formula, the current violence is likely to continue, the outcome of a rapid regime change that has deprived many of previous positions of power and privilege and of an occupation that has both stirred nationalistic and religious feelings and become a magnet for foreign militants. But there are political steps that can and should be taken to strengthen the legitimacy of Iraq's leaders, co-opt currently estranged political, tribal and religious groups, lessen the feeling of foreign occupation and maximise the prospects of producing a legitimate and viable Iraqi constitution. They should be based on the following principles:

- ❑ The immediate question of governance should be decoupled from the process of putting in place a permanent constitution.
- ❑ The UN should be given primary authority and responsibility for overseeing both the transfer of governing authority to Iraqi institutions and the constitution-making process.

- ❑ On governance, the UN should oversee the process of broadening the Interim Governing Council – by elections if possible, by appointment after wide consultation if not - to include social and political forces that are either not represented or under-represented (including followers of Muqtada al-Sadr, and representative of Sunni tribes).
- ❑ The expanded Interim Governing Council should become a Transitional Government of National Unity which, working through its appointed cabinet, would exercise (as distinct from merely embodying) Iraqi sovereignty on a wide, and increasing, range of issues including budgetary management, social services, education, economic reconstruction, trade and investment and foreign relations.
- ❑ Iraq's constitution-making process must begin to move forward, but at a deliberate pace and in a transparent and consultative manner, with an effective mechanism both to produce a workable constitution and to endow it with the necessary legitimacy.

The primary focus of this report is on the challenge of constitution-making, given the difficulty and complexity of the issues involved. In an earlier report¹ we addressed the question of immediate governance, arguing for a three way division of power between the Coalition Provisional Authority, the UN and the Interim Governing Council, and that approach is further supported here. In the present report we canvass options, but do not reach concluded views about, the most appropriate method for achieving both a more broadly representative government and an effective constitution-making process. More consultation, under the aegis of the UN, is required to determine what is most acceptable, and achievable, in both areas.

As this report goes to press on 13 November 2003, the latest indications are that Washington has broadly accepted the need to decouple governance and constitution-making, but that it is no closer than before to accepting a wider oversight role for the UN in either area. Several options are to be the subject of further consultations between CPA head Paul Bremer and the Interim Governing Council. They include elections in the first half of 2004 for a body that would both appoint a transitional government and act as a constituent (ie. constitution-writing) assembly or, alternatively, immediate efforts to transfer power to a

¹ ICG Middle East Report N°17, *Governing Iraq*, 25 August 2003.

revamped and broadened Interim Governing Council acting as a provisional government until a constitution is drafted.² As the U.S. Administration moves forward, it will be important that it not rush into a decision, but rather keep an open mind on the full range of options canvassed here. This is its second chance to get it right; there may not be a third.

The occupying powers have a continuing responsibility to provide Iraqis with a secure environment in which orderly government can be conducted, consultations on the constitutional process held nationwide and elections organised safely. Because the constitution-making endeavour is and should be a strictly Iraqi-owned project, the U.S. and other states should resist the temptation of interference or, worse, micro-management. Most importantly, Iraqis should be free from the kinds of unhelpful pressures – in the form of demands for unrealistic timetables and deadlines – that threaten to undermine not only the constitutional process but, through it, the future stability of the country.

RECOMMENDATIONS

To the United States, Other Coalition Members and the UN Security Council:

1. Adopt a new Security Council Resolution that would:
 - (a) decouple the transfer of power to a transitional Iraqi government from the process of drafting a permanent constitution, setting realistic timetables for each; and
 - (b) transfer from the Coalition Provisional Authority (CPA) to the UN primary authority and responsibility for overseeing both processes.

To the (newly constituted) United Nations Mission in Iraq:

2. Oversee the process of political transition by, in particular, as soon as possible expanding the Interim Governing Council into a broad-based Transitional Government of National Unity, to

include social and political forces that currently are either not represented or under-represented.

3. Accomplish this expansion by the method which best satisfies criteria of acceptability, practicability and timeliness, whether this be:
 - (a) local and functional-constituency elections;
 - (b) nationwide elections;
 - (c) a broad gathering of Iraqi delegates representing a range of social and political forces from around the country tasked with appointing new members;
 - (d) selection of additional members by the UN mission itself; or
 - (e) some combination of these elements.
4. Oversee the adoption of a procedure designed to produce an Iraqi Constitution which will best ensure its ultimate workability and acceptability, considering as options:
 - (a) direct elections to a Constituent Assembly (time-consuming, but likely to improve popular acceptance of the product);
 - (b) appointment of a drafting committee whose product would be submitted to a popular referendum (saving time and resources, but which may diminish long-term popular acceptance of the product); and
 - (c) some process embodying elements of both selection and election.
5. Encourage Iraqi political parties, civil society organisations, professional associations and institutions to launch internal and public debates about key constitutional questions, and encourage the Iraqi media to cover the constitutional process aggressively and constructively.

Baghdad/Brussels, 13 November 2003

² A U.S. official told ICG that Bremer was returning to Baghdad with a series of proposals “but no details”. ICG interview, Washington, 13 November 2003. See *The Washington Post*, 13 November 2003; *The New York Times*, 13 November 2003.

IRAQ'S CONSTITUTIONAL CHALLENGE

I. THE LEGAL AND POLITICAL CONTEXT

Iraqis are emerging slowly from the punishing reign of a tyrannical regime, punctuated by wars of aggression (against Iran, 1980-1988; against Kuwait, 1990-1991) and the brutal suppression of internal uprisings (of the Kurds in 1988, and of the Kurds and Shiites in 1991) that produced large numbers of casualties and severely deformed and crippled their society. Prolonged one-party rule led to the centralisation of power in the hands of a small clan-based clique and marginalised the few alternative voices that were not snuffed out. Sectarian divisions, long evident only to those who wished to see them, became a political reality as a result of the regime's divide-and-rule tactics designed to perpetuate its dominance in the face of crumbling support in the 1990s.³

The U.S.-led invasion of Iraq, while removing the regime, has done little to restore stability, with suicide bombs, random violence and the unpredictability of chaotic conditions replacing totalitarian oppression. Although Iraqis have started freely to express themselves politically for the first time in decades and have experienced other significant improvements in their daily lives, their sense of insecurity is restricting their ability to revive institutions and administrative capabilities.

One of the principal keys to stability is a constitution whose content reflects the interests of Iraq's ethnic and religious communities and that comes about through a process that is consensual and enjoys wide

popular support. There are many international precedents on which Iraqis can draw in deciding their course. But whatever model of constitution-making they choose, they will have to engage in considered trade-offs involving three interrelated dimensions: the cost, the time required, and the final product's degree of legitimacy. A decision on any one will affect the other two, possibly with deleterious consequences. For example, a process involving direct elections to a constituent assembly is likely to yield a document with a high degree of legitimacy, but such an election is very costly and requires much time to prepare. The appointment of a drafting committee by the Interim Governing Council, on the other hand, may save precious time and resources but also reduce acceptance of the final document, even if it is formally adopted in a referendum, because of its likely perception as the brainchild of unrepresentative, U.S.-controlled experts dominated by the diaspora.

In proceeding with the constitutional process and making these calculations, Iraqis must operate in the specific legal and political context that has emerged over the past decade and deal as well with the legacy of past constitutions.

A. PRIOR CONSTITUTIONS

Since the coup that overthrew the monarchy in 1958, Iraq has had a series of "provisional" constitutions, each with a shelf life equal to the longevity of the regime that drafted it, and none providing satisfactory guarantees against the monopolisation of power and the use of coercion rather than consensus as a basis of state-building. All were largely ignored when it came to implementing their lofty provisions on human rights and the protection of minorities. Today, the word "provisional" attached to any state

³ See ICG Middle East Reports N°s 6, 11, 17, *Iraq Backgrounder: What Lies Beneath*, 1 October 2002; *War in Iraq: Political Challenges After the Conflict*, 25 March 2003; *Governing Iraq*, 25 August 2003; and ICG Briefing, *Iraq's Shiites Under Occupation*, 9 September 2003.

institution or instrument has become anathema to many Iraqis, especially in relation to the constitution.⁴

Iraq's first constitution dates from 1925. It followed the country's creation amid the ruins of the Ottoman Empire as a unitary state under British mandate. Having installed a foreign lineage in the new monarchy – the Hashemites from the Hijaz – Britain fashioned a constitution through which it could assert its indirect rule. Unsurprisingly, the citizens of the new nation, having already revolted against the British in 1920 in a failed bid to achieve independence, regarded the constitution as “an instrument of foreign manipulation and control”, and it never took root.⁵ Yet, unlike its successors, it had the virtue of being preceded and influenced by open public debate.⁶ It survived independence in 1932 and the turbulence of leadership successions, being replaced only following the military coup of 1958.

The period of military dictatorships that ensued and ended only in April 2003 saw successive “provisional” constitutions, each reflecting the narrow interests of those who had gained power by force. The 1958 provisional constitution combined executive and legislative powers in the three-member Presidential Council and, under it, the Council of Ministers, and thus laid the groundwork for dictatorial rule. The 1970 provisional constitution, a creature of the Baath regime that had come to power two years earlier, established the rule

of the “Revolution” and the “Leading Party”, explaining (in an official 1977 interpretation) that if “the people” constitute “the source of authority and its legitimacy”, “the people” should be defined only as those not hostile to the Revolution and its program.⁷ The 1974 amendment to that constitution reflected the regime's interpretation of the autonomy arrangement it reached, under duress, with an insurgent Kurdish leadership in 1970. It was rejected by the Kurds and thus gave rise to renewed strife.⁸ The draft “permanent” constitution of 1990, meant to reflect reinvigorated Baath power following the war with Iran and the insurgency in Kurdistan, was superseded by the events set in motion by the invasion of Kuwait and never ratified.

It is because of this historical legacy of deeply flawed constitutionalism that Iraqis are eager to get on with the creation of a document that truly reflects them and their complex society, that will set up a durable state structure protective of all religious and ethnic communities, and that will allow for the establishment of government that is both representative and accountable.

B. POLITICAL PRECEDENTS

During Saddam's time, dissent was banned on pain of death. Tens of thousands of Iraqis perished at the hands of a regime whose readiness to kill was matched only by its resort to extreme cruelty as a method of intimidation, deterrence and control.⁹ The sole organised opposition that could exist arose, by necessity, in exile,¹⁰ and only after the defeat in the

⁴ This point was driven home by a number of Iraqis, including two members of the Constitutional Preparatory Committee (CPC), who asserted that if a temporary constitution is contemplated to bridge the period until adoption of a permanent constitution, it should be referred to as a “transitional” (*intiqali*), not a “provisional” (*mu'aqat*) constitution. ICG interviews with Fouad Masoum, head of the CPC, and Jalal al-Din al-Sughayer, CPC member, Baghdad, 31 August and 6 September 2003, respectively.

⁵ Phebe Marr, *The Modern History of Iraq*, Second Edition (Boulder, Co., 2004), pp. 27-28. The 1925 constitution “was the outcome of a compromise between the British desire for effective executive power, exercised by the king, and their recognition of the need to give powerful sections of the emerging Iraqi political society some stake in the new order.” Charles Tripp, *A History of Iraq* (Cambridge, 2000), p. 58.

⁶ See “The Transition to Democracy in Iraq”, final version of the working document of the Conference of the Iraqi Opposition, as amended by the members of the Democratic Principles Working Group (November 2002), available from the Iraqi Future Affairs Institute at <http://www.iraqiaffairs.org/pages/res14.htm>, section 1.5, which refers to the 1925 constitution as “the most legitimate constitution of Iraq because it was adopted after a process of social debate”.

⁷ Cited in “The Transition to Democracy in Iraq”, op. cit., para. 1.1.

⁸ See David McDowall, *A Modern History of the Kurds* (London, 2000), pp. 327-337.

⁹ See Kanan Makiya, *Republic of Fear: The Politics of Modern Iraq* (Berkeley and Los Angeles, 1998).

¹⁰ A number of underground parties existed during the reign of the Ba'ath, most notably the Iraqi Communist Party and the Islamic Da'wa, but their membership was decimated and their leadership driven into exile. The Kurds launched an insurgency during the Iran-Iraq war (1980-1988), taking advantage of the regime's preoccupation with the battles on the southern front to gain control of large swathes of territory in the north. Once wartime fortunes turned, the regime sent its forces northward in early 1988, crushing the Kurdish resistance in the notorious Anfal operation. See Human Rights Watch, “Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds”, New Haven and London, 1995.

1991 Gulf War gave Iraqis a sense that the regime, after all, was vulnerable.

One of the first to grasp the new opportunity was the Iraqi National Congress (INC), originally a coalition of parties headquartered in London and headed by Ahmad Chalabi, a U.S.-trained mathematician and banker. It included the two main Kurdish parties – the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK) – as well as a Tehran-based Shiite party, the Supreme Council for the Islamic Revolution in Iraq (SCIRI) and several other parties.¹¹ These groups met on three occasions in 1992, including in Salahuddin in northern Iraq, an area free of Iraqi government control since the end of 1991.

Fissures over the vision for a post-Baath Iraq were evident from the start, centring on the decision by the INC's General Assembly in October 1992 to embrace federalism and advocate a constitutional, parliamentary system of government. Iraqi Arab nationalists opposed federalism, while some Shiite representatives expressed reservations.¹² The notion's prime promoters were the Kurdish parties, who had just jointly formed a regional government in northern Iraq following the first popular elections ever in the area and whose National Assembly had formally adopted an ethnically-defined federalism within a unitary Iraq as the solution to the unresolved Kurdish question.¹³

With the outbreak of fighting between the PUK and KDP in 1994, the opposition broke into its

constituent parts, and the INC effectively ceased to operate as an umbrella organisation.¹⁴ Its prospects unclear, the opposition lapsed into relative inertia, revived only in part by the Clinton Administration's lukewarm implementation of the Iraq Liberation Act (passed by the U.S. Congress in 1998). As a consequence, the potentially divisive debate over the federal question and other key constitutional matters remained in abeyance.

The Bush Administration's response to the events of 11 September 2001 radically transformed the situation. With Iraq singled out, following the military campaign in Afghanistan, as the next target in the "war on terrorism", the opposition regained its energies and started preparing for the hoped-for transition to a post-Saddam Iraq. Perhaps the most significant initiative was the creation in 2002 of the Democratic Principles Working Group as part of the "Future of Iraq" project of the U.S. Department of State. One of its primary tasks was to hammer out a blueprint of Iraq's state structure and system of governance. Its main product, the fruit of the labours of 32 Iraqi exiles – affiliates of the various exile parties and independents, but with a strong INC influence – was a report entitled "The Transition to Democracy in Iraq". The paper became the sole working document of those who attended in London in December 2002 the U.S.-sponsored Conference of the Iraqi Opposition.¹⁵ It laid out policy options concerning the transitional institutions that were to rule a post-war Iraq, all "within the common framework of a democratic system of government" from which "the collectivity of the Iraqi opposition" was to choose "or to decide to set up a mechanism for making such choices".¹⁶

The document posited a federal Iraqi state structure, harking back to the decisions of the Kurdish National Assembly and the INC's General Assembly in 1992. Moreover, it claimed, "today most Iraqi organisations that oppose the regime in Baghdad, whether they are in the INC or not, advocate one interpretation or another of federalism....[It] should therefore become

¹¹ For a description of the Iraqi opposition groups, see ICG Report, *Iraq Backgrounder*, op. cit.

¹² Robert G. Rabil, "The Iraqi Opposition's Evolution: From Conflict to Unity?", *Middle East Review of International Affairs*, vol. 6, N°4 (December 2002); and Kenneth Katzman, "Iraq: U.S. Efforts to Change the Regime", Congressional Research Service, 10 December 2002.

¹³ According to the KDP's 2002 draft constitution for the Kurdish federal region, "By a unanimous vote of the Iraqi Kurdistan National Assembly, the 'Parliament', the people of the Kurdistan Region were able to practice their right in choosing the form of future constitutional relationship with the Iraqi government and hence decided [in October 1992] on federalism as the constitutional basis for the Government of Iraq whereby the Iraqi Kurdistan Region would comprise one of the future regions of the Federal Republic of Iraq". Kurdistan Regional Government, "Constitution of the Iraqi Kurdistan Region", available at: http://www.krg.org/docs/K_Const.asp. See also, ICG Middle East Report N°10, *War in Iraq: What's Next for the Kurds?*, 19 March 2003, pp. 13-16.

¹⁴ As Rabil puts it in relation to the INC's successful attempt in 1998 to obtain U.S. government funding for the Iraqi opposition, "although the INC served as an umbrella organisation of opposition groups..., each one of them has claimed the right to operate outside the INC framework, thereby undermining the cohesion of the opposition." Rabil, op. cit.

¹⁵ "The Transition to Democracy in Iraq", op. cit.

¹⁶ Ibid., preamble.

in some form or another a cornerstone of the new Iraqi body politic".¹⁷ Statements by Shiite groups, in particular, however,¹⁸ underscored the need to explore further the "some form or another" of the federal structure; they distanced themselves from the ethnically-delimited federalism favoured by the Kurds and reflected in draft constitutions for the Kurdish federal region and the federal republic of Iraq which the KDP started circulating in 2002.¹⁹

The some 300 attendees of the London conference failed to adopt the "Transition to Democracy" document, eyeing its INC/State Department provenance with suspicion and fearing a privileging of the INC.²⁰ Instead, they agreed to a final political communiqué that reasserted the "democratic parliamentary, pluralist [and] federal" character of the future Iraqi state and defined the role of Islam as "one of the [state's] foundations".²¹ A smaller group, however, prepared a "Transition Period Paper" that was based on the "Future of Iraq" document, prescribing both transitional and permanent constitutions, the latter to be drafted by a committee of specialists, politicians and religious scholars appointed by a Transitional National Assembly.²²

The last pre-war gathering of the fragmented opposition – now reduced to four groups – in Salahuddin at the end of February and beginning of March 2003 did not further address the principal constitutional questions but elected a six-member leadership council and called for a swift post-war transfer of power to "the Iraqi people and their true representatives",²³ again consistent with the "Future of Iraq" project. Opposition participants in a meeting with U.S. and Turkish officials on 19 March signed on to a number of principles, including: "Determining the future political system and the constitution for Iraq through the full participation and free consent of the totality of the Iraqi population".²⁴

Finally, in Ur (just outside the southern Iraqi town of Nasiriyeh) on 15 April 2003, only days after the fall of the regime, 100 Iraqis selected by the U.S. issued a statement that seemed to question the acceptance of federalism as a given by calling for a country-wide consultation and said that the role of religion in Iraq had merely been "discussed".²⁵ This was the first indication that the ideals of diaspora Iraqis might fail to mesh with the realities of the country to which they were returning, and that they might be forced to reconsider and modify those ideals as a result. Yet, there should be no doubt that the formerly exiled groups, however divided and

¹⁷ Ibid., section 8.1.1.

¹⁸ Rabil, op. cit.

¹⁹ Kurdistan Regional Government, "Constitution of the Iraqi Kurdistan Region", op. cit., and "Constitution of the Federal Republic of Iraqi [sic]", at: http://www.krg.org/docs/Federal_Const.asp. The re-unified parliament of the Kurdistan Regional Government (incorporating both KDP and PUK, as well as some smaller parties) adopted a federalism bill on 7 October 2002.

²⁰ See Chris Toensing, "U.S. Support for the Iraqi Opposition", *Foreign Policy in Focus*, January 2003, available at www.pfif.org.

²¹ The statement also said that "the rules of Islamic *shari'a* are a principal source of the sources of legislation". "Political Statement of the Iraqi Opposition Conference in London, 14-16 December 2002, available at <http://www.iraqcrisis.co.uk/resources.php?idtag=R3E1AF5DDA15BB>.

²² The document states: "a. The Transitional National Assembly will form a committee of specialists consisting of academics and law scholars who have experience and specialisation as well as politicians and religious scholars representing the ethnic, political and religious diversity of Iraq, for the purpose of drafting a permanent constitution which will be presented in a referendum to be endorsed by the people; b. The Iraqi people will decide in a referendum whether the political system will be republican or monarchist". The document does not explain whether the latter referendum should precede the drafting of the

constitution. Iraqi Opposition Conference, "Transition Period Project", 14-16 December 2002, distributed at the conference.

²³ The statement reiterated that "the effects of Saddam's brutal policies must be eradicated to pave the way to transition to a parliamentary system and constitutional traditions in a united, democratic, pluralistic and federal Iraq that respects Islamic values and religious freedoms and practices". "Final Statement, Meeting of the Coordination and Follow-Up Committee held in Salahaddin, 26 February – March 1, 2003", distributed at the conference. See also Borzou Daraghi, "Iraqi Opposition Unites to Demand Home Rule After Saddam", Associated Press, 1 March 2003. In a statement after the war had commenced, the same opposition groups reasserted the need for a quick transfer of power but remained silent on the constitutional question. Council of the Leadership of the Iraqi Opposition, "Statement", 27 March 2003.

²⁴ "Final Statement, Meeting of Representatives of Turkey and the United States with the delegations of ADM, CMM, INA, INC, ITF, KDP, PUK and SCIRI", Ankara (19 March 2003), available at: <http://www.nohra.ca/magazine/news/finalstat.htm>.

²⁵ The United States Central Command, "Visions of Freedom: 100 Iraqis Meet in Nasiriyah and Create Basis for New Government", Press Statement, 15 April 2003. The statement on federalism says (somewhat ambiguously): "A future government should be organised as a democratic federal system, but on the basis of countrywide consultation".

unrepresentative they may have been, gained an institutional advantage over other Iraqis – certainly those living under the regime – who had not yet even come close to considering constitutional issues in any detail. The only half-way concrete ideas, plans and proposals that exist at present originate from the former exiles.

C. INSTITUTIONAL FRAMEWORK

After much wrangling and several policy reversals, the CPA established the Interim Governing Council on 13 July 2003.²⁶ CPA administrator Paul Bremer indicated that one of the Council's first jobs would be "to help launch the constitutional process". Speaking to Iraqis, he said: "It will be a constitution to cement your freedoms, and to enable...democratic elections to take place." And, he added significantly, "The constitution will be written by Iraqis and for Iraqis".²⁷ Muhammad Bahr al-Uloum, a member of the Council, read out a statement that same day that mentioned the drafting of the constitution as one of the Council's tasks.²⁸ A more substantive note came a week later, when the Council issued a statement in which it restated the former opposition's long-standing aim to:

establish the foundations of a democratic, federal and pluralist regime that guarantees public freedoms, freedom of opinion and speech, and human rights; respects the Islamic identity of the majority of the Iraqi people and the rights of women; and reinforces the authority of the judiciary and guarantees its

independence – all on the basis of a democratic process to draft a permanent constitution for the country.²⁹

One month later, on 11 August, the Interim Governing Council established a 25-member Constitutional Preparatory Committee (CPC), each Council member submitting the name of one CPC candidate, and all candidates then being appointed with the Council's approval. To some on the Council, the CPC's creation was a direct response to a challenge laid down by the country's highest Shiite religious authority, Grand Ayatollah Ali al-Sistani, in Najaf, at the end of June 2003. Al-Sistani, apparently responding to the popular perception prevalent at the time that the Americans and Israelis would be drafting the constitution,³⁰ had issued a fatwa, or religious edict, on 30 June, stating that Iraqis should elect the drafters of the new constitution via general elections to a constituent assembly.³¹ To counter al-Sistani's edict, CPA chief Bremer pressed the Interim Governing Council to take charge and select the CPC in order to give the process the appearance of being purely Iraqi.³²

The committee was given a narrowly defined mandate: to recommend to the Council how it should

²⁶ The Council was established under CPA Regulation N°6, "Governing Council of Iraq", CPA/REG/13 July 2003/06, available at <http://www.cpa-iraq.org/regulations/REG6.pdf>. For an analysis of the Council, see ICG Report, *Governing Iraq*, op. cit.

²⁷ U.S. Department of State, International Information Programs, "New Governing Council A Huge Step Forward, Bremer Tells Iraqis", 14 July 2003, available at <http://usinfo.state.gov/cgi-bin/washfile/display.pl?p=/archives/products/washfile/latest/2003/July&f=03071401.nlt&t=/products/washfile/architem.shtml>.

²⁸ Coalition Provisional Authority, "Text of statement issued by Iraqi Interim Governing Council after its first meeting, in Baghdad on 13 July, read by Governing Council member Muhammad Bahr al-Ulum", *CPA Daily*, 14 July 2003, available at <http://usinfo.state.gov/regional/nea/iraq/text2003/0714council.htm>. Bahr al-Uloum suspended his membership of the Council following the assassination of Ayatollah Muhammad Baqr al-Hakim, the head of SCIRI, in Najaf at the end of August 2003.

²⁹ Governing Council, "Political Statement" (Arabic), 22 July 2003.

³⁰ Baghdad was awash with rumours in June that Iraqis would be given a constitution drafted in Washington and Jerusalem. These rumours were likely fuelled by the existence of various draft constitutions prepared by members of the Iraqi diaspora and the Kurds, and the perception that the Iraqi opposition was closely allied with the United States and, in some cases, Israel. Another contributing factor may have been the CPA's appointment of a constitutional scholar, Noah Feldman of New York University, as an adviser; Feldman has been described in media reports as a Hebrew-speaking orthodox Jew – a virtual code word in the Arab world for Israeli. See, for example, Jennifer Lee, "American Will Advise Iraqis on Writing New Constitution", *The New York Times*, 11 May 2003. Hoshiyar Zeibari, a senior KDP leader who became Iraq's interim foreign minister in September 2003, told ICG in May: "Noah Feldman's task is to draft a constitution", ICG interview, Baghdad, 23 May 2003.

³¹ Amy Waldman, "Cleric Wants Iraqis to Write Constitution", *The New York Times*, 1 July 2003. See also a statement by the Islamic Democratic Current, an Iraqi opposition group, of 15 August 2003, titled, "Why are we supporting al-Sistani's edict regarding the elections?"

³² ICG interview with a CPC member, Baghdad, 1 September 2003, and with Dara Nur al-Din, an independent Kurdish judge and member of the Interim Governing Council, Baghdad, 6 September 2003.

go about drafting a new constitution.³³ Six weeks later, on 1 October 2003, after travelling throughout the country for consultations with “wise people”³⁴ but having lost two weeks due to the assassination of SCIRI leader Muhammad Baqr al-Hakim, the CPC reported back to the Council.³⁵ Rather than making a firm recommendation, though, its ten-page report, which was not made available to the public, laid out a menu of options from which the Council was to choose, and in the process laid bare the persistent gulf between powerful communities in Iraq, most notably the Shiites and the Kurds.³⁶

D. U.S. POLICY

The occupying powers' inability to put an end to the chaos that erupted following the collapse of the Iraqi regime and its institutions in April 2003 prompted its decision to set up the Interim Governing Council in July and triggered a sharp debate over the need to hand over full sovereign power to Iraqis much more rapidly than U.S. officials, who had been discussing a two-year timeframe, were initially willing to contemplate. On one side of the debate, the CPA was seeking to hold the line: there should be no rushing of the process. On the other, a broad spectrum – Iraqis of all shades, governments that opposed the U.S. war in Iraq such as France and Germany, and elements of the Bush Administration – was pressing for a much swifter restoration of full Iraqi sovereignty. The latter scenario would entail a much shorter life span for the CPA than currently envisioned.

³³ Interim Governing Council President Ibrahim Ja'fari was quoted as saying the CPC would not draft the constitution but “will be concerned with discussing the best mechanism that will lead to an Iraqi constitution chosen and respected by Iraqis”. Reuters, “Council takes first steps to Iraq constitution”, *Middle East Times*, 15 August 2003, available at: http://www.metimes.com/2K3/issue2003-33/reg/council_takes_first.htm. Ja'fari told ICG that the CPC was “starting from zero – by intent – to show that it is really *our* project”, not an imposed one. ICG interview, 2 September 2003.

³⁴ CPC members fanned out through the country for consultations with local notables or, as one member of the Interim Governing Council referred to them, “wise people”. ICG interview with Mahmoud Othman, Baghdad, 31 August 2003.

³⁵ The CPC's mandate ended with its report, though it is possible that the committee will be revived in some capacity once a Constituent Assembly assumes its work. ICG interview with Fouad Masoum, Baghdad, 31 August 2003.

³⁶ For details, see Section III A below.

The constitutional question has thus become intertwined with the question of the transfer of sovereignty, but this is almost certainly not the most useful way of looking at the political transition in Iraq.

In testimony before the U.S. Congress in September 2003, Paul Bremer outlined a series of steps he said were necessary before Iraqis could assume full sovereignty. Following the appointment of the Interim Governing Council, CPC and Cabinet, he said, “the fourth step, writing a constitution, frames all that follows”. Once the constitution is ratified “by popular vote of the entire adult population”, general elections will be organised and, subsequent to that, sovereignty transferred to the new government. “The only path to full Iraqi sovereignty”, Bremer emphasised, “is through a written constitution, ratified and followed by free, democratic elections. Shortcutting the process would be dangerous.”³⁷

The very day of Bremer's testimony, U.S. Secretary of State Colin Powell made a statement designed to show that, while it might not be cut short, the process also would not be prolonged. “We would like to put a deadline on them”, Powell told *The New York Times*, referring to the interim Iraqi leadership's role in drafting a permanent constitution. “They've got six months. It'll be a difficult deadline to meet, but we've got to get them going”.³⁸ Bremer, apparently concerned about the quick schedule that was being suggested, added his own gloss to Powell's statement: “I think if you read carefully what the secretary was talking about, he was talking about the period after the...constitutional conference convention is assembled....There is another unknown period which precedes that, which is when do we see the constitutional conference convened?” Then he said: “We don't know how long it will take for them to write the constitution....There are no deadlines involved”.³⁹

The primary argument against a quick hand-over of sovereignty, according to U.S. officials who oppose

³⁷ Statement by Ambassador L. Paul Bremer, III, before the House Armed Services Committee, U.S. House of Representatives, 25 September 2003.

³⁸ Steven R. Weisman, “Powell Gives Iraq 6 Months to Write New Constitution”, *The New York Times*, 26 September 2003.

³⁹ Agence France-Presse, “No deadline over Iraq constitution”, *Jordan Times*, 28 September 2003. For the full transcript of Bremer's comments, see footnote no.42 below.

it, is that it would further undercut the legitimacy of a handpicked leadership⁴⁰ – a leadership, they might have added, that is heavily tilted toward diaspora Iraqis who have yet to prove they have significant support inside Iraq. Officials have offered another reason: fear that the Iraqi leadership might prolong or subvert the constitutional process once the U.S. handed it full sovereignty, thereby extending its own tenure.⁴¹ Bremer has repeatedly warned that rushing the process would be dangerous. “We are not standing in the way of a rapid return to sovereignty of the Iraqi government”, he testified, “provided it is done in a reasonable and politically sensible way, which means getting a conference together, writing a constitution and holding elections”.⁴² He appears inspired at least in part by two realities: that for a truly legitimate regime to emerge, considerable time is required, and that the interim Iraqi leadership has hardly progressed on constitutional matters in the four months of its existence.

In contrast, others in the Bush Administration, wanting to move toward Iraqi self-government so as to lessen the U.S. footprint and diminish popular resistance to the occupation, have argued in favour of speeding up the constitutional process, thereby accelerating the establishment of a constitutionally based, democratically elected and therefore legitimate Iraqi government. This would terminate the role of the CPA well before the time Bremer gave himself when he replaced General Jay Garner in May 2003, even if he agrees that he is working himself out of a job. A shorter life span would place additional pressures on the CPA to put the mechanisms for an orderly constitutional process in place, and this may simply not be possible.

The debate was temporarily resolved by U.N. Security Council Resolution 1511 of 16 October, which placed responsibility for “a timetable and a

program for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution” in the hands of the Interim Governing Council, which was asked to respond by 15 December 2003.⁴³ The resolution thereby endorsed the union of the constitutional and political processes. It called on the CPA to “return governing responsibilities and authorities” to Iraqis “as soon as practicable”, and declared the convening of a constitutional conference to be “a milestone in the movement to the full exercise of sovereignty”.

Subsequently, however, concerns about the pace and quality of the Interim Governing Council’s work have led the U.S. administration to consider alternative suggestions. These include:

- Replacing the Council with a larger, more representative assembly of Iraqis whose principal tasks would be to work on the constitution and the holding of elections. The assembly might be modelled on the Afghan *loya jirga*.
- Shifting the sequence of the transition, and allowing the creation of a provisional government prior to the adoption of a new constitution and national elections.⁴⁴

U.S. officials have not provided their views on the precise outlines and content of an Iraqi constitution. The U.S. endorsed the call by opposition groups for a federal, pluralist, parliamentary democracy when the latter were still in exile, but has given no detailed indication as to what kind of federalism it favoured.⁴⁵ Reportedly, Washington expressed opposition to a loose federation based on ethnic and religious groupings, fearing a break-up of the country and resulting regional instability, and asserted it wants a strong central government.⁴⁶ On religion, Bremer is on record as stating that “there are certain issues on which we feel quite strongly. One of them is the protection of individual rights...of which a subset is

⁴⁰ Quoted in Weisman, op. cit.

⁴¹ One U.S. official was quoted as saying: “If a constitution has to be drafted before there can be a government, you bet we’ll get a constitution”, Rajiv Chandrasekaran, “Iraqis Call U.S. Goal on Constitution Impossible”, *The Washington Post*, 30 September 2003. In other words, if the U.S. wants to ensure that Iraq ends up with a permanent constitution, the optimal way to do it is by telling the Iraqis they can’t have a sovereign government until the work of drafting one is done.

⁴² U.S. Department of State, “Bremer Says Iraqis Not Ready for a Quick Turnover of Power”, 27 September 2003, available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=September&x=20030927230106relhcie0.4198114&t=usinfo/wf-latest.html>.

⁴³ United Nations, S/RES/1511, 16 October 2003.

⁴⁴ *The Washington Post*, 9 November 2003; 10 November 2003.

⁴⁵ In a press conference on 7 March 2003, President Bush declared: “Iraq will provide a place where people can see that the Shia and the Sunni and the Kurds can get along in a federation”. Transcript available at: <http://www.puk.org/web/htm/news/knwslne/nws/07mar03.html>.

⁴⁶ King Abdullah II was told this by Bush administration officials in Washington in September 2003. E-mail communication from Marwan Muasher, Foreign Minister of Jordan, 21 October 2003.

freedom of religion. And we will be quite insistent that individual rights must be respected and must be established in the constitution.”⁴⁷

Aside from these basic principles, U.S. officials insist that the constitutional exercise resides “clearly in Iraqi hands. It is for them and by them. We will not provide them with a draft constitution. We will only advise them when they ask us to”.⁴⁸ Making sure Iraqis understand this – and making sure it turns out to be the case – will be critical given the considerable suspicion that already exists in Iraqi opposition circles that the CPA, rather than assuming a hands-off approach, intends to be intimately involved in drafting the constitution.⁴⁹ Even those who are prepared in principle to solicit the CPA’s aid have now expressed a reluctance to do so in practice, or even to rely on the (for now theoretical) assistance of the UN.⁵⁰ This means that the U.S. will have to tread carefully if it is not to undermine – by the perception of too close an involvement – the credibility of a document on which it has staked much of its political capital and whose legitimacy it has advocated as critical to the stability of a sovereign Iraq.

⁴⁷ He added: “I’m not particularly worried about that. The Governing Council, in its political statement it issued after it took office, said it planned to respect individual rights, including women’s rights and children’s rights and human rights”. Remarks made during a press conference at the Pentagon on 26 September 2003. For the full transcript, see footnote no.42 above available at: <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=September&x=20030927230106relhcie0.4198114&t=usinfo/wf-latest.html>.

⁴⁸ ICG interview with a U.S. official, Baghdad, August 2003.

⁴⁹ Abd-al-Karim al-Anizi, for example, a member of the political bureau of the opposition Islamic Al-Da’wa Party (Iraqi branch) and a former exile in Iran, said: “The Americans are trying to establish a constitution that does what the Americans want, not the Iraqis”. ICG interview, Baghdad, 30 August 2003. In a variation, Sadoun al-Dulame, executive director of the newly-established Iraq Centre for Research and Strategic Studies, and a former exile in the U.K., contended that “the constitution has already been drafted by the Interim Governing Council. Now they are just trying to cover their tracks”. ICG interview, Baghdad, 3 September 2003.

⁵⁰ Fouad Masoum, head of the CPC, told ICG: “While we thought the UN’s expertise in constitutional affairs would have been useful to us, Sistani’s fatwa changed this, and now the work must be done by Iraqis only – all because of false rumours spread by the media”. ICG interview, Baghdad, 31 August 2003.

E. THE INSIDER/OUTSIDER DYNAMIC

In their attempt to address the principal constitutional questions of a post-Baath Iraq during their years in exile, the Iraqi opposition groups did not succeed in moving beyond the proclamation of general slogans while maintaining the appearance of unity. For the most part, they could agree only on general headlines; the moment an attempt was made to discuss detail – for example, the nature, number and boundaries of the envisioned federal regions – disunion prevailed and key issues were deferred. The only serious discussion of the future state system is contained in the “Transition to Democracy” document, but whatever the utility of its analysis and the merits of its recommendations, the document has come up against the realities of post-war Iraq,⁵¹ especially the chasm between the “internal” Iraqis and those returning from the diaspora,⁵² including the Kurdish leadership.⁵³

The “insiders” are viewed by diaspora Iraqis either as long-term victims of a regime that withheld a liberal education and discouraged the acquisition of expertise that might threaten its hold on power, or as unreconstructed Baathists, loyal perhaps not to the old ruling clique but to outmoded ideas such as socialism and Arab nationalism. The “outsiders”, in turn, are mistrusted by those who chose, or were forced, to stay in Iraq and suffered the regime’s depredations on a daily basis. The “insiders” suspect the former exiles of wanting both to impose alien, Western-inspired ideas on Iraqi society and, supported by the U.S. and other Western countries,

⁵¹ One of the two coordinators of “Transition to Democracy in Iraq”, Kanan Makiya, a member of the CPC, told ICG that he saw his work on the document and the constitutional question in particular as “a chance to make a breakthrough on the issue of norms in the Arab world. But [now that we are in Baghdad] the process has become heavily politicised, as perhaps it should be. And so my highfalutin ideas should be fitted into the current realities, and concessions are required”. ICG interview, Baghdad, 1 September 2003.

⁵² There were major disagreements within the Democratic Principles Working Group about the role of the “outsiders” versus the “insiders” in post-Baath Iraq; some of these same tensions are very much evident today in discussions about the creation and role of the Interim Governing Council.

⁵³ Although the Kurdish parties operating in the self-rule area in 1991-2003 can clearly not be referred to as exile-based groups, they had no access to regime-controlled Iraq during this period, and so their arrival in Baghdad in April 2003 was similar to that of the “true” exiles.

to grab power though they have no significant popular support inside Iraq.⁵⁴

Statements by the opposition in prior years have fuelled the insiders' perception. The "Transition to Democracy" document, for example, asserted the right of the externally-based opposition to form the Transitional Authority – envisaged in the months before the war, overtaken by events afterwards – on the basis that "the Iraqi opposition is no less legitimate than the regime of Saddam Hussein. In fact it is no less legitimate than any Iraqi regime that followed the 1958 military coup...With its multiple voices, the opposition speaks for many Iraqi constituencies, rather than for one group".⁵⁵

The perception of the former exiles' predominance in the new Iraq is reinforced by their over-representation on the key institutions established by the CPA: the Interim Governing Council and its nine-member leadership council on which the monthly-rotating presidency is based (13 July), the Constitutional Preparatory Committee (11 August), and the Cabinet (3 September).⁵⁶ "Insider" Iraqis have yet to produce an authentic leadership of their own, not having had sufficient time to meet, discuss and organise. Although this process has commenced at the local and neighbourhood levels through quasi-elections, it still has a long way to go before it will yield a class of legitimate political representatives ready to extend their control through the institutions, take on the experienced exiles and stake their claim to national power.

For all practical purposes, then, the cards are now stacked in the former exiles' favour. Despite their expertise and honest intentions, such an imbalance may be a recipe for instability. At the same time, the returning exiles are themselves divided, most notably over federalism and the role of religion, and here, too, the prior weight of those like the Kurds or the Shiite clerics, who were able to organise themselves during the Baathist years, may tip the balance against those who did not have the same opportunity or

failed to make use of it. Interestingly, these internal divisions may serve to restore the balance between "insiders" and former exiles, as the deadlock over key constitutional problems may force resort to a popular vote.

⁵⁴ ICG interviews in Baghdad with a range of political actors, August-September 2003. See also ICG Briefing, *Voices from the Iraqi Street*, 4 December 2002; and, for a very useful characterisation of the insider/outsider dynamic, Saif al-Khayat, "Ruling Council Seeks Best of Both Worlds", *Iraqi Crisis Report* N°31, Institute for War & Peace Reporting, 10 October 2003, available at <http://www.iwpr.net>.

⁵⁵ "The Transition to Democracy in Iraq", op. cit., section 2.3.1.

⁵⁶ See ICG Report, *Governing Iraq*, op. cit.

II. CONSTITUTIONAL FAULT LINES

The cardinal questions relating to the future Iraq include:

- ❑ the purpose of the new constitution and how it defines citizenship;
- ❑ the nature of the state system (monarchical or republican);
- ❑ the distribution of power between centre and regions (the question of federalism);
- ❑ the system of government (presidential or parliamentary);
- ❑ the role of religion;
- ❑ the protection of human rights and minority rights; and
- ❑ the role of the military in politics.

Some of these issues are likely to be more easily resolved than others – for example, the question of whether Iraq should be a republic or a monarchy: all indications are that there is very little support among Iraqis for restoring the Hashemite throne.⁵⁷

Several other questions have not yet been discussed but are largely non-controversial and may be readily resolved once the constitution drafters set about their work. They include such large issues as whether the constitution should include, or be accompanied by, a bill of rights,⁵⁸ or whether Iraq should have a presidential or parliamentary system of government – or, if a parliamentary system, how much relative power a prime minister should have, whether the parliament should be bi-cameral and how its membership should be chosen. So far, no interest has

⁵⁷ ICG interviews and impressions in Iraq since May 2003. In an indicative but far from conclusive poll conducted among a sample of 50 university professors, the daily *Al-Zaman* found that 86 per cent supported a republican system of government, while only 10 per cent favoured a reinstatement of the monarchy. “Legal experts favour secular government in Baghdad”, *Daily Star*, 19 September 2003. CPC chair Fouad Masoum told ICG he had observed “weak support” for a restoration of the monarchy, but said that if there is real support for the idea, “then there should be a referendum before the drafting of the constitution”. He raised the additional obstacle that none of the current contenders holds Iraqi citizenship. Interview, Baghdad, 31 August 2003.

⁵⁸ A bill of rights was proposed by the drafters of “The Transition to Democracy in Iraq”, op. cit.

been expressed in maintaining a presidential system, given Iraqis’ overpowering experience with its abuse. That issue does not feed into sectarian differences and is therefore unlikely to serve as a source of inter-community rivalry – unlike citizenship, federalism and the role of religion, which must be considered the true fault lines at the outset of the constitutional process.

A. CITIZENSHIP AND THE ETHNIC/RELIGIOUS ISSUE

A first question Iraqis will need to address is what they see as the overarching purpose of a new and permanent constitution and what will be the balance between the state, religious, tribal or ethnic communities, and the individual. The Baathists had sought to resolve the question and create a “new Iraqi citizen” in the early 1970s by prohibiting any mention of regional or tribal identification in one’s name and pushing for a politicised patriotism that emphasised loyalty to the regime. Today, while a strong feeling of nationalism appears to predominate among most political currents,⁵⁹ and a confessional, Lebanon-style outcome (in which political and other resources are allocated strictly on the basis of ethnicity and religion) is in principle rejected by all, the precise political formula remains contentious.

Rend Rahim Francke, a member of the Democratic Principles Working Group and long-time director of the Iraq Foundation in Washington, has suggested two principal objectives that, she said, while not diametrically opposed, may pull in different directions: one, “to ensure that different ethnicities can coexist in peace, that no single group has an overriding power over the others, and that the interests of all the groups are in balance”; and two, to create a strong Iraqi identity and a sense of common Iraqi citizenship.⁶⁰ The first goal may require that, in allocating power and resources, the political system refer explicitly to ethnic groups; the second may require that it does not. Simply put, the

⁵⁹ Interestingly, virtually all political organisations have included the word “national” (*watani*) in their names and are quick to attack their opponents for lack of nationalism or patriotism (*wataniya*).

⁶⁰ Presentation at a conference, “Constitutional Issues and Federalism: Ethnicity and Justice in Post-Saddam Iraq”, held at the American Enterprise Institute in Washington, D.C., 3 March 2003, available at: <http://www.aei.org/events/eventID.229/transcript/asp>.

more the system is decentralised so as to create sub-national identities, the more the sense of national unity and identity is diluted.

Kanan Makiya, a member of the CPC, has argued that the constitution should “elevate the Iraqi-ness of Iraq over all other factors to express what we have in common”, and that “we should therefore avoid formulations that prioritise one group over another. So not: ‘Iraq is an Arab nation with a Kurdish minority’, or ‘Iraq is an Arab and Kurdish nation with other nationalities’”.⁶¹

Such a proposal, generated in the diaspora, awaits a wider debate by Iraqis. It probably will find resonance in the (majority) Arab community but invite suspicion among the Kurds. The 1970 constitution, like its 1958 predecessor, recognised two nationalities, Arab and Kurd, placing them on equal footing and acknowledging “the national rights of the Kurdish people and the legitimate rights of all minorities within the Iraqi union”.⁶² The Kurds may not cherish the prospect of having to relinquish their formal status as a separate nationality, which afforded them a broad spectrum of cultural and linguistic rights – unlike, for example, their brethren in Turkey. On the other hand, the Baath regime’s attempted “Arabisation” of Kurdish areas (through extermination of rural Kurds and wholesale destruction of their villages) in the 1980s may persuade the current Kurdish leadership that carefully enumerated constitutional guarantees for minority groups generally are worth more than a preambular recognition of the Kurds’ separate-but-equal status in particular.

For the smaller ethnic groups, such as the Assyro-Chaldeans⁶³ and Turkomans, who were pressed to

declare themselves, in virtual ethnicity conversions, “Arabs” during administrative “nationality correction” campaigns and in the decennial censuses,⁶⁴ constitutional protection from domination by any of the larger groups, including the Kurds, is a *sine qua non*. Assyrians are on record as calling for constitutional recognition “as one of the principal nations, or ethnic groups, within the political framework of the Republic of Iraq”, but, like the Kurds, they may be swayed to forfeit this reference in favour of concrete constitutional protections.⁶⁵

Nevertheless, ethnic identities are deeply ingrained, not least because of the Baathist repression. Time is needed for them to be reshaped to accommodate and be accommodated in the new Iraq. The drafters of the constitution will face the complicated task, therefore, of retaining sufficient reflection of specific ethnic identities to reassure Kurds, Assyro-Chaldeans and Turkomans that they will receive protection as

to describe the entire ethnic group. The Assyrian Democratic Movement purports to represent the “Assyrian-Chaldean nation”.

⁶⁴ As a Turkoman representative on the Kirkuk City Council described it: “In 1975 a decree of the Revolutionary Command Council established two nationalities in Iraq. Turkomans and Assyro-Chaldeans were excluded, and from then on pressure was put on us to change our nationality. We had to sign a document stating: ‘I’m not a Turkoman but an Arab’. Otherwise we could not find jobs or receive public services”. ICG interview with Irfan Kirkukli, leader of the Iraqi Turkmen People’s Party, Kirkuk, 9 June 2003.

⁶⁵ Presentation by Emanuel Kamber at the conference, “Constitutional Issues and Federalism”, *op. cit.* Kamber called for autonomy for the Assyrians within a federated Iraq or, failing that (if federalism is not based on ethnicity), he said Assyrians would “support the establishment of a unified democratic, secular, pluralistic, and parliamentary government”, within which they would demand constitutional recognition as a distinct ethnic group, with all the necessary protections. Also, ICG interview with Idris Mirza, member of the central council of the Assyrian Democratic Movement, Ein Kawa, 6 June 2003. See also, “Declaration regarding the stance of the Assyrian Democratic Movement towards the approval by the parliament of the Iraqi Kurdistan region of the plans for constitutional federal republic of Iraq and the constitution of the region of Iraqi Kurdistan”, available at: <http://www.zowaa.org>. A similar point was made by the leader of a Turkoman party, Jawdat Najar of the Turkmen Cultural Association. He told ICG: “Our main goal is that the constitution recognises us as a minority with rights equal to those of other minorities. As Turkomans we want to carry out our obligations as Turkomans, but we also want to be considered as Iraqi citizens, and we will take part in Iraqi national politics just as we have in the Kurdistan Regional Government during the past decade”. ICG interview, Erbil, 6 June 2003.

⁶¹ ICG interview, Baghdad, 1 September 2003.

⁶² Arabic text available at: <http://www.undp-pogar.org/resources/country/constitution.html>. The language was replicated in the 1990 constitution, available in English at: http://www.oefre.unibe.ch/law/icl/iz00000_.html. The 1925 constitution made no reference to individual nationalities, bestowing equal rights on all Iraqis. English text available at: <http://www.geocities.com/dagtho/iraqiconst19250321.html>. An English translation of the 1958 constitution is available from the University of Indiana.

⁶³ Ethnic Assyrians are sub-divided into branches, or church denominations, of Christianity: the Assyrians are Eastern Orthodox or Nestorian, the Chaldeans are Catholics, and there are also Syriacs (both Catholics and Orthodox), and smaller groups. Although all are ethnic Assyrians, Chaldean sensitivities about their distinct (religious) identity have yielded the term Assyro-Chaldeans (or Chaldeo-Assyrians)

minorities, while at the same time providing their representatives incentives to penetrate national politics and institutions and so help their communities integrate into a sovereign Iraq.⁶⁶ “Citizenship”, a CPC member said, “should not serve to deny the rights of special groups; these require guarantees. Iraqi-ness is the key.”⁶⁷

There are also more mundane and technical questions of citizenship, the answers to which will determine whether a person can vote in Iraqi elections and be elected to office. This is not a trifling matter: it affects, among others, an estimated four million diaspora Iraqis (including economic migrants and Iraqis expelled to Iran by the Baath regime and shorn of their identity papers). The first task will be to make a determination about those who lost their Iraqi passports and restore them to those found eligible (based on available documents proving their previous status).⁶⁸

⁶⁶ This point was made by Ephraim Karsh at the conference, “Constitutional Issues and Federalism”, op. cit. Karsh remarked (as transcribed): “I think you should ensure that at least for quite some time the Kurds are distinct identities [sic]. Because I think, for example, the Kurds or Assyrians or other [sic] will feel frightened if you come and said, oh, okay, as of now you are an Iraqi, you’re not an Assyrian, so forget about this, forget about that. I think it takes time. And you have to on the one hand let them feel separate and equal; at the same time, give them enough, sufficient incentive to play on the national scene”.

⁶⁷ ICG interview with Sami Khaled of the Iraqi Communist Party, Baghdad, 2 September 2003.

⁶⁸ There are (as yet informal) proposals to revise the definition of nationality. Under current law an Iraqi is someone who was born in Iraq and has an Iraqi father. This rule disenfranchises many who were born outside Iraq due to their parents’ prolonged migration/exile. One proposal modifies the definition by removing the location-of-birth clause and extending the required familial threshold to the grandfather’s nationality. ICG interview with Fouad Masoum, Baghdad, 31 August 2003. Another would allow also for the mother to pass on Iraqi citizenship to her children. ICG interview with Judge Dara Nur al-Din, Baghdad, 6 September 2003. An Iraqi law also prevented an Iraqi citizen from holding a second passport, a prohibition that discriminated against those who, by force of circumstance, assumed a foreign nationality to ease their exile. In September 2003, the Interim Governing Council passed a temporary law allowing Iraqis to hold dual citizenship. This law benefited the Council’s own members, given their preponderant diaspora provenance. For the same reason, some in the opposition condemned the proposed law prior to its adoption, saying Council members and other “lapsed” Iraqis should be offered the opportunity to regain their Iraqi citizenship and that those who refuse to give up their foreign passport should not be eligible for political office in Iraq. ICG

B. THE FEDERALISM ISSUE

By most accounts, the degree of devolution of central power to yet-to-be-defined regional governments in a new Iraq will be the most important, most controversial and therefore most difficult constitutional matter to be decided. Decades of despotism have rendered Iraqis suspicious of a centralised state, but how much devolution will they accept, how many regions can they countenance, and what will define the boundaries of these regions?

In post-war Baghdad, some former exiles and Kurds have stressed that there is no need for further discussion on whether Iraq should be a federal or unitary republic. This, they contend, has been decided and reconfirmed in favour of federalism in successive opposition gatherings in exile over the past decade, as well in the Interim Governing Council’s founding document.⁶⁹ This notion also has gained considerable purchase internationally, given in particular the former exiles’ access to governments and the media. Many “insiders”, however, disagree that the question is settled.⁷⁰

interview with Sadoun al-Dulame, Baghdad, 3 September 2003. Beyond the issue of citizenship, Iraqis will have to decide how to organise an absentee vote for those living in the diaspora – for elections to a Constituent Assembly, perhaps, as well as for a constitutional referendum and elections to a national parliament – given the absence, for now, of a functioning national postal system and the current inability of the Foreign Ministry, through its embassies, to serve as a depository for absentee ballots.

⁶⁹ Those who, in interviews with ICG, argued that the principle of federalism has been settled definitively in opposition conferences spanning more than a decade and can therefore no longer be revisited include Fouad Masoum, head of the CPC (Baghdad, 31 August 2003), Mahmoud Othman, a member of the Interim Governing Council (Baghdad, 31 August 2003), and Dara Nur al-Din, the Council’s liaison with the CPC (Baghdad, 6 September 2003) – all three Kurds. See also the Democratic Principles Working Group’s “The Transition to Democracy in Iraq”, op. cit.

⁷⁰ Those “insiders” who stated to ICG that the matter remains to be decided by the Iraqi people include Raja’ Habib Khuzai, a member of the Interim Governing Council (Baghdad, 1 September 2003), Riyadh Aziz Hadi, dean of the Faculty of Political Science at Baghdad University (Baghdad, 31 August 2003), and Ibrahim Hindawi, a CPC member and district judge who resigned from the committee on 1 September, in his words because of his opposition to federalism (Baghdad, 2 September 2003), but according to some members of the Interim Governing Council and CPC because of his alleged functions under the Ba’athist regime. On the federal question, Khuzai told ICG: “I am from the inside and an independent. I don’t know what happened [in opposition conferences]

Moreover, even the former exiles do not see eye to eye on the precise structure of a federal Iraq.⁷¹

The Kurds, in particular, exhibit a great sense of entitlement, deriving from the conditions they endured under Saddam.⁷² They consider that they have the right to declare Kurdish independence and some possibility of making this stick because of their accumulated power and experience, the weakness of the Iraqi state, the support of many among the returning exile political figures and the disarray of any potential detractors inside Iraq. However, they recognise this right is in fact severely restricted by regional realities. They have made a strategic decision to stay within Iraq, hedging this only on the acquisition of those rights they say they find necessary to prevent future discrimination by the central state apparatus – rights, they contend, that can only be guaranteed in a federal Iraq in which they live in a Kurdish federal region under their own

outside Iraq. I saw a map in Mosul last week that showed Iraq cut up into four parts. So far there has been no discussion of the federal question by the members of the Council, but most people in Iraq don't like federalism. We used to live together, Arabs and Kurds. It is Saddam Hussein who caused these divisions. He moved people around, creating identities and hatred. Let the people decide the matter in a referendum". Another "insider" took a slightly different position: "Federalism scares a lot of people. They think of it as the preface to secession. I think it's the perfect solution for Iraq, but what matters is the process". ICG interview with Wisal Najib al-Azawi, Baghdad, 4 September 2003.

⁷¹ ICG interview with Ibrahim al-Ja'fari, a member of the Interim Governing Council's leadership council and that body's president in August 2003 (Baghdad, 2 September 2003), who, while a former exile, reflects the Shiite concern that federalism needs to be carefully defined before it is accepted, lest the new state structure harm the long-term interests of the Shiite community.

⁷² CPC member Fersat Ahmad Abdallah, secretary for the KDP of the Kurdistan Regional Assembly, told ICG (prior to the CPC's creation): "Woodrow Wilson was very clear in saying that nations could get their independence. So why not the Kurds? We have made many sacrifices. We are looking for a reasonable solution. In other countries, federalism is achieved through demonstrations and laws. We have been fighting since the 1960s but we have achieved nothing except the Anfal campaign and bombs". ICG interview, Erbil, 7 June 2003. See also, ICG Report, *What's Next for the Kurds?*, op. cit. Some Iraqi Shiites counter, sensibly, that the Kurds have no monopoly on suffering. "What did Kurds lose more than other Iraqis did?", asked one young Shiite cleric. "In fact, after 1991 they have been much better off than other Iraqis!" ICG interview with Hassan al-Zarqani, a senior official in the Muqtada Sadr movement, Baghdad, 4 September 2003.

direct political control.⁷³ In other words, the Kurdish leadership is holding on to the threat of a declaration of independence should this base demand not be met in negotiations. Fouad Masoum, for example, the head of the Constitutional Preparatory Committee, has warned that "if the people of Iraq decide against federalism, the Kurdish problem will not be solved, and we may have to return to fighting".⁷⁴

In the context of this debate, the Kurds have displayed a tendency, bred perhaps by their decade-long experience of virtual independence, to presume some basic issues that to date remain highly controversial among non-Kurds. There is, for example, the a priori insistence by some Kurdish leaders that Iraq must not only be a federal state⁷⁵ but one comprising no more than two federal regions, an Arab and a Kurdish one.⁷⁶ Some Iraqi Arab politicians counter, understandably, that whereas the decision to seek independence is one for the Kurds themselves, the moment they indicate they wish to remain an integral part of the Iraqi state, the nature of their status and rights must evolve from full deliberations between all Iraqi political actors and cannot be imposed by the Kurds.⁷⁷

⁷³ CPC member Fersat Abdallah explained: "[KDP leader] Barzani said we should participate in a central government as Kurds, not as second-class citizens. We want to be part of Iraq but must protect our rights via a federal government. This would be a guarantee for the protection of Kurdish rights". ICG interview, Erbil, 7 June 2003. Abdallah went further by asserting that a federal solution is necessary, as "without federalism, Iraqi democracy will not be able to protect us".

⁷⁴ ICG interview, Baghdad, 31 August 2003. Fersat Abdallah put it equally strongly: "If the Arabs want to be our partners, then great. If not, bye bye!" ICG interview, Erbil, 7 June 2003.

⁷⁵ Judge Dara Nur al-Din told ICG that "it is up to the Kurds to decide on whether Iraq should have a unitary or federal state structure". ICG interview, Baghdad, 6 September 2003.

⁷⁶ Fersat Abdallah maintained that since the former Iraqi opposition groups had accepted the Kurdish twin draft constitutions for a federal Iraq and a Kurdistan Federal Region, they had implicitly accepted the two-region solution, but regretted that "now that they have returned to Iraq, they are changing their minds". ICG interview, Erbil, 7 June 2003. Salahaddin Bahaouddin, a member of the Interim Governing Council who is general-secretary of the Kurdistan Islamic Union, indicated that a federal Iraq should have only two regions. ICG interview, Baghdad, 1 September 2003.

⁷⁷ Kanan Makiya, a member of the CPC representing the INC, remarked: "The Kurds see the constitutional process purely through the Kurdish prism. They say that the right to self-determination means they have an inalienable right to

The Kurdish psychological and political trajectory, from statehood aspiration, embodied in their long struggle against central government, to a hedged commitment to what they consider the decidedly lesser solution of federalism, is critical to understanding what the Kurds want and what they are prepared to settle for. It has been narrated graphically by Hoshyar Zeibari, a senior KDP figure who was his party's leading international representative for many years and in September 2003 was chosen to be Iraq's first interim foreign minister. In an interview in Baghdad in May 2003 he explained:

We will not accept to be half-Iraqis. We will either be full Iraqis with all the rights and responsibilities, or we will not be Iraqis. Our leadership is here [in Baghdad]. This is our country and our capital, and we will help rebuild it. Back in 2000, Barham Salih [the PUK's current prime minister, and its international representative at the time] and I were in Washington. We acknowledged that we Kurds had reached the end of our self-rule experiment: we had no constitution, no passport, no oil extraction, no hope of trade expansion. Was there reason to be content? Our impact on events in Iraq was very limited. Turkey was making threats, and we were an obvious target for a Turkish attack. We understood that if we wanted a bigger role, we would have to change our entire thinking – to focus not on Mosul, Kirkuk and Sinjar, but on Baghdad; to claim the whole country, fully participate in the overthrow of Saddam Hussein and kill this mindset that we are Kurds with limited objectives and capabilities.

We fought hard within our movements to shift the political thinking from the narrow nationalist perspective. This would protect us from Turkey (it turned their argument back on them by suggesting that Kirkuk was Iraqi, not Kurdish, and that a Turkish attack therefore

would be against Iraq, not the Kurds), while preserving all we had gained during the 1990s. This was before 11 September. Then the events of that day, with their mix of Arab nationalism and Islamist fundamentalism, sharpened our focus. We realised we couldn't secure federalism if we weren't in Baghdad. So we took the lead in the Iraqi opposition, making a calculated risk. But the idea now has become very popular; most political forces have adopted it. We now want an Iraqi platform with shared political programs and with a broad national agenda...The implementation of the federal idea is up for negotiation. It will be a very tough battle. We tell our Arab friends who are sceptics: Why are you afraid? It is we who are giving up our militias, our currency, even our oil resources – in short, everything we have!⁷⁸

Apart from the Kurds' flat assertion of federalism, however, little has been discussed in the country at large about how the matter should be decided and how many federal regions there ought to be. Kurds say that the outlines of federalism are to be negotiated and that they are prepared to make concessions. But some Arab Iraqis have already suggested that the matter of a federal versus a unitary structure should be decided in a popular referendum⁷⁹, or by the elected members of a future constituent assembly.⁸⁰ Most Kurds have indicated they want to see a single Kurdish federal region and some have suggested they prefer to see only a single Arab one; others have expressed flexibility over the number of non-Kurdish federal regions, ranging from two (presumably one for the Shiites and one for the Sunnis) to many. Arab Iraqis who support federalism seem for the most part undecided, even confused, and in most cases have yet to give the matter serious thought.⁸¹

federalism. I told the Kurds that, no, we need to convince the Iraqi people of a federal solution; you only have the right to secede. We'll support you if you choose independence, but if you opt for federalism, you will have to work with us and develop a workable arrangement for Iraq. Any Iraqi solution necessarily concerns all". ICG interview, Baghdad, 1 September 2003. CPC member Jalal al-Din al-Sughayer concurred: "This is not a question for Kurds only". ICG interview, Baghdad, 6 September 2003.

⁷⁸ ICG interview, Baghdad, 23 May 2003.

⁷⁹ ICG interview with Ibrahim Hindawi, a former CPC member (Baghdad, 2 September 2003) and an opponent of the federal idea, who added: "If the Kurds want federalism, then perhaps every little group or area wants a federal region of its own".

⁸⁰ Interview with Interim Governing Council member Ibrahim al-Ja'fari, Baghdad, 2 September 2003.

⁸¹ Interim Planning Minister Mehdi al-Hafedh initially said he supported the idea of having only two regions in a federal Iraq, then backtracked, saying the issue "requires a lot more thought". ICG interview, Baghdad, 1 September 2003. Adel Abd-al-Mahdi, a senior SCIRI representative, said he thought a compromise might be possible between the Kurdish

C. THE QUESTION OF KIRKUK

The most contentious issue may well turn out to be the boundaries of the Kurdish region – whether it will be defined ethnically or territorially, and especially whether it will include Kirkuk. Here there seems to be little room for compromise on the Kurdish side. The most fanciful notions, presented in discussion by prominent Kurdish officials, envisage a Kurdish-Arab boundary running roughly across the oil fields and the known but unexploited oil deposits along an arc from Sinjar in the northwest to Khanaqin in the southeast, incorporating into the Kurdish region all of the city of Kirkuk as well as the eastern part of the city of Mosul (the east bank of the Tigris river).⁸²

The draft constitution for the Kurdish region, authored by the KDP and adopted by the reunified KDP/PUK-run Kurdistan National Assembly in October 2002, envisions an ethnically delimited federal region that incorporates significant chunks of territory that Iraqi Arabs would consider Arab, or mixed, and that straddle Iraq's northern oil fields.⁸³ Whether one refers to such a region as territorially based or drawn according to ethnicity, the Kurdish reality in the north is that any line that includes the Kirkuk region and part of Mosul, while bringing in

extreme (one Kurdish and one Arab region) and the Arab extreme (eighteen federal regions, drawn according to the boundaries of the eighteen current governorates) in the form of five to seven federal regions, either one or two corresponding with Kurdistan. ICG interview, Baghdad, 4 September 2003.

⁸² "I have an Ottoman encyclopedia", said Judge Dara Nur al-Din, "that suggests borders rather further south than generally accepted. But we don't have problems. The Kurdish region should include the area north of a line running from Mandali-Khanaqin, Sa'diyeh (Kazel Robot), Jelola (Du Awan), Hamrin Mountain, Daqouq, Tuz Khurmatu, Kirkuk, Timtad, up to Mosul, staying on the eastern bank, and then north of Mosul due west to Sheikhan and Sinjar". ICG interview, Baghdad, 6 September 2003. KDP leader Masoud Barzani declared, resorting to hyperbole, that "the historic borders of Kurdistan are known to all: whether 20,000 years ago, or today. It is very well-known in Iraq where the border between the Kurdish region and the Arab region runs". Andrea Nüsse, "Barzani: The Arabs should leave Kurdistan again", *Frankfurter Rundschau*, 16 September 2003.

⁸³ Kurdistan Regional Government, "Constitution of the Iraqi Kurdistan Region", op. cit., and "Constitution of the Federal Republic of Iraqi [sic]", at: http://www.krg.org/docs/Federal_Const.asp. The re-unified parliament of the Kurdistan Regional Government (incorporating both KDP and PUK, as well as some smaller parties) adopted a federalism bill on 7 October 2002.

significant Arab, Turkoman and Assyro-Chaldean populations, would capture an overwhelmingly Kurdish population.

Thus, interim Foreign Minister Zeibari can stress the Kurdish desire for a single federal unit "not purely based on ethnic lines, but on a geographic/administrative line", and still secure a Kurdish federal region, one that would include the five northern governorates – the maximalist option – or, alternatively, the three Kurdish governorates and parts of Mosul (Nineveh governorate) and Kirkuk (Ta'mim governorate). Either would be a very positive outcome for the Kurds, who would have a substantial majority and only need to accommodate ethnic minorities.⁸⁴ On the Arab side, few appear willing to start a discussion of federal boundaries, finding the issue, in the words of a CPA official, "inflammatory".⁸⁵

The inclusion of Kirkuk into a Kurdish autonomous region has been a long-standing Kurdish demand, one over which previous negotiations with the central government – in 1974-1975, 1984, and 1991 – have collapsed.⁸⁶ Kirkuk remained under central government control during the Kurds' self-rule experiment in the 1990s. Their precipitate wartime move into the city, ahead of U.S. forces with whom they had a nominal agreement not to act without prior coordination, betrayed their deep desire to create critical facts on the ground.

The Kurds' initial dominant military presence in the city did not, however, translate into commensurate political power. Their American allies promptly assumed overall command, then – in May 2003 – established a 30-member city council whose composition was determined not proportionally but by an even division between the four principal communities with claims to prior inhabitation: the Kurds, but also the Turkomans, the Assyro-Chaldeans, and the Arabs. Each was given the right to nominate six candidates; the American administration then added six personalities it considered independent. The result was at most quarter-power for the Kurds, rather than the majority they coveted and said they deserved on the basis of their numbers, although the mayor, while

⁸⁴ ICG interview, Baghdad, 23 May 2003.

⁸⁵ ICG interview, Baghdad, September 2003.

⁸⁶ See ICG Middle Report, *What's Next for the Kurds?*, op. cit.

independent, was also a Kurd.⁸⁷ The Kurdish militias were made to withdraw as the police were resurrected and the bearing of arms prohibited.

Thus, despite their early gains, the Kurds faced an entirely new game established by the CPA. It sought to create a level playing field while putting decisions on hold until the national political scene could be sorted out, an independent judiciary was up and running, competing property claims could be settled fairly and, most importantly from the U.S. point of view, politics in the city could be separated from ethnic competition. Time was to be allowed also for members of the City Council to prove their worth not by their political ties but by providing real services to the city's inhabitants.⁸⁸

Although this arrangement did not match the Kurds' plans, they appear to have concluded that if they played the game, they would benefit in the end. In interviews, Kurdish leaders made clear they had decided to remain patient, not to press their claims to Kirkuk at this time – either politically or by encouraging displaced Kurds to return to their “Arabised” homes.⁸⁹ Still, despite their avowed self-restraint, there are ample indications that the Kurds have tried ever since the end of the war to tilt the evolution of political institutions and administrative control in the reviving city in their favour, muscling their way into government offices⁹⁰ and preventing Arab inhabitants of “Arabised” areas from returning to their homes ahead of a census.⁹¹

⁸⁷ Of the six self-selected Kurds, three were affiliated with the KDP and three with the PUK.

⁸⁸ ICG interviews and observations in Kirkuk, 8-11 June 2002.

⁸⁹ KDP leader Masoud Barzani, for example, declared in response to a question about the fate of Arabs who had moved north as part of the former regime's Arabisation campaign: “These Arabs should leave, because they were brought here to ‘Arabise’ Kurdistan. It is impossible for the Kurds to say that the Arabs can remain. But we will be patient until a legal solution can be found”. Quoted in Nüsse, *op. cit.*

⁹⁰ One senior police officer in Kirkuk (not a Kurd), while acknowledging that the Kurds constitute at least 50 per cent of the city's population, insisted that local government jobs should be given to Kirkukis. He complained that Kurds were arriving from Erbil and Suleimaniyah, speaking little or no Arabic, to occupy city posts. ICG interview, Kirkuk, June 2003.

⁹¹ ICG observations and interviews in the north in June 2003 suggested that while little violence occurred, there were many instances in which intimidation, and the threat of

As the constitutional process gets under way, the Kurds have staked their hopes on the outcome of a pre-election population count, to be organised if not nation-wide then at least in the Kirkuk region. A census, they believe, will confirm that Kurds constitute the plurality if not the absolute majority in Kirkuk. Fuad Masoum, head of the CPC, indicated the question of Kirkuk ought to be discussed during the constitutional process. Perhaps, he offered, Iraqis were not ready to define Kirkuk as Kurdish but might nonetheless consent to include it in the federal Kurdish region because of its plurality Kurdish population. And that determination, he said, might have to depend on a census.⁹² Demanding proportional representation, Kurds expect that their numbers will earn them extensive political rights, including the right to name Kirkuk the capital of the Kurdish federal region.

Although all sides have made inflated claims about their numbers, more cautious minds among the Assyro-Chaldeans and Turkomans have acknowledged their communities' minority status in the city.⁹³ The true controversy is about the ratio of

overwhelming Kurdish force, deterred many Arab families, most of whom had evacuated their homes during the war, from returning afterwards. One Kurdish City Council member evoked a well-known proverb: “If you pick up a stick, the thieves will wag their tails and run”. This, he said, was the response of the Arabs who, realising they had committed a wrong, left when, or even before, the Kurds returned to Kirkuk. ICG interview with Pirot Talabany, a lawyer and member of the PUK, Kirkuk, 8 June 2003.

⁹² ICG interview, Baghdad, 31 August 2003. An Arab member of the City Council, Ismail Hadidi, told ICG the contrary that “a Kurdish federal state with Kirkuk as its capital will not be accepted by most Iraqi people or by Kirkukis”. Kirkuk, he said, “ought to be a shared city, and income from its oil exploitation distributed fairly to all the people of Iraq”. ICG interview, Kirkuk, 10 June 2003.

⁹³ A Turkoman representative asserted that the total number of Turkomans in Iraq hovers around one or one and a quarter million, of which perhaps 150,000 live in the city of Kirkuk. ICG interview with Jawdat Najjar, Erbil, 6 June 2003. An Assyro-Chaldean representative put the total number of Christians in Kirkuk at 15,000-18,000, based on the calculation of an average family size of five for the city's 3,300 Christian families (1,500 Assyrians and Nestorians, 1,500 Chaldean Catholics, 100 Syriac Catholics, 100 Syriac Orthodox, 50 Protestants, five Adventists, and 50 Armenians. Only the latter group, while Christian, are not ethnic Assyro-Chaldeans). ICG interview with Sargun Lazar Sleewa, member of the Kirkuk City Council and member of the Assyrian Democratic Movement, Kirkuk, 8 June 2003. There are no reliable census figures for Kirkuk, though some

Kurds to Arabs, which has been changing as a result of the population movements that started during the war and which the U.S. forces tried to halt until an impartial adjudication mechanism could be established. To some, the unresolved problems of Kirkuk as the putative heart of the Kurdish federal region constitute a ticking time bomb ready to go off if Kurds and other victims of Arabisation are unable to reoccupy their original properties and assert their "true" numbers in their dreamed-of capital. "All Arabised Arabs must go", said one Kurdish City Council member. "We are under a lot of pressure from the Kurds. We are telling them to be patient. But if it takes too long, there will be civil war".⁹⁴

D. THE ROLE OF RELIGION

The vast majority of Iraqis being Muslim, there is widespread expectation in Iraq that the new constitution will include language to the effect that Islam is the state religion. As an affirmation of religious identity, this is rather uncontroversial and would in and of itself have little impact on how the country is run. Previous Iraqi constitutions also placed Islam in this largely symbolic realm.⁹⁵ The thornier issues are what kind of guarantees of religious freedom will be incorporated into the constitution and what precise role Islam will be given in the system of government: should Islamic law, *shari'a*, be the state's only source of law, its primary source of law, or only one of its sources of law?

estimates put its total population at roughly 800,000. See generally ICG Report, *What's Next for the Kurds?*, op. cit.

⁹⁴ ICG interview with Kamal Kirkuki, a member of the KDP's central committee, Kirkuk, 8 June 2003. The term "Arabised" Arabs derives from the notion that many of the Kirkuk region's Arab inhabitants originate from other parts of Iraq, having been brought north by previous regimes, either by force or incentive, displacing Kurds, Turkomans and Assyro-Chaldeans, who were either expelled or "encouraged" to leave. Kurds readily acknowledge that there are Arabs with historical claims to residency in the area; by and large these Arabs stayed put during and after the war and have not been affected by the Kurds' return. For example, ICG interviews with Pirot Talabany, Kirkuk, 8 June 2003, and with Ismail Hadidi, an Arab member of the City Council, Kirkuk, 10 June 2003.

⁹⁵ The 1925 constitution, for example, designated Islam as the official religion of the state, and guaranteed freedom of conscience and worship. It granted the Islamic *shari'a* power as a source of law only with respect to personal status issues affecting Muslims. op. cit. The 1958 constitution also designated Islam as the state religion, and pledged that freedom of religion would be safeguarded.

Iraqi society under the secular Ba'ath regime was largely free of religious involvement in politics. However, the regime's repression of militant Shiite groups strengthened their Islamist identity, enhanced their motivation, bolstered their sympathisers both underground and in exile, and thus gave them an immediate political advantage in post-war Iraq. That said, various shades of political Islam exist today, including:

- the "quietism" of Grand Ayatollah Ali Sistani (no aspiration to political power but also not averse to making penetrating political statements, as in his edict on the necessity of direct elections to a Constituent Assembly);
- the Supreme Council of the Islamic Revolution in Iraq's apparent two-step approach to an Islamic Republic (commitment to and participation in the democratic process first, then the creation of an Iranian-style Islamic republic through the support of the resulting Shiite political majority later); and
- the firebrand politics of Muqtada Sadr, who, assuming the political mantle of his assassinated father, calls for clerics to play a direct political role.⁹⁶

From interviews in Baghdad, it emerges that any assumption regarding these groups' ultimate positions on the role of religion would be premature. They have yet to give serious thought to the challenge of constitution-making and their positions may be modified in political bargaining.⁹⁷ Certainly Shiite political-religious quarters have displayed remarkable pragmatism to date, relieved at the fall of the Baathist regime and confident that, over time, they will be in a position to assert their rights and political influence. As a result, they have generally been cooperative toward the occupying forces for

⁹⁶ See ICG Briefing, *Iraq's Shiites Under Occupation*, op. cit.; and Juan Cole, "The Iraqi Shiites: On the History of America's Would-Be Allies", *The Boston Review*, October/November 2003.

⁹⁷ The opinions of Sunni (Arab) religious groups on the role of Islam as it should be enunciated in the new constitution may take even longer to come together. The collapse of the regime caused disarray in Sunni ranks, and a keenly felt sense of growing disenfranchisement has fuelled armed resistance to the U.S. occupation and prompted an under-representation of recognised Sunni leaders in key institutions of the new interim administration.

the sake of unity and stability.⁹⁸ Ibrahim Ja'fari, head of the Islamic Da'wa Party (formerly London branch) and a member of the Interim Governing Council, sought to play down any threat posed by radical Islam to Sunnis and Christians, as well as secular Shiites, saying the matter will be up for discussion in the future Constituent Assembly and that many interpretations and possible models are available, including that presented by Christian Democratic parties in Europe.⁹⁹

SCIRI's representative on the CPC provided some detail regarding the intricate balancing of competing demands he envisioned with respect to *shari'a*:

Most importantly, the new Iraqi law should not conflict with *shari'a* law, and so the articles of the constitution should also not conflict with it. But we are talking about a *shari'a* unlike the one of the Taliban, one that is accepted by both Sunni and Shiite religious leaders in Iraq. A council should be established whose composition should accommodate but not be limited to representatives of religious groups and legal experts, and that should monitor this during the drafting of the constitution, i.e., that nothing in it conflicts with *shari'a*. Later this same council could fulfil a similar function once there is an elected parliament that starts creating legislation.¹⁰⁰

How much of the draft legislation is deemed inconsistent with *shari'a* will, of course, be a matter of interpretation, so the composition of key institutions, such as the proposed council, will be a critical element in this process.

There undoubtedly will be strong resistance from most Kurds against any attempt to give *shari'a* significant constitutional cachet. Kurdish politics, dominated by the KDP and PUK, have been largely secular, Islamist attempts at in-roads in the 1990s notwithstanding.¹⁰¹ However, the Kurdish Islamist

on the Interim Governing Council, Salahaddin Bahauddin, a Sunni, said he saw no contradiction in having *shari'a* as "the primary source among other sources of law" in a democratic, parliamentary and multiparty system of government.¹⁰² The demand for *shari'a*, he indicated, fell far short of a possible claim for Iraq to have Islamic rule, the circumstances for which, he said, "are not suitable. Moreover, experiments in Sudan, Iran and elsewhere have failed in this region and defamed Islam".¹⁰³

The way forward may well be along the lines of the model proposed by the SCIRI representative quoted above, with a careful selection of an impartial monitoring council and guarantees of freedom of religion together with strong constitutional protections for minority religions. At this stage, though, the absence of a broad public debate on such a pivotal issue as this makes any firm conclusions about the future role of Islam in Iraq impossible.

categorically that *shari'a* could not be the primary source of law in the new Iraq.

¹⁰² Other Islamists have argued that *shari'a* is compatible with democracy, obviously a matter of interpretation. Raja' Habib Khuzai, a female Shiite member of the Interim Governing Council similarly asserted *shari'a* should be the basic law of Iraq, contending it is "very democratic". ICG interview, Baghdad, 1 September 2003. An American supporter of the notion that a democratic and pluralist Iraq can be compatible with Islamic values (not necessarily *shari'a*) is the CPA's former senior constitutional adviser, Noah Feldman. See his testimony before the Senate Foreign Relations Committee, "Hearing on Building Democratic Institutions in Iraq and the Middle East", Washington, D.C., 24 September 2003.

¹⁰³ ICG interview, Baghdad, 1 September 2003. The call for Islamic government (the "rule of the Islamic jurist") is typically a Shiite, not a Sunni, demand in Islam.

⁹⁸ SCIRI representatives "talk about democracy the way we do", gushed the Iraqi Communist Party's representative on the CPC, "while in the past they used to talk about a *shura* [Islamic consultative council] and such". ICG interview with Sami Khaled, Baghdad, 2 September 2003.

⁹⁹ ICG interview, Baghdad, 2 September 2003.

¹⁰⁰ ICG interview with Jalal al-Din al-Sughayer, Baghdad, 6 June 2003.

¹⁰¹ See ICG Middle East Briefing, *Radical Islam in Iraqi Kurdistan: The Mouse That Roared?*, 7 February 2003. Fouad Masoum, the Kurdish head of the CPC, stated

III. MOVING THE PROCESS FORWARD

A. DECOUPLING GOVERNANCE AND CONSTITUTION-MAKING

Security Council Resolution 1511 affirms that the exercise of the CPA's responsibilities, authorities and obligations will cease "when an internationally recognised, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority [CPA], inter alia through steps envisaged in paragraphs four through seven and ten below." These paragraphs¹⁰⁴ call on the Interim Governing Council to prepare a "timetable and a program for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution" by 15 December 2003. This language seems to lock in the process envisaged by

¹⁰⁴ Their full text is as follows:

The Security Council ...

4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority;

5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;

6. *Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and *requests* the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;

7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution;

10. *Takes note* of the intention of the Governing Council to hold a constitutional conference and, recognizing that the convening of the conference will be a milestone in the movement to the full exercise of sovereignty, *calls for* its preparation through national dialogue and consensus-building as soon as practicable and *requests* the Special Representative of the Secretary-General, at the time of the convening of the conference or, as circumstances permit, to lend the unique expertise of the United Nations to the Iraqi people in this process of political transition, including the establishment of electoral processes;

the international community, accomplished following difficult negotiations in October 2003 between the U.S., the resolution's primary drafter, and nations that opposed the war but whose support Washington now needs. And it presents Iraq with a difficult dilemma: either accelerate the constitution-making process in order to achieve the desired transfer of sovereignty; or prolong the current occupation regime in order to achieve a more legitimate and viable constitution. Neither option is good for Iraq's future.

An alternative approach is available, for there is no need to have a constitution in place for political power and sovereignty to be handed over. Given multiple demands, including from members of the Interim Governing Council, for ample time to draft a proper constitution,¹⁰⁵ the solution lies in decoupling the two issues – transfer of political authority and a permanent constitution – and proceeding with a different progression and timetable. In order for this option to be successfully implemented, however, ultimate oversight responsibility for the political/constitutional process should be given to the UN, working in close coordination with the coalition. Such a transfer of responsibility from the CPA to the UN is required to endow both the governance and constitutional processes with the necessary domestic and international legitimacy.

Accordingly, this different approach would include the following steps:

- Transfer from the CPA to the UN, through the establishment of a newly constituted United Nations Mission in Iraq, of ultimate authority to oversee both the political transition and constitution-making process. Resolution 1511 gave no more than a subordinate advisory role to the UN in these respects, and the result has been gradual UN disengagement. Officials in the UN Secretariat make clear they will recommend re-engagement only if and when

¹⁰⁵ The wish among Iraqis for sufficient time to draft a permanent constitution was nearly universal, ICG found. On 9 November 2003, the interim foreign minister, Hoshiyar Zubari, warned of a possible delay in the constitution-writing process due to the security situation. The "timetables depend on the security situation, and if the security situation deteriorates, we will not adhere to such commitments". Quoted in *The Washington Post*, 10 November 2003.

they will no longer play a subsidiary role to the CPA.¹⁰⁶

- A rapid process to establish a more representative, legitimate and sovereign temporary governing body in Iraq, with the Interim Governing Council being reshaped for this purpose and perhaps called a Transitional Government of National Unity.
- A longer-term, deliberative and consultative process of drafting an Iraqi constitution.

The prime benefit of this approach, in addition to gaining time for work on the constitution, would be to bestow a greater degree of legitimacy both on the transitional governing structures and, most importantly, on the permanent constitution that is to emerge. Any deficit in legitimacy that attached to the Transitional Government or other transitional bodies would be mitigated by their transparently, self-admittedly interim character. The UN Security Council would need to agree on a timetable for the constitutional process – which would ideally be no longer than three years – to avoid undue perpetuation of the interim governing arrangements.

B. MOVING FORWARD ON GOVERNANCE

As described in earlier ICG reports, the Interim Governing Council suffers from significant problems: it lacks legitimacy,¹⁰⁷ authority and efficiency; moreover, its composition established the troubling precedent of allocating power on the basis of ethnic/religious affiliation.¹⁰⁸

Revamping Iraq's governing body and providing it with a greater degree of authority are urgent priorities to demonstrate to the Iraqi people that sovereignty is being turned over to them. Overseen by the UN, a process should be instituted rapidly – within the next few months at most – to broaden the Interim Governing Council, and to enable it to exercise (as distinct from just 'embody') a wide range of

sovereign powers. A particular effort should be made to incorporate those currently excluded – followers of Muqtada al-Sadr, former Baathists with no record of misused authority, monarchists, Arab nationalists, socialists, and representatives of Sunni tribes.

There are several ways available to broaden the base of the Interim Governing Council and create the conditions for it to become a more fully empowered transitional government of national unity. Further analysis is required – best done after consultations on the ground by the proposed new UN mission to Iraq – as to which of them best satisfies the criteria of acceptability, practicability and timeliness. While an election process of some kind may be the most desirable in principle, it may prove to be the least achievable within the short time-frame required.

- One option would be to hold local and functional elections – at municipal and provincial levels, for business and professional associations and within trade unions – of a kind previously discussed and recommended by ICG.¹⁰⁹
- Another, more ambitious, electoral option would be to seek organise within the next few months national elections to elect (for an interim period of up to three years, pending the adoption of a permanent constitution) both a transitional government of national unity and a constitution-writing assembly.¹¹⁰ A variant on this theme would be for the initial national elections to be for a body which would both appoint the transitional government and act as a constituent assembly. The difficulty here is that the political and security conditions for any kind of national elections in all likelihood will not exist for some time, and to put the process on hold until such elections take place risks

¹⁰⁶ ICG interview, New York, October 2003.

¹⁰⁷ According to a Gallup Poll conducted in October 2003, while 61 per cent of Iraqis held a favourable view of the Council, only 16 per cent thought it was "fairly independent," while 75 per cent view its policies and decisions as "mostly determined by the coalition's authorities." Gallup Poll, 28 October 2003.

¹⁰⁸ See ICG Middle East Reports N°s 11 and 17, *War in Iraq: Political Challenges After the Conflict*, 25 March 2003; *Governing Iraq*, 25 August 2003.

¹⁰⁹ See *Political Challenges*, op. cit., p. 32 and *Governing Iraq*, op. cit., p. 23.

¹¹⁰ This option is well described in Marina Ottaway and Thomas Carothers, "Avoiding the Dangers of Early Elections in Iraq", Carnegie Endowment Policy Brief, 27 October 2003. As its authors recommend, "Limit the first phase of constitution-writing to an interim constitution and hold the first elections under that framework only for an interim government of national unity and a constituent assembly. This would produce an elected government to which the CPA could hand over sovereignty and create an institutional framework that could oversee the longer term, less hurried efforts to create permanent democratic institutions."

holding it hostage to the actions of those determined to sabotage it.

- A third option, proposed by some at the UN, would be to convene a broad gathering of Iraqi delegates (similar to the Bonn process used for Afghanistan) in a conference representing various political and social forces. Their task would be to select a new governing institution, which might again be called the Transitional Government of National Unity.¹¹¹ While the resulting body might enjoy a greater degree of legitimacy, the Afghan precedent offers at least some reason for caution. Both the Bonn process and the ensuing *loya jirga* have met with very mixed results, and they have not led to the emergence of a balanced or broadly legitimate government.¹¹²
- A fourth option would be simply for the UN, in consultation with the CPA, to select a number of individuals representing various constituencies to be added to the Interim Governing Council. The advantage of this option is that it would be relatively quick; the disadvantage is that the end-result might not enjoy much enhanced legitimacy given the meagre Iraqi input into it.

Regardless of the process that is selected, a clear priority should be to undo the ethnic/religious allocation of power that is one of the Interim Governing Council's most serious flaws.¹¹³

¹¹¹ ICG interview, New York, October 2003.

¹¹² See ICG Briefings, *The Loya Jirga: One Small Step Forward?*, 16 May 2002; *The Afghan Transitional Administration: Prospects and Perils*, 30 July 2002; and ICG Asia Report N°62, *Afghanistan: The Problem of Pashtun Alienation* (5 August 2003).

¹¹³ Although most Iraqis agree that their division between various communal groups is an artificial product of the Baathist regime, the current organisation of all institutional bodies according to ethnic and religious principles risks having a long-lasting effect, contributing to the emergence of a Lebanon-style system, empowering "ethnic entrepreneurs", who can mobilise political constituents according to communal affiliations because assets and resources are allocated on that basis as well. The expression "ethnic entrepreneurs" is from Toby Dodge, an Iraq expert, speaking at the Council on Foreign Relations, Washington, 3 November 2003. For further discussion of the problem of ethnic/religious allocation of power practices by the Interim Governing Council, see ICG Reports, *War in Iraq*, op. cit.; *Governing Iraq*, op. cit.

C. MOVING FORWARD ON CONSTITUTION-MAKING

The first step in the constitutional process as currently envisioned (and as endorsed by Security Council Resolution 1511) is almost certain to be the creation of a body charged with preparing, deliberating and) approving a text for final ratification by popular referendum. Even this step is enormously controversial. The debate centres on the (primarily) Shiite demand that the members of this constitutional body – variously referred to as a constitutional conference, council, or assembly and in this report called, for convenience, a Constituent Assembly – be chosen through a direct election, and goes to the heart of the question of how the constitution should acquire its legitimacy. At the same time – and this is what is stirring the acrimony – the procedural controversy conceals a far more profound battle over tactical advantage. It pits the presumed dominance of the majority Shiites against the concerns of minorities, be they Kurds demanding their self-defined federalism or a combination (not yet a coalition) of non-Shiites and non-religious Shiites fearful of too great clerical power.

The perception of a pre-emptive U.S. move to impose a constitution of its own making prompted the dramatic entry into politics of Grand Ayatollah Ali Sistani at the end of June 2003. While not the *marja'* (source of emulation) of the Shiites worldwide, nor representing Iraqi Shiites as such, this Iranian-born cleric residing in Najaf nonetheless has shown he commands great respect and support in Iraq, and not only among religious Shiites. His edict – that the task of constitution writing should be limited to Iraqis, and then only those elected directly by the people¹¹⁴ – served to focus the constitutional process and channel it into one direction at a time when neither the CPA nor the formerly exiled political opposition groups were prepared to tackle the issue. The incident highlighted the opaque nature

¹¹⁴ The Ayatollah's edict declared that the "CPA does not have any authority to appoint members of a drafting committee", and that there is "no guarantee that such a committee would produce a constitution that would be consistent with the interests of the Iraqi nation and reflects its national identity, the Muslim faith being one of its basic pillars". Cited in a pamphlet issued by the Islamic Democratic Current, "Why do we support the fatwa issued by Al-Sistani regarding the elections?", 15 September 2003. See also, Amy Waldman, "Cleric Wants Iraqis to Write Constitution", *The New York Times*, 1 July 2003.

of a CPA sequestered in the Republican Palace, the details of whose reconstruction efforts are largely mysterious to their Iraqi beneficiaries, thus giving rise to the wildest rumours and speculations.

The CPA's response, once it had established the Interim Governing Council in mid-July 2003, was to urge that body to appoint a Constitutional Preparatory Committee (the CPC) that, as strictly Iraqi, could explore alternative options to Sistani's prescript without the damaging taint of acting as a U.S. proxy. "The Sistani fatwa has complicated matters", said one political party official in a typical comment. "We will need a new fatwa [from him], one reflecting a historic compromise that will yield a non-ideological constitution".¹¹⁵ Others said they hoped to persuade Sistani that, while his fatwa is "correct" and comports with "the original plan", the current circumstances – prevailing insecurity – do not permit free elections, and so a procedural middle ground must be sought.

Sistani, though he has cultivated an image of seclusion, is well-informed, according to an Interim Governing Council member who visited him in Najaf in mid-August. She recounted that he complained that he had yet to see anything concrete from the Council in its first month. "He told us we should work on 'security, security, security!' – he said it three times." She expected him to be inflexible on his June decree: "When Sistani says something, that's it. But perhaps if we go and meet him as a group, he'll be open to negotiations".¹¹⁶

The CPC was hopelessly divided over the matter and, in its (confidential) report to the Council on 1 October 2003, failed to present it with a single recommendation, offering instead a menu of options that included:

- direct elections to a constitutional conference;¹¹⁷
- appointment by the Interim Governing Council of the members of the constitutional

conference, who in turn appoint a drafting committee;¹¹⁸ and

- partial elections, a possible middle ground between election (intikhab) and selection (ikhtiyar), referred to sometimes as "half" elections (nous intikhab); groups of recognised notables in the various regions of the country would elect a given number of members for the constitutional conference.¹¹⁹

Given that the CPC was a mirror image of its creator, when it returned the question of how a Constituent Assembly should be established unanswered, it transferred its own fault lines on this issue to the Interim Governing Council. Unlike the CPC, though, the Council faces a more serious deadline and has a more powerful supervisor to answer to. It has been charged by the Security Council to present by 15 December 2003 a program outlining steps in the constitutional process. It therefore must spell out how the Constituent Assembly is to come about. It began discussions on this issue on 27 October.

The religious Shiite parties – SCIRI, Da'wa (in its various transfigurations), even opposition groups such as Muqtada Sadr's movement – all have endorsed Sistani's edict, banking on the Shiite majority that would naturally issue from direct elections to shape the constitution in the way they desire.¹²⁰ Especially those groups with a largely secular Shiite membership – the INC, the Iraqi Communist Party (ICP) and others – are opposed to

¹¹⁵ ICG interview, Baghdad, August 2003.

¹¹⁶ ICG interview with Raja' Habib Khuzai, Baghdad, 1 September 2003.

¹¹⁷ A CPC member said this option enjoyed most support on the committee and was also "the preference of the street." ICG interview with Jalal al-Din al-Sughayer, Baghdad, 6 June 2003.

¹¹⁸ CPC memorandum to the Interim Governing Council, 30 September 2003, as summarised by a CPA official for ICG.

¹¹⁹ Ibid. CPC chairman Fouad Masoum was quoted as saying Kurds and Sunni Arabs might accept a semi-selection. This would yield a body with some legitimacy that, at the same time, could not be dominated by any particular group using an election mandate. Patrick E. Tyler, "Iraqi Groups Badly Divided Over How to Draft a Charter", *The New York Times*, 30 September 2003. Interim Governing Council member Mowaffaq Ruba'ee endorsed the notion of partial elections and suggested that Ali al-Sistani might accept this method as well. Rajiv Chandrasekaran, "Iraqis Call U.S. Goal on Constitution Impossible", *The Washington Post*, 30 September 2003.

¹²⁰ ICG interviews with Adel Abd-al-Mahdi and Jalal al-Din al-Sughayer of SCIRI, Ibrahim al-Ja'fari of the Islamic Da'wa Party (London branch), Abd-al-Karim al-Anizi of the Islamic Da'wa Party (Iraq branch), and Hassan al-Zarqani of the Muqtada Sadr movement, Baghdad, August-September 2003. Al-Ja'fari said there was "broad popular support for an elected assembly."

its concept.¹²¹ Nor do the Kurdish parties want an elected Assembly, though their fears have more to do with having to face a hostile Shiite majority in negotiations over the definition of federalism.¹²²

Those opposing a direct election – the Kurds in particular – have raised a census requirement as an obstacle. But exercises can be designed short of a census that would be sufficient to organise elections to a Constituent Assembly. The CPC's Jalal al-Din al-Sughayer proposed the following possible alternatives:

- ❑ using the 1997 census, an option unpopular with CPC members;¹²³
- ❑ issuing voter cards to individuals at the time they present themselves to vote, a proposal that is obviously fraught with technical difficulties; and
- ❑ using food ration cards as a basis for voter registration, a proposal that al-Sughayer said “is not the optimal option but the best realistic one”, and the one that enjoyed majority support on the CPC.¹²⁴

¹²¹ ICG interviews with Sami Khaled of the ICP and Tawfiq al-Yaseri, General-Secretary of the Iraqi National Alliance, Baghdad, September 2003.

¹²² This is certainly the way SCIRI sees it. Jalal al-Din al-Sughayer, for example, told ICG: “The Kurds are asking for a federal structure. By direct elections to the Assembly, they would not have the support they need for federalism”. ICG interview, Baghdad, 6 September 2003. CPC chairman Fouad Masoum, a senior PUK official who, in the early 1990s, served as prime minister of the Kurdistan Regional Government, and CPC member Sami Abd-al-Rahman, a senior KDP official, made strong and detailed interventions on the federal question in the early days of the CPC's work in July 2003 that reportedly took the other members by surprise.

¹²³ The 1997 census was the last population count organised by the Ba'ath regime. Its results were kept under wraps for four years and are therefore not trusted, given the possibility of tampering.

¹²⁴ ICG interview with Jalal al-Din al-Sughayer, Baghdad, 6 June 2003. Voter registration on the basis of food ration cards would require holders of such cards (heads of family) to present themselves; the local mukhtar would then have to certify the eligible members in the family, as the cards list only the number, not the names, of household members. Other options, employed internationally, include using a civil roll: rely on district civil affairs offices to obtain data on residents (numbers and addresses); invite them to register on the basis of whatever identity cards they have in their possession (including food ration cards); and issue a standardised identity card on the basis of the new register.

On balance, even if the Interim Governing Council can overcome its internal differences, its instinct might well be to resist direct elections – if only because the resulting body would enjoy far greater legitimacy than the Council itself. On the other hand, a selection process would be widely viewed as illegitimate insofar as it would emanate from a body (the Interim Governing Council) that itself suffers from a serious legitimacy deficit.

The midway proposal of partial elections might constitute an acceptable compromise. Under this process, unelected governorate-level councils would elect their representatives to a Constituent Assembly. This might get support from the Kurds and others such as the ICP, who say a mechanism short of a full election is justified by the persistent lack of law and order in parts of the country and especially the capital, which inhibits Iraqis from leaving their homes and neighbourhoods to involve themselves in politics and participate in elections. And, they argue, a direct election would need to be preceded by a census as the preferred method of voter registration, which would be impossible to organise under prevailing conditions. Most crucially, they say, restoring sovereignty to Iraqis is critical to restoring order and stability to the country, so the transfer of sovereignty by the CPA brooks no delay, not even for a process as important for the future as the writing of a constitution.¹²⁵

There may be room for compromise, because upon closer inspection Sistani's call for direct elections could be interpreted to mean something less. As described by CPC's Fouad Masoum, a partial election would require that predefined districts each organise a meeting of 150 notables drawn from professional unions and popular organisations, the Hawza (the Shiite clerical establishment) and the tribes. The notables would elect ten persons from their district to a Constituent Assembly of no more than 500 members, and these representatives would have to satisfy a set of qualifications (age, perhaps

Alternatively, one could use existing lists, for example from a previous election or census, de-duplicate them during data entry, post the new lists at pre-designated electoral district centres, then invite Iraqis above the age of consent to present themselves on election day with a valid identity card. If their name is on the list, they vote. If not, they also vote but must apply to be added to the list for that district. Under this option, everyone would dip a finger in indelible ink.

¹²⁵ ICG interview with Fouad Masoum, Baghdad, 31 August 2003.

a college degree, good standing in the community and such). The Assembly, in turn, would appoint a drafting committee and, eventually, submit the constitution to a popular referendum.

The CPC's SCIRI representative also seemed willing to contemplate a compromise solution and thought that Sistani might ultimately back the "half" election (*nous intikhab*) proposal, recognising that elections to a Constituent Assembly need not be identical to parliamentary or presidential elections since a degree of specific expertise is required in the constitutional process.¹²⁶

However, there are definite drawbacks to a compromise solution around a *nous intikhab*. First of all, it must pass muster with the majority of the Shiite community, and therefore with Ayatollah Sistani, who might then have to issue a new fatwa modifying his earlier one. Difficult negotiations are underway. Secondly, experience with partial elections at the district level has shown that women fall by the wayside when too much reliance is placed on notables.¹²⁷ Finally any option less than a general election may diminish the future constitution's legitimacy, even if the constitution ultimately is approved in a popular referendum.

Under the approach recommended here – decoupling the political and constitutional processes – there is no reason to rush the process of selecting a Constituent Assembly. Consideration therefore ought to be given to the approach advocated by Sistani: a Constituent Assembly chosen by the people of Iraq in a direct and free election. These could be held, security circumstances permitting, within one to two years.¹²⁸ The elected Constituent Assembly should then set about the task of drafting a constitution for Iraq, relying for its deliberations on the broadest possible input from the public through extensive consultation and participation. In order to address Kurdish concerns, these elections could be held on a regional or governorate basis, therefore ensuring adequate Kurdish representation.

¹²⁶ ICG interview with Jalal al-Din al-Sughayer, Baghdad, 6 June 2003.

¹²⁷ ICG interview with Ban Saraf, Civil Society Specialist, Iraq Local Government Project, Baghdad, 2 September 2003.

¹²⁸ As seen above, some have suggested holding such elections far sooner, by the second half of 2004. See Carnegie Endowment Policy Brief, *supra*.

As a means of facilitating the task of the Constituent Assembly, the Constitutional Preparatory Committee (CPC) could be charged with preparing a working-draft constitution for its consideration. The CPC has done some important work to date, and its contribution could be useful. On the other hand, it is noteworthy that none of its members is a woman, a fact that ought to be remedied.

A Transitional Constitution? During the period prior to the adoption of a constitution, some Iraqis have suggested the idea of a transitional constitution which would define the powers of the transitional government; ground rules for the adoption of a permanent constitution; modalities for elections to a Constituent Assembly; and a timetable with a realistic deadline by which the transitional process must be completed.¹²⁹

This proposal has the potential support of key swing votes on the Council: the Kurds and SCIRI. The advantage, according to Jalal al-Din al-Sughayer (who was non-committal when presented by ICG with the idea but expressed willingness to entertain it), is that a transitional constitution could be prepared by a mechanism that did not require an election. Such a constitution, he said, could set both the parameters and a precise timetable for a permanent constitution. Fouad Masoum was more assertive in stating that a transitional constitution is called for as a way of circumventing the dilemma of a swift sovereignty transfer amounting to a rush order for a permanent constitution – as long, he said, as the document is called transitional, not provisional.

The proposal has also found express support from a Sunni member of the Interim Governing Council, Nasir Chadirchi, leader of the National Democratic Party, who has counselled patience and slow deliberation in proceeding with a constitution and elections.¹³⁰ He offered a combination of the 1925

¹²⁹ See the relevant experience of South Africa, described by Neil Kritz, "Constitution-Making Process: Lessons for Iraq", Testimony before Senate Committees on the Judiciary and Foreign Relations, 25 June 2003, available at: http://www.usip.org/aboutus/congress/testimony/2003/0625_kritz.html.

¹³⁰ Chadirchi said he was motivated by the fact that damage caused by the Ba'ath regime and a decade of international sanctions would be difficult to overcome in the short term, and that especially the absence of a middle class would lead to a victory of the Shiite religious parties at the polls. ICG interview, Baghdad, 1 September 2003. He said he had raised the possibility with Bremer and John Sawers, the senior

and 1958 constitutions, appropriately amended, as the basis for a transitional document, and said that if there were an open debate, this option might garner a good deal of support.¹³¹

However, there are disadvantages. Arguably, a transitional constitution will simply prolong the process of drawing up a permanent one, and potentially could go the same way as its provisional predecessors, becoming the default permanent constitution. Support for a transitional constitution from Iraqi political actors could be interpreted by Iraqis – and of course the perception itself counts – as a way for those political actors to perpetuate and institutionalise their own power. Depending on conditions in the country, they might declare a state of emergency, suspend the constitutional process, and ratify their maintenance in power. In addition, the transitional constitution could serve as a surrogate for fights over issues that will have to be addressed anew in debates over the permanent constitution.

Much depends on how much detail is contemplated for a transitional or interim constitution.¹³² A full-fledged constitution probably is not necessary for the interim period. Instead, a set of guiding principles – perhaps just called a transitional mandate - defining

the structure and powers of the transitional government and modalities for the adoption of a constitution may well suffice. This mandate could be drafted by the CPC, in consultation with the UN. Should the decision be made to have a gathering of Iraqi delegates choose members of the Transitional Government, this could also be tasked with approving the transitional mandate.

British CPA official, during the summer, but they indicated they preferred to see the process be sped up.

¹³¹ The proposal to have a transitional constitution has also found significant resonance in the pages of the daily *Al-Zaman*. See for example the opinions of Majed Ahmad al-Samarra'i (17 September 2003), Falah Khaled (20-21 September 2003) and Sa'ed Abbas (23 September 2003). Falah Khaled argued that "our current circumstances..., the presence of a foreign army and a foreign ambassador charged with running the country who has the right to reject any decision made about the constitution or otherwise,... make the process of drafting a constitution that enjoys legitimacy and longevity impossible, even if it was the best constitution in the world". *Al-Zaman* is a London-based independent Iraqi newspaper whose circulation inside Iraq, by force of circumstance, remains limited for the moment. The majority of entries on the constitution after the series was initiated on 15 September 2003 were provided by Iraqis living in the diaspora.

¹³² The Carnegie Endowment Policy Brief, op cit, p.5, argues for a minimalist option in this respect: "Such a document would contain a broad commitment to democratic principles and respect for human rights; institutionally, however, it would only provide a minimalist and temporary framework needed to elect an interim government of national unity that would rule the country for three years, and a constituent assembly that would oversee the writing of a permanent constitution in the same period."

IV. CONCLUSION

How the transitional period is handled will have significant ramifications – for Iraq's immediate and long-term stability and for the well being of its citizens. The biggest threats to the emergence of a well-ordered constitutional process in Iraq are the continuing lack of security, pressures from the international community that force an unrealistic timetable, and a lack of transparency.

Iraqis agree that no nationwide electoral exercise, nor broad consultations, can occur safely and sensibly under current conditions. The U.S. therefore finds itself in a dilemma. Facing an armed threat against its troops, its allies in Iraqi governing structures and law enforcement, and international relief workers, it must, in addition to military responses that function as stop-gap measures at best and may, at worst, aggravate the problem, speed up the political process. Precipitate actions on the political front in a situation that remains inherently unstable, however, may help put in place institutions that lack the broad-based support necessary to guarantee enduring political stability – surely the overriding interest of any administration in Washington, and indeed of the international community.

There is no ready-made solution that will immediately resolve the Iraqi crisis but, as has been recognised both in Iraq and in the international community, a de-Americanisation of the reconstruction effort – on all fronts – is imperative. This should come in two forms. First is internationalisation, by bringing in foreign legitimacy, foreign troops, foreign aid, foreign business and foreign expertise to a much greater degree than before. Resolution 1511 was, in this respect, a blank shot, going only a very limited way toward this objective. Secondly, there should be empowerment of Iraqis in governance at all levels. Iraqi police must be brought onto the streets in greater numbers as soon as possible (though not at the cost of shortcuts in their training, especially with respect to human rights), Iraqi civil servants at all levels of the administration must be given greater powers, and the Interim Governing Council must be transformed, broadened and given new authority, so that it exercises – and doesn't just 'embody' – a substantial measure of Iraqi sovereignty.

A strong and legitimate constitution is needed in the longer term. For this, ample time, deliberation and

popular input is required. Pressures from the international community to short-circuit the process are dangerous and fly in the face of successful precedent elsewhere around the globe. Constitutions adopted without broad consultation tend to reflect a deal between the powerful, and often fail to meet the test of time.¹³³

In an ideal world, a broadly interactive process would unfold in which elected representatives actively engaged in civic education concerning issues germane to the drafting of a constitution and invited public debate on its most controversial elements. The situation in Iraq today, as all recognise, is not ideal. Rather than signalling that certain allowances ought, therefore, to be made and a flawed process accepted, however, additional time should be found to permit a solid process to run its natural course. The notion of establishing a more legitimate transitional government responds to that requirement.

A critical third element is transparency and public participation. The experience in Iraq so far teaches that lack of openness on the part of the CPA gives rise to damaging rumours, which in turn trigger actions (such as the Sistani fatwa) that, whatever their merits, run counter to professed U.S. objectives. It also compounds alienation and feelings of disenfranchisement among Iraqis and therefore fuels opposition. The sense that Iraqis have no ownership of the political process and are blocked from participation in decisions critical to the future of their country is profound.¹³⁴ The work of the CPC, while conducted in relative openness as it visited the governorates in August and September, resulted in a confidential report on an issue that is so important it

¹³³ For example, some scholars contend that in Cambodia the rushed adoption of the 1993 constitution contributed to the subsequent instability. See Kritz, *op. cit.*

¹³⁴ A typical statement came from a spokesman of the Muqtada Sadr movement who, although he undoubtedly has a political agenda, was giving voice to a much more generalised sentiment. Referring specifically to the installation of the Interim Governing Council, he observed: "Under Saddam Hussein everything was imposed on us. Even if we whispered something, we'd be executed. Now things are still being imposed on us, but now, even when we speak out against it (as I have done via media interviews), no one even listens to us. There is a proverb in Iraq: 'You want a rabbit? Here, take a rabbit! You want a gazelle? Here, take a rabbit!' We have no real choice. Irrespective of what we want, we get the Interim Governing Council". ICG interview with Hassan al-Zarqawi, Baghdad, 4 September 2003. The expression in colloquial Arabic is: "*Turid arnab? Khud arnab! Turid ghazal? Khud arnab!*"

calls out for public debate. This approach augurs poorly for all the steps that must still be taken in the constitutional process, and must be reversed if the Iraqi public is to gain a sense of ownership over the final product.

In all this, a much greater role must be given to the United Nations, which should play a critical part in overseeing the political transition process, providing Iraqis with the technical expertise they require for the drafting of the constitution and the organisation of voter registration, elections (including the gathering of absentee ballots), a nationwide census and a popular referendum. The UN's impartiality would do much to mitigate the prevailing impression that the U.S. is engineering the drafting of a constitution to further its own interests, and its experience in other transitional societies is certain to enhance the constitutional process in these difficult times.¹³⁵

Baghdad/Brussels, 13 November 2003

¹³⁵ That said, some Iraqis did note that the UN has perception problems to overcome, especially with regard to corruption charges and the problem of bureaucratic inertia to which Iraqis became acquainted during the sanctions decade. ICG interviews in Baghdad.

APPENDIX A

MAP OF IRAQ



APPENDIX B

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (ICG) is an independent, non-profit, multinational organisation, with over 90 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

ICG's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, ICG produces regular analytical reports containing practical recommendations targeted at key international decision-takers. ICG also publishes *CrisisWatch*, a 12-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

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November 2003

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CrisisWatch N°2, 1 October 2003

CrisisWatch N°3, 1 November 2003

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