

# **IRAQ: DON'T RUSH THE CONSTITUTION**

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## IRAQ: DON'T RUSH THE CONSTITUTION

### EXECUTIVE SUMMARY AND RECOMMENDATIONS

The next stage in Iraq's political transition, the drafting and adoption of a permanent constitution, will be critical to the country's long-term stability. Iraqis face a dilemma: rush the constitutional process and meet the current deadline of 15 August 2005 to prevent the insurgents from scoring further political points, or encourage a process that is inclusive, transparent and participatory in an effort to increase popular buy-in of the final product. While there are downsides to delay, they are far outweighed by the dangers of a hurried job that could lead to either popular rejection of or popular resignation to a text toward which they feel little sense of ownership or pride.

The Transitional Administrative Law (TAL) of March 2004 dictates the pace and process of constitutional drafting and adoption. According to its terms, drafting must be completed no later than 15 August 2005 and the text put up for popular referendum by 15 October, with elections for a full-term assembly to follow by 15 December. If successful, this process may go a long way in drying up support for the insurgents. Conversely, failure to get the constitutional endeavour right risks increasing popular discontent and swelling the ranks of the insurgency.

The experience of other transitional societies is clear. Popular participation in and acceptance of the basic pillars of the new order are critical to its success and longevity. The creation of a foundational document that not only receives majority support in a nationwide referendum but is based on popular input and consensus may well be the optimal way of whittling away support for the insurgents (whose hardcore elements would still need to be tackled militarily) and stabilising Iraq.

This cannot realistically be done within the extremely narrow timeframe of just over two months remaining before 15 August. Far better would be to accept up front that the deadline cannot be met and take advantage of the TAL's escape clause to extend it by six months, to 15 February 2006. This would allow the Transitional National Assembly (TNA), with the help of the United Nations and other organisations and governments with

the requisite expertise and resources, to set up a realistic timetable for bringing in excluded sectors of the population (not only Sunni Arab leaders but also representatives of civil society), educating the public about the deliberations, and consulting widely among Iraqis on critical choices regarding their nation's political structure, identity and institutions. With persistent violence taking on an increasingly sectarian character, ensuring that the constitution is viewed as legitimate by all sectors of the population is a vital necessity.

A different approach in the name of rigid adherence to the TAL's deadline would risk playing into the insurgents' hands, condemning Iraq to more violence, and encouraging those elements that have sought, by their deliberately sectarian attacks, to plunge the country into an even deadlier civil war.

### RECOMMENDATIONS

#### To Iraq's Transitional National Assembly (TNA):

1. Announce now an extension of the drafting deadline by six months, to 15 February 2006, to allow for public education and broad consultation.
2. Expand the drafting process by either:
  - (a) adding Iraqis who are not TNA members to the constitutional committee, making every effort to include groups that did not participate in the January 2005 elections -- especially Sunni Arabs, civil society activists and under-represented groups such as women and ethnic and religious minorities -- and allowing them to select their representatives; or, failing that,
  - (b) creating a commission to draw up the permanent constitution that incorporates the current committee and includes representatives of excluded communities and groups. This constitutional commission should make its decisions by consensus or, where impossible, by a two-thirds vote, and

submit its draft text to the constitutional committee and full TNA for ratification or for referral back to the commission for amendment.

3. Set up a transparent drafting process in which the media have free access to the constitutional commission's proceedings and can report fully to the public.
4. Establish an agency that is charged with coordinating outreach through the media, public gatherings and thematic seminars, as well as collecting views from the public and forwarding them to the drafters.
5. Encourage civil society initiatives in support of the constitutional process, including public education and monitoring of the drafting process.

**To the United States and Other Members of the International Community:**

6. Refrain from policy statements endorsing a specific timetable and especially cease insisting on adherence to the 15 August 2005 deadline.
7. Channel all support of the constitutional process via the United Nations and approved non-governmental organisations.

**To the United Nations Assistance Mission in Iraq:**

8. Assist the TNA, the constitutional committee and, if created, the constitutional commission in setting up a workable eight-month timetable with a series of interim deadlines that reflect key benchmarks in the drafting process concerning public outreach, consultation and review.
9. Continue to offer technical advice to the TNA and constitution drafters both on matters of process and on issues requiring comparative expertise or consistency with international standards.

**Amman/Brussels, 8 June 2005**

## IRAQ: DON'T RUSH THE CONSTITUTION

### I. PROCEDURAL QUESTIONS IN THE CONSTITUTIONAL PROCESS

On 8 March 2004, the 25 members of the Interim Governing Council, appointed by the Coalition Provisional Authority (CPA) in July 2003, signed an interim constitution known as the Transitional Administrative Law (TAL).<sup>1</sup> Widely criticised at the time as a foreign imposition, favouring Kurds,<sup>2</sup> and of dubious legal standing,<sup>3</sup> the TAL has remained the accepted, governing charter. Opting for the path of least resistance, the two groupings that prevailed in the January 2005 elections -- the United Iraqi Alliance (UIA), a predominantly Shiite list put together at the request of Grand Ayatollah Ali al-Sistani, and the Kurdistan Coalition List (KCL), an alliance of the Patriotic Union of Kurdistan (PUK), the Kurdistan Democratic Party (KDP) and an amalgam of smaller parties -- agreed, despite UIA misgivings, that

the TAL would be the basis for governance during the transitional stage.<sup>4</sup>

According to the TAL (Art. 61 A), an elected Transitional National Assembly (TNA) "shall write the draft of the permanent constitution by no later than 15 August [2005]", which "shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005" (Art. 61 B). New elections would then have to be organised by 15 December 2005 to produce a full-term, national assembly, president and cabinet. "If necessary", the TAL continues in Art. 61 F:

The president of the National Assembly, with the agreement of the majority of the members' votes, may certify to the Presidency Council no later than 1 August 2005 that there is a need for additional time to complete the writing of the draft constitution. The Presidency Council shall then extend the deadline for writing the draft constitution for only six months. This deadline may not be extended again.

If the drafting deadline is extended, the referendum and elections also move back six months.

The goal of drafting a permanent constitution between the January elections and the 15 August deadline is ambitious by most contemporary international standards.<sup>5</sup> What already was an extremely tight timetable has been further reduced to three months by delays incurred in establishing a government, and now risks being whittled down to a mere two months by further procedural wrangling over the inclusion of Sunni Arabs. Yet, Iraq's leaders publicly insist, notwithstanding the complexity and controversial

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<sup>1</sup> Formally, the TAL is the "Law of Administration for the State of Iraq for the Transitional Period". It is available at: <http://www.cpa-iraq.org/government/TAL.html>.

<sup>2</sup> The TAL, which was drafted in early 2004 behind closed doors by a handful of Iraqis and ratified by the Interim Governing Council, a body appointed by the Coalition Provisional Authority and heavily weighted toward former exiles, stipulates, in Art. 61 C, that the draft permanent constitution will be ratified "if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it". The latter phrase was considered at the time as code for the three predominantly Kurdish governorates of Erbil, Suleimaniyah and Duhok, whose combined voting tendency might thus defeat a constitution that failed to satisfy the Kurds' core demands. In light of succeeding events, it is now viewed also as potentially empowering an alliance of predominantly Sunni Arab governorates (Nineveh, Anbar, Salah al-Din and Diyala) to block the text. See Crisis Group Middle East Report N°26, *Iraq's Kurds: Toward an Historic Compromise?*, 8 April 2004, pp. 18-20; and Crisis Group Middle East Report N°27, *Iraq's Transition: On A Knife Edge*, 27 April 2004, pp. 24-28.

<sup>3</sup> The TAL was conspicuous by its absence in Security Council Resolution 1546 of 8 June 2004, a fact angrily noted by the Kurdish leadership, who saw its omission as a gift to Iraqi Arabs that could nullify the advantages they had successfully negotiated into the text by depriving the document of legal standing and, therefore, enforceability.

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<sup>4</sup> The text of the governance agreement between the United Iraqi Alliance and the Kurdistan Coalition List, "Foundations and Principles Agreed by the UIA and KLC Concerning the Operation of the Interim Government", posted on 13 April 2005, is available in Arabic from the website "Iraq 4 all news" at <http://www.iraq4allnews.dk/>.

<sup>5</sup> Over the past decade, states involved in drafting constitutions took on average between twelve to 24 months. East Timor drafted its constitution in about seven months, whereas Ukraine took well over four years. It took Afghanistan fifteen months, Rwanda 24 months, Uzbekistan fifteen months and Kazakhstan eighteen months.

nature of key issues that will have to be decided, that the original deadline remains realistic and will be met.<sup>6</sup>

Three procedural questions stand out as the most significant and the most likely to affect the drafting timeline. These are the inclusiveness of the drafting process (especially the role of Sunni Arabs), the extent of public consultation, and the choice to either use or discard the substance of the TAL as the principal basis for the permanent constitution.

## A. SUNNI ARAB PARTICIPATION

The 30 January 2005 elections resulted in a victory by the United Iraqi Alliance, which garnered 140 of the 275 seats with 48 per cent of the vote. The Kurdistan Coalition List came in second with 75 seats (26 per cent of the vote). Others were far behind, and Sunni Arabs gained only seventeen seats, as the main political parties based in that community chose to boycott. In the words of an informed observer, "impressive as they were, the elections amounted to a national census in which two groups wanted to be counted and a third chose to sit out".<sup>7</sup>

Protracted wrangling between the UIA and the KLC over the apportionment of government positions, compounded by divisions within their own ranks,<sup>8</sup> derailed the effort to draw Sunni Arabs in, despite the near-universal recognition that this was necessary for stability. In the end, a mere five of the 36 ministries were designated for Sunni Arabs. Only one (defence) is a senior position, and one (human rights) is still open.<sup>9</sup> Even in the case of the defence minister, voices promptly arose from within the Sunni Arab community condemning the dignitary, Sa'doun al-Dulaimi, for being a mere token or, worse, a "double agent".<sup>10</sup>

<sup>6</sup> This view is prevalent among those charged with drafting the constitution and the leadership of their parties. Crisis Group interviews, Baghdad, 23-26 May 2005.

<sup>7</sup> Crisis Group interview, Paris, February 2005.

<sup>8</sup> Both UIA and KLC are an amalgamation of various parties that claimed predominance without being able to measure or prove their individual electoral strength.

<sup>9</sup> The five ministries are: defence, industry, women's affairs, culture and tourism, and human rights.

<sup>10</sup> These were the words of Fakhri al-Qaisi, secretary general of the National Dialogue Council, a coalition of 31 Sunni Arab groups, as quoted in Steven R. Weisman and John F. Burns, "Some Sunnis Hint at Peace Terms in Iraq, U.S. Says", *The New York Times*, 15 May 2005. The minister for human rights agreed on by Iraq's new leaders, Hisham al-Shibli, refused to take his post, stating he was not willing to be a token representative of the Sunni Arab community: "This post was given to me without anyone consulting me. I was surprised when they nominated me. It was just because I am Sunni. This is something I reject completely. I am a democratic figure... and I am completely

If Sunni Arab marginalisation in the new government offered a fresh opportunity to insurgents<sup>11</sup> -- the months of April and May 2005 saw the worst spate of car bombings since the fall of the Baathist regime -- their effective exclusion from the constitutional process might well prove even more destabilising given the stakes involved. According to the TAL, the TNA is to draft the constitution,<sup>12</sup> and to this purpose the TNA appointed a constitutional committee on 10 May drawn exclusively from its own membership. As a result, only two of the committee's 55 members are Sunni Arabs, neither of whom belongs to a party that is viewed as representing that community.<sup>13</sup> Iraq's leaders justified their decision by the TAL's language but it is more accurately attributed to their reluctance to surrender power or influence in the constitutional process.<sup>14</sup>

The composition of the committee by political affiliation is as follows:<sup>15</sup>

United Iraqi Alliance	28
Kurdistan Coalition List	15

against sectarianism". Waleed Ibrahim, "Iraq cabinet deal falters as Sunni rejects post", Reuters, 8 May 2005.

<sup>11</sup> The choice of terminology to describe those engaged in acts of violence is a controversial issue. Those who have carried out attacks against foreign military forces, government personnel and civilians in Iraq are a motley collection of fighters whose goals and methods differ widely and who lack a national program, joint leadership or operational coordination. In the Arabic media, they generally are designated as "armed men" (*musallihin*) and "the resistance" (*al-muqawama*). In major Western newspapers such as *The New York Times*, *The Washington Post*, *Financial Times* and *The Wall Street Journal*, they are referred to as "insurgents" and "the insurgency". While Crisis Group also uses the generic term "insurgents" to describe the fighters, it is not meant to suggest that all engage in similar acts or to belittle the horrific terrorist attacks against civilians (including car bombs and other suicide actions) that some have perpetrated.

<sup>12</sup> Art. 60 of the TAL states: "The National Assembly shall write a draft of the permanent constitution of Iraq".

<sup>13</sup> The two are Abd-al-Rahman al-Nu'aimi, number 127 on the UIA electoral list, and Adnan al-Janabi, number five on former interim Prime Minister Iyad Allawi's Iraqi List.

<sup>14</sup> Crisis Group interviews, Baghdad, 23-26 May 2005.

<sup>15</sup> The committee consists of 46 men and nine women. Of the latter, seven are on the UIA list. According to Art. 30 C of the TAL, the electoral law used for the 30 January 2005 elections was to "aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly and of having fair representation for all communities in Iraq, including the Turkomans, Chaldo Assyrians, and others." The law achieved this goal with respect to women (although the various parties and coalitions did not move beyond duly recording a woman on every third place of their lists, as if by dictate rather than conviction). By comparison, women are only 16 per cent of the constitutional committee.

Iraqi List	8
National Rafidain List	1
Front of Iraqi Turkomans	1
People's Union	1
Patriotic Cadres and Elites	1 <sup>16</sup>

On 24 May, in its first formal meeting, the committee selected the UIA's Sheikh Humam Hamoudi as its chairman,<sup>17</sup> Fuad Ma'soum of the KLC as its "first" deputy chairman,<sup>18</sup> and Adnan al-Janabi, a Sunni Arab on former Interim Prime Minister Iyad Allawi's Iraqi List as a "second" deputy chairman.

Conscious of having lost three valuable months and the dangers of further slippage, Grand Ayatollah Ali al-Sistani<sup>19</sup> and U.S. Secretary of State Condoleezza Rice --

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<sup>16</sup> The Iraqi List was put together by former Interim Prime Minister Iyad Allawi and came in third in the elections with 14 per cent of the votes and 40 seats. The other four lists are very small groupings that gained fewer than the five seats that former Interim President Ghazi al-Yawar's list won in January but without gaining representation on the constitutional committee. The National Rafidain List is a Christian-based grouping; its leader, Yonadam Kanna, is the long-time head of the Assyrian Democratic Movement, who gained the list's only seat in the TNA. The Front of Iraqi Turkomans, not to be confused with the Iraqi Turkoman Front (ITF), is an umbrella group, established for the January 2005 elections (in which it won three seats); it incorporates the ITF as well as other Turkoman parties, including Shi'ite Turkomans (though not the Turkoman Islamic Union, which joined the UIA in the elections). The People's Union is an electoral incarnation of the Iraqi Communist Party; headed by Hamid Majid Mousa, it won two seats. The Patriotic Cadres and Elites List is a small grouping that mustered three seats in the TNA.

<sup>17</sup> Sheikh Hamoudi, number 31 on the UIA's electoral list, is a senior member of the Supreme Council for the Islamic Revolution in Iraq (SCIRI), one of the UIA's principal coalition partners. A cleric, he calls for a greater role for religion, though he has declared himself content with the TAL's language on the role of religion in the state ("Islam is the official religion of the State and is to be considered a source of legislation" -- Art. 7 A). He has disagreed with Ayatollah Sistani who, he claims, seeks stronger language (religion as "a principal source of legislation"), with some of the Sunni and Shi'ite parties that prefer an even greater role for Islam, as well as with the Kurds, who favour a more secular outlook. Crisis Group interview with Humam Hamoudi, Baghdad, 25 May 2005.

<sup>18</sup> Fuad Ma'soum, number five on the Kurdistan Coalition List, is a senior PUK official who served as prime minister of the Kurdistan Regional Government for a period in the 1990s, as chairman of the Constitutional Preparatory Committee in August-October 2003, and as president of the Interim National Assembly in August 2004-January 2005.

<sup>19</sup> In one of several reported statements, Sistani affirmed, in mid-May 2005, the "brotherhood" of Sunnis and Shi'ites in Iraq

arguably two of the persons with the greatest influence in Iraq -- exhorted the country's leaders to go the extra mile to bring Sunni Arabs into the constitutional process. Rice and her deputy, Robert Zoellick, in separate visits to Baghdad, made urgent appeals.<sup>20</sup> The mechanics of doing so meaningfully and in a fashion acceptable to Sunni Arabs presented another procedural puzzle and thus occasioned further delay.

While there is little dispute over the need to include Sunni Arabs,<sup>21</sup> decisions over how to identify representative leaders and incorporate them meaningfully into the drafting process have proven difficult. It is generally recognised that Sunni Arabs will reject anyone designated as their representatives by the current government, just as the appointments of Sunni Arabs to cabinet posts and attempts to give prominent positions to Sunni Arab members of the UIA were met with disdain, if not outrage, and dismissed as tokens.<sup>22</sup> No mechanism exists to establish who in fact represents them. A number of parties have emerged -- the Iraqi Islamic Party, the Muslim Scholars Association, the National Dialogue Council<sup>23</sup> --

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and told Prime Minister al-Ja'fari that Sunni Arabs must take part in drafting the constitution. Quoted in the Iraqi daily *Al-Sabah*, as reported by the Institute for War & Peace Reporting, Iraqi Press Monitor, no. 242, 17 May 2005. "There is only one man who has held the country together", commented a (secular) Iraqi adviser attached to the Presidency Council, "and that man is Ayatollah Sistani. He has consistently called for including Sunni Arabs in the political process". Crisis Group interview, Baghdad, 23 May 2005.

<sup>20</sup> Deputy Secretary of State Robert Zoellick, on 19 May 2005, and Secretary Rice two days later, both pressed this concern with the new government. John F. Burns, "Shiites Offer to Give Sunnis Larger Role on Broader Panel Writing a Constitution", *The New York Times*, 26 May 2005.

<sup>21</sup> Safa al-Din al-Safi, the minister of state for national assembly affairs, has said explicitly that it serves no one's interest to exclude parts of Iraqi society in the drafting of the constitution and that the government was sparing no effort to reach out as broadly as possible, including to Sunni Arabs, "within the bounds of the law". Press conference, Convention Centre, Baghdad, 24 May 2005. A poll organised by the International Republican Institute in April 2005 found overwhelming support for the idea that people or groups that did not participate in the January elections should have the right to contribute to drafting the constitution. Some 35.2 per cent agreed and 35.7 per cent strongly agreed; 14.1 per cent disagreed or strongly disagreed, and 13.1 per cent said they did not know. IRI, "Survey of Iraqi Public Opinion", 11-20 April 2005, p. 53, available at: <http://www.iri.org/05-05-05-IraqPoll.asp>.

<sup>22</sup> This occurred when the UIA attempted to impose one of the handful of Sunni Arabs on its own electoral list as the new TNA speaker.

<sup>23</sup> The National Dialogue Council, which has not yet turned itself formally into a political party, was established in late 2004-early 2005. It comprises former Baathists, former army

but at this point none of these individually can genuinely claim broad support.

May saw a series of useful initiatives aimed at producing a representative Sunni Arab leadership. The Iraqi Institute for Peace, for example, organised a conference of 800 Sunni Arabs in Baghdad on 2 May -- following smaller events in the governorates of al-Anbar, Salah al-Din, Nineveh and Diyala -- that elected a committee of ten (a mix of tribal leaders and lawyers) to represent them, each committing to collect 35,000 signatures as a way of establishing popular support in the absence of elections.<sup>24</sup> On 21 May, a range of Sunni Arab parties and local leaders convened in Baghdad, declaring their readiness to participate in drafting the permanent constitution and compete in elections later this year.<sup>25</sup>

The non-governmental Iraq Foundation for Development and Democracy (IFDD) on 9 May convened a broad meeting in Baghdad of civil society representatives, including both Sunnis and Shiites, as a basis for establishing a future independent constitutional commission to monitor and support the TNA's constitutional committee and engage the public. Interviewed by Crisis Group, its director, Ghassan Atiyyah, emphasised the importance of consultation as well as the need to draw in Sunni Arabs, saying the government had started out with a handicap -- "They take a condescending attitude toward the Sunni Arabs" -- whereas civil society initiatives could more effectively reach out to disenfranchised communities and lay the basis for national reconciliation.<sup>26</sup>

Officials have suggested resorting to a caucus system to identify Sunni Arab representatives in the four governorates in which they predominate. Local gatherings of tribal leaders, political party members and other notables would elect up to fifteen additional constitution drafters.<sup>27</sup> Hamoudi, the chair of the constitutional

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officers and tribal leaders from the Sunni Arab community and was actively involved in negotiations over Sunni Arab inclusion in the new government.

<sup>24</sup> Crisis Group interviews with Western officials, Baghdad, 24 May 2005. The Iraqi Institute for Peace is a non-sectarian, inter-faith initiative led by Fadhel al-Fatlawi and Muwaffaq al-Ruba'i and sponsored by Canon Andrew Whyte in the UK. The conference was partly funded by the UK government and the U.S. Institute of Peace.

<sup>25</sup> Ellen Knickmeyer and Naseer Nouri, "Sunnis Step Off Political Sidelines", *The Washington Post*, 22 May 2005.

<sup>26</sup> Crisis Group interview, Amman, 18 May 2005.

<sup>27</sup> The proposal by Shiite leaders that Sunni Arabs should choose their representatives in a caucus process is ironic, given that a similar proposal by the CPA in November 2003 was rejected by Ayatollah Sistani as undemocratic -- a position that led directly to the decision to organise elections in January 2005.

committee, suggested that these caucuses, which he called the best available but most time-consuming option, would take "at least two weeks" to organise. On 25 May, the committee appointed a subcommittee of seven to consult the Sunni Arab community over how to select its representatives and bring them into the drafting process.<sup>28</sup>

Another question concerns giving Sunni Arabs a meaningful role in drafting the constitution when responsibility, under the TAL, lies with the elected TNA. Proposals to expand the constitutional committee with non-elected Iraqis were initially rejected as unworkable but on 5 June, after Sunni Arabs had turned down suggestions they participate in a strictly consultative capacity, a new proposal was floated to accept them into the committee as equal members with full voting rights.<sup>29</sup> Should this arrangement fail during further negotiations, an alternative proposed by several groups might bridge the gap. It involves creation of a "general commission" (*hay'a 'ameh*) over and above the current constitutional committee (*lajneh dustouriyeh*), whose membership, in addition to all 55 members of the committee, would comprise a to-be-determined number of Sunni Arabs and civil society representatives.<sup>30</sup> It would be charged with drafting the constitution; its text would then be ratified by the constitutional committee and, subsequent to that, the full TNA.

One unresolved dispute over this proposal concerns numbers. Committee members have been debating in particular how many Sunni Arab representatives to invite. Current thinking ranges from thirteen to fifteen,<sup>31</sup> but there is no indication yet whether Sunni Arabs will accept even an offer to invite the higher number, given their own

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<sup>28</sup> Crisis Group interview with Humam Hamoudi, Baghdad, 25 May 2005.

<sup>29</sup> Deputy Chairman Adnan al-Janabi was reported as saying: "We have agreed in principle to accept the fact that [Sunni Arabs] will be on equal footing, under the same rules as the members of the committee". Quoted in "Sunnis to Help Write the Constitution", Agence France-Presse, in *Jordan Times*, 6 June 2005.

<sup>30</sup> This is a solution advocated by the United Nations Assistance Mission in Iraq (UNAMI), in a non-paper presented to the constitutional committee in May 2005, as well as by the U.S. Institute of Peace, in "Iraq's Constitutional Process: Shaping a Vision for the Country's Future", Special Report no. 132, February 2005, p. 5.

<sup>31</sup> Committee Chairman Humam Hamoudi reportedly stated that fourteen members would be added to the committee: thirteen Sunni Arabs and one representative of the minority Mandaean community. Quoted in "Sunnis to Help Write the Constitution", op. cit. Others have indicated that the Sunni Arabs would be invited to present fifteen representatives to the committee. E-mail communication from a close observer of the constitutional process, 6 June 2005.



(inflated) estimates of their share of the population.<sup>32</sup> In addition, there has been discussion of inviting between nine and 31 civil society representatives to join the commission as a way of broadening participation beyond the TNA. A variation on this proposal has been suggested by the first deputy chairman of the constitutional committee, Fuad Ma'soum of the Kurdistan Coalition List: to add 46 drafters, including thirteen to fifteen Sunni Arabs, to the current 55 in a series of thematic sub-committees.<sup>33</sup>

A second unresolved dispute concerns the threshold for decision-making: a simple majority, a two-thirds majority, or consensus.<sup>34</sup> Iraq's minorities will reject a majority-vote proposal, while the UIA may try to impose a simple-majority vote on all but the most critical issues. That said, the UIA's Hamoudi has stated he favours consensual decision-making to lay the groundwork for a successful referendum. One argument in favour of the consensus rule is that it would facilitate passage of the text by the constitutional committee, all of whose members would sit in the commission.<sup>35</sup> For the same reason, use of the consensus rule also would facilitate Sunni Arab inclusion; even though they would not be truly a part of the constitutional committee, their prior approval at the commission level would guarantee them the voice they have been asking for.<sup>36</sup>

## **B. PUBLIC CONSULTATION**

While the TAL prescribes a process of public consultation, it fails to describe it in detail. Article 60 states that in drafting the constitution, the TNA "shall carry out this responsibility in part by encouraging debate on the

constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq".<sup>37</sup> The newly elected leaders have echoed this injunction,<sup>38</sup> while giving little indication they are taking it with adequate seriousness. On 24 May, the government announced establishment of a "Committee to Support and Encourage National Dialogue and Popular Participation in Drafting the Permanent Constitution", which is charged with raising awareness of the constitutional process (the government simultaneously announced creation of a media centre) and soliciting views from citizens.<sup>39</sup> Hamoudi has suggested that constitutional committee meetings be televised and information about the proceedings be aired via the press and the internet. He has also proposed that religious and community leaders be mobilised to organise seminars in the governorates.<sup>40</sup> But while transparency and raising public awareness are necessary preconditions for public education and debate, they are insufficient for systematically channelling proposals back to the constitutional committee.<sup>41</sup>

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<sup>32</sup> Like all of Iraq's communities, Sunni Arabs present inflated estimates of their numbers. Conservative estimates give them roughly 20 per cent of the population but Sunni Arab politicians can be heard speaking of numbers closer to 40 per cent.

<sup>33</sup> Crisis Group interview with Fuad Ma'soum, Baghdad, 24 and 25 May 2005, and an undated memo prepared by him, "General Ideas About the Constitutional Process", which, inter alia, contains this proposal.

<sup>34</sup> The two-thirds majority vote that is enshrined in the TAL favoured the Kurds in the formation of the government. The KCL has been the strongest supporter of using that criterion in the constitutional committee as well. The UIA, by contrast, prefers an absolute-majority vote, which would better serve its interests. John F. Burns, "Iraq Legislators Set Up Panel to Draft a Constitution", *The New York Times*, 11 May 2005.

<sup>35</sup> Crisis Group interview with Humam Hamoudi, Baghdad, 25 May 2005. The need for consensus was also stressed by Jawad Maliki, a member of the constitutional committee for the UIA and an adviser to Prime Minister Ibrahim al-Ja'fari. Crisis Group interview, Baghdad, 25 May 2005.

<sup>36</sup> Crisis Group interview with an NGO official, Baghdad, 25 May 2005.

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<sup>37</sup> Moreover, in Art. 61 B, the TAL states that "[i]n the period leading up to the referendum, the draft constitution shall be published and widely distributed to encourage public debate about it among the people". The implication here is that this review should take place after the 15 August drafting deadline, at which point no second draft of the constitution is envisioned, so that any public response could then only be expressed in the referendum.

<sup>38</sup> In a speech to the UN Security Council on 31 May 2005, Iraqi Foreign Minister Hoshyar Zeibari stated with respect to the constitution-drafting process: "A satisfactory formula can only be reached with the input and consensus of all the country's communities. As we have just learned from the European experience, a permanent constitution is unlikely to succeed if drafted behind closed doors, in isolation from the constituency. We are reaching out and engaging all groups in a broad consultative dialogue in the writing of the constitution. In our social, religious and ethnic mosaic, the only route to peace, tolerance and national unity is for all Iraqis to be represented in this process. My government is committed to ensuring that the constitutional process will be inclusive". United Nations Security Council, S/PV.5189 (Provisional), 31 May 2005.

<sup>39</sup> Minister of State for National Assembly Affairs Safa al-Din al-Safi, in remarks at a press conference, Convention Centre, Baghdad, 24 May 2005; and a government document describing the new committee, distributed at the press conference.

<sup>40</sup> Crisis Group interview with Humam Hamoudi, Baghdad, 25 May 2005.

<sup>41</sup> While transparency of the constitutional committee's proceedings would be important, it is common for hard bargaining, if it is to be successful, to be conducted out of the limelight. The aspiration, therefore, should be to have the greatest degree of transparency possible under the circumstances, including coverage of committee meetings and frequent media briefings.

The UN, which in mid-May received a government invitation to assist in the constitutional process, has emphasised training of the constitution drafters, through thematically-organised seminars and by making available relevant materials. But on 30 May, it additionally presented a set of proposals to help establish a unit attached to the committee that would be charged with both outreach and the collection, assimilation and dissemination to drafters of civil society proposals.<sup>42</sup> Other organisations and governments are offering similar services and resources. The main concern, though, is that time is short for an all-out attempt at drawing the population into the drafting process and so giving it a sense of ownership in the final product.<sup>43</sup> The latter is critical not only to secure a "Yes" vote in the referendum but also to forge a national consensus and thereby marshal support for the new political order as a whole.<sup>44</sup>

Suggestions have been floated that appear to pay mere lip-service to public consultation. The KLC, for example, has circulated a proposal (see above) to organise a "constitutional conference" that would strive to reach consensus on the draft constitution's basic principles. The conference, analogous in some ways to the Afghan Loya Jirga, would comprise the original 55 members of the constitutional committee, 46 additional members of its yet-to-be-established thematic sub-committees that would bear primary responsibility for drafting text on specific topics, and another 50 religious, tribal and community leaders -- a total of 151 individuals who, by virtue of representing a cross-section of society, would be able to endorse a broadly acceptable draft constitution based on prior work in the sub-committees. The draft

would then go to the constitutional committee and subsequently to the TNA for a final vote before being submitted to popular referendum.<sup>45</sup>

The advantage of this option is that in principle it might be possible to complete it within the current timeframe; according to Fuad Ma'soum, it could be achieved within a month of the start of negotiations over the draft constitution.<sup>46</sup> The downside is that it amounts to a relatively narrow consultation without open public input,<sup>47</sup> raising the risks that voters would either reject the constitution or, should they accept it, lack any genuine sense of ownership of its content.

Under any scenario that falls short of broad consultation and public participation, Iraqis may also conclude that the constitution -- drafted essentially behind closed doors -- is of foreign authorship. It is already widely believed, including by members of the educated elite, that the blueprint for the permanent constitution was long ago written in Washington. Iraqis of this view point to the TAL, which was supposed to have been drafted on the basis of public consultation but, instead, appeared to be pulled out of a hat and was signed by the Interim Governing Council in March 2004 without even the merest hint of public input. Should it be seen as of foreign provenance, the new constitution would lose much of its legitimacy, even if the UIA and Kurdish leadership used their mobilisational skills to get it ratified.

### C. THE TAL AS BASIS FOR THE PERMANENT CONSTITUTION

Nothing in the TAL states that it must be used as a basis for the permanent constitution. It stipulates only that it will remain in force for the duration of the transitional period, i.e., until after a permanent constitution has been ratified, new elections held and a full-term government formed.<sup>48</sup> Yet, the use of the TAL as a principal source for the drafters is, on the face of it, attractive. The document offers many key elements of a constitution and, in fact, is often referred to as an interim constitution.

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<sup>42</sup> The UN has also proposed that the public be given the opportunity to comment on a complete first draft of the constitution, leading to a new draft, which then could be put up for a vote in a nation-wide referendum.

<sup>43</sup> The IRI opinion survey gives some indication of the Iraqi desire to provide input into the drafting process, although it does not pose the question directly. In response to the question of what the most appropriate role would be for the newly elected governorate councils in the drafting of the constitution, a plurality of respondents (34.6 per cent) said they wanted the councils to consult the TNA informally, and another 24 per cent (marking their second choice) said the councils should receive input from the Iraqi people. IRI, op. cit., p. 29.

<sup>44</sup> Articles in the Iraqi press in late May and early June signalled a growing public interest in a process of broad consultation. For example, Ismail Zayer, the editor of the daily *Al-Sabah al-Jadid*, which put out a special supplement on the constitution in early May 2005 as a way of educating the public, has demanded that civil society organisations and the media put their "thumbprint" on the constitution in order to draft the best document possible. "UN Help Needed for the Constitution", *Al-Sabah al-Jadid*, 31 May 2005, as reported by the Institute for War & Peace Reporting, Iraqi Press Monitor, no. 255, 3 June 2005.

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<sup>45</sup> Undated memo, "General Ideas about the Constitutional Process", op. cit.

<sup>46</sup> Crisis Group interview with Fuad Ma'soum, Baghdad, 24 May 2005.

<sup>47</sup> The proposal does call for public consultation by the constitutional committee via media outreach and the convening of seminars but does not envisage an active channelling of public input into the work of the committee, thematic sub-committees, or conference.

<sup>48</sup> Art. 3 C reads: "This Law shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution."

Yet the means by which the TAL was created, together with the circumstances surrounding its adoption, make it a fragile foundation on which to build a permanent constitution.<sup>49</sup> Even many politicians who reject the charge that it was written in a foreign capital decry it as an alien imposition written under foreign occupation<sup>50</sup> and thus not a legitimate template for the permanent constitution.<sup>51</sup> The fact that senior U.S. officials have publicly stated they expect the TAL to be used as a "cornerstone" is unlikely to have helped its cause.<sup>52</sup>

In a session on 25 May 2005, the constitutional committee decided either to use or not use the TAL, depending on who is asked. Some committee members insist the TAL was voted down, while others maintain it was adopted as a basis for negotiations. Unsurprisingly, the former include politicians known for their opposition to the TAL, while the latter typically are its supporters, in particular the Kurds.<sup>53</sup> The UIA leadership appears to be navigating a middle course, rejecting the TAL as a blueprint but

acceding to its use as an important source.<sup>54</sup> The result is likely to be an uneasy compromise in which the TAL is one source consulted in drafting the constitution, perhaps even (though not explicitly) the principal one.

The Kurdish leadership in particular is keenly aware of the TAL's utility in furthering its core interests. Its insistence on hewing as closely as possible to the TAL may drive Sunni and Shiite Arabs closer together on certain fundamental issues: the role of religion, the political structure of the new state and the fate of Kirkuk.

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<sup>49</sup> The TAL was written originally in English (a fact not lost on Iraqis), and subsequently translated into Arabic, albeit not particularly well. This Arabic version was published simultaneously with the original English one and only later corrected.

<sup>50</sup> For example, Dhia al-Shakarchi, an advisor to Prime Minister al-Ja'fari on constitutional issues and a member of his party, insisted to Crisis Group that the TAL could not be the main basis for the permanent constitution because it had been imposed. At the same time, he said, the drafters could not entirely neglect it. Crisis Group interview, Baghdad, 25 May 2005. This sentiment appears predominant particularly among Sunni Arabs. See Liz Sly, "Shiites Want to limit Islamic References in Iraqi Constitution", *Chicago Tribune*, 26 May 2005.

<sup>51</sup> The issue is so sensitive that it has affected the question of the role of foreign expertise in drafting the permanent constitution. Deputy Prime Minister Nouri Rozh Shaweis reportedly has insisted that the drafting process is a matter for Iraqis only and that "we reject any foreign body interfering with it", even if Iraqis "might make use of foreign experts". And Humam Hamoudi reportedly declared that "we will seek the help of foreign experts on technical points, but not on political matters". Quoted in the Iraqi daily *Al-Zaman*, as reported by the Institute for War & Peace Reporting, Iraqi Press Monitor, No. 248, 25 May 2005.

<sup>52</sup> U.S. Deputy Secretary of State Robert Zoellick told reporters, while on a visit to Baghdad on 19 May 2005, that Iraqi leaders *he had met* agreed on using the TAL as the starting point for debate: "There's a general sense with everyone I've talked to about using the TAL as a cornerstone". Neil MacDonald, "Iraq constitution will draw heavily from transitional law, says Zoellick", *Financial Times*, 20 May 2005.

<sup>53</sup> Fuad Ma'soum, for example, told reporters: "We have agreed that the TAL will be the basis for our discussions. We can edit it, more or less. This way we can easily reach an agreement and finish the job on time". Quoted in Sly, *op. cit.*

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<sup>54</sup> Humam Hamoudi told Crisis Group: "We will rely on general principles of the TAL but in the drafting of the constitution it will be only one of several sources". Crisis Group interview, Baghdad, 25 May 2005. The April 2005 agreement on governance between the UIA and KLC expressly states that the TAL's basic notions are to serve as the basis for the permanent constitution and that they can be further developed but not retracted. See, "Foundations and Principles Agreed by the UIA and KLC Concerning the Operation of the Interim Government", *op. cit.* It is not clear whether this agreement will supersede any decisions taken by the TNA or its constitutional committee.

## II. THE DEBATE OVER THE DEADLINE

Difficult negotiations over key procedural issues have cost valuable time, and further delays are likely. The constitutional committee still must agree on basic procedural rules; arguably, all future drafters, including members of a putative constitutional commission, will need to be involved. The committee is also expected to create thematic sub-committees, a time-consuming task if, as anticipated, their leadership is to reflect the diversity of the drafters.

Such delays make the TAL-prescribed deadline of 15 August 2005 increasingly unrealistic. To negotiate a new social contract in a deeply traumatised and fractured society within less than seven months is hard enough; to do so in one-third that time is virtually impossible. Yet, Iraq's elected leaders have indicated they have every intention of meeting this deadline. Their rationale centres on the fragility of the transition, popular frustration at the slow pace of political progress and protracted haggling among leaders, and the need to sustain the credibility of the process by sticking to the agreed timetable.<sup>55</sup> Hamoudi, the constitutional committee chairman, told Crisis Group Iraqis are fed up with the ethno-sectarian logic that is defining the division of power and with the interim process as a whole. For this reason, he argues, the transitional phase has to be kept as short as possible and ended according to the TAL's original timetable.<sup>56</sup> Others have argued that the effort to defeat the insurgents stands or falls with success in drafting a permanent constitution by 15 August.<sup>57</sup> The Kurds -- well-organised, disciplined and, relative to their Arab counterparts, politically strong -- see benefit in capitalising on their position to secure a settlement of the Kurdish question on advantageous terms.<sup>58</sup>

More broadly, members of the governing parties have indicated they have an interest in proceeding at a fast

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<sup>55</sup> In fact, public opinion appears confused on the question of the deadline. The IRI opinion survey suggests that (1) the majority of Iraqis (68.1 per cent) do not know what the actual deadline is (only 1.3 per cent answered correctly); (2) only a minority (15.2 per cent, asked in mid-April) feel that the drafting process should be completed in less than three months; and (3) in what may appear a contradiction, a slim majority of Iraqis find it inappropriate for the TNA to extend the deadline by six months if constitutional issues remain unresolved. IRI, *op. cit.*, pp. 24, 25, 27.

<sup>56</sup> Crisis Group interview, Baghdad, 25 May 2005.

<sup>57</sup> Crisis Group interview with an official at the Presidency Council, Baghdad, 23 May 2005.

<sup>58</sup> Crisis Group telephone interview with an NGO representative, 17 May 2005.

clip so as to get to the next general elections before they fritter away their public support; under current conditions, December 2005 appears to offer them more certainty of retaining power than June 2006.<sup>59</sup> Two UIA leaders told Crisis Group additional time is unnecessary because the difficult issues already have been discussed: during negotiations over the government's formation and, informally, at gatherings in the convention centre and politicians' homes.<sup>60</sup>

Even if the drafters can agree on the required compromises in a mere two months, the deadline still will be incompatible with the requirements of inclusiveness, transparency and consultation, key principles the drafters profess to hold dear and have promised to implement. Most likely it will be impossible to organise a consultative process involving all sectors of society in that time (assuming the thorny question of Sunni Arab inclusiveness is settled by 15 June).<sup>61</sup> Several members of the national leadership, when pressed, acknowledged this; indeed, tacit acceptance that the deadline may slip is relatively commonplace.

"We consider the deadline set by the TAL as realistic, and so we are going to try", declared the UIA's Jawad Maliki, "but delays in the process so far may necessitate an extension. Since this possibility is anticipated by the TAL, there won't be any problem".<sup>62</sup> Hussain al-Shahristani, the influential deputy speaker of the TNA, linked adherence to the deadline to success in bringing Sunni Arabs, chosen in local caucuses, into a broader

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<sup>59</sup> E-mail communication from an NGO representative monitoring the constitutional process, 2 June 2005.

<sup>60</sup> Jawad Maliki, a senior member of Prime Minister al-Jafari's party, jokingly remarked: "All the issues have already been discussed. On one issue [presumably Kirkuk], the Kurds will compromise; on the second [most likely religion], we will; and the third one [probably federal structure and decentralisation] we will split down the middle". And a prominent government official declared, tongue-in-cheek, that the controversial question of the relationship between mosque and state would prove easy to settle: "When even the Communist Party agrees to the language [Islam is the official religion of the state and is to be considered a source of legislation], we know it is going to be alright!". Crisis Group interviews, 24 and 25 May 2005.

<sup>61</sup> At a conference on "Constitution Building in Iraq" organised by the Friedrich Naumann Stiftung on 1-3 June 2005, Iraqi participants in a working group on the timeline were split 50-50 over whether the drafters would be able to meet the 15 August deadline or should extend it by six months in order to ensure broad public consultation and resulting buy-in to the final product. Crisis Group attendance of the working group session, Amman, 3 June 2005. Iraqis at the conference included members of the constitutional committee, TNA members not part of the constitutional committee, university professors and representatives of civil society organisations.

<sup>62</sup> Crisis Group interview, Baghdad, 25 May 2005.

constitutional commission by 15 June. If this fails, he suggested, the deadline should be extended.<sup>63</sup> And an adviser on constitutional matters to the prime minister proposed that the TNA approve at least a set of basic constitutional principles by 15 August, then work out details over the subsequent six months.<sup>64</sup>

An important reason Iraqi leaders are not willing to declare an extension may be that the U.S. has adamantly rejected any suggestion of delay. Deputy Secretary of State Zoellick, for example, told journalists in Baghdad on 19 May 2005 that he had exhorted the Iraqi leadership not to use the TAL escape clause: "I've urged them to hold to the deadline".<sup>65</sup> The Bush administration appears motivated by a number of factors, primary among them the need to stick closely to TAL deadlines lest the credibility of the entire enterprise suffer and provide fresh hope to the insurgents. "Washington does not wish to give the insurgents a foothold", through slippage in the political process, a U.S. official explained.<sup>66</sup> U.S., British and UN officials also have expressed fear that if the drafters are not under pressure, they will postpone the necessary compromises.<sup>67</sup> Having helped in setting the deadline, the U.S. has a considerable stake in it; any change, it fears, would be costly. For example, a major U.S. troop rotation has been scheduled for January 2006, just after the general elections under the current timetable. An extension would place this rotation before, rather than after, the completion of the TAL political process and in the worse case in the midst of highly contentious negotiations over the most difficult unsettled questions.

Still, third parties are not universally or equally attached to the schedule. The British government is encouraging Iraqis to meet the 15 August deadline but seems ready to consider an extension. It is preparing for slippage without saying so openly. There is also an inherent contradiction in the international call for a constitutional process that is inclusive, participatory and transparent and insistence on the 15 August deadline.<sup>68</sup>

Moving the deadline ultimately must be an Iraqi decision, a close Western observer of the constitutional process said: "At the moment they are all saying they want to stick to the deadline. But if Washington and London change their tune, the Iraqis may also change, because in private they all indicate that the deadline may not be met".<sup>69</sup> A senior Iraqi diplomat, speaking on background, told Crisis Group: "The deadline must be extended. The drafting of the constitution should be done according to an Iraqi timetable, reflecting Iraqi interests, not an American timetable".<sup>70</sup>

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<sup>63</sup> Crisis Group interview, Baghdad, 24 May 2005.

<sup>64</sup> Crisis Group interview with Dhia al-Shakarchi, Baghdad, 25 May 2005.

<sup>65</sup> Quoted in MacDonald, op. cit.

<sup>66</sup> Crisis Group interview, Baghdad, 24 May 2005.

<sup>67</sup> Crisis Group interviews in New York in April 2005 and in London and Baghdad in May 2005.

<sup>68</sup> In a statement from its president on 31 May 2005, the UN Security Council "stressed the need for Iraq's constitutional process to be inclusive, participatory and transparent", and it "encouraged the Transitional National Assembly and other relevant institutions to reach out broadly to all segments of Iraqi society, with a view of promoting genuine political dialogue and national reconciliation and ensuring that all Iraqis

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have a voice in the drafting of the constitution". "Press Statement on Security Council Iraq Consultations", SC/8403 IK/495, 31 May 2005. The statement did not mention the drafting deadline of 15 August (in part, perhaps, because the Security Council has not embraced the TAL), but UN officials have indicated that whatever misgivings they might have about the Iraqis' ability to adhere to the deadline, they were unwilling to challenge Washington's leadership on this issue. Crisis Group interviews, April and May 2005. UN Security Council Resolution 1546 (8 June 2004), while making no reference to the TAL, does accept the broad timetable it lays out, with 15 December 2005 as the date by which a constitutionally elected government should come to power (para. 4c).

<sup>69</sup> Crisis Group interview, Baghdad, 24 May 2005.

<sup>70</sup> Crisis Group interview, April 2005.

### III. THE STAKES

The principal constitutional issues to be discussed are the following:

**State structure.** The drafters will have to decide whether Iraq requires a federal structure -- as the TAL prescribes -- and, if so, agree on a common definition of federalism. The Kurds, who have enjoyed virtual autonomy in three northern governorates since late 1991, aspire to a geographically defined federalism comprised of two regions, one predominantly Kurdish, the other consisting of the rest of the country.<sup>71</sup> Under their view, the regions would enjoy broad powers and coexist on an equal basis. Arabs, to the extent they agree to a federal structure (many Sunni Arabs do not), prefer an administrative federalism based on the existing eighteen governorates. In effect, they aspire to a decentralised state with significant powers devolved to the governorates to prevent a slide into another dictatorship.

The key battles will be over (1) the definition of federalism, with a possible compromise leading to the establishment of five or six federal regions: Kurdistan, Baghdad, and three or four conglomerates of the remaining governorates; (2) ownership over natural resources as well as control and distribution of revenue deriving from their exploitation; (3) the role of regional military forces, such as the Kurdish *peshmegas*, and the right of federal military forces to enter the Kurdistan region, for example to protect international borders; and (4), arguably most difficult, over the status of Kirkuk governorate, which the Kurds wish to incorporate into the Kurdistan region (elevating Kirkuk city to the region's capital).<sup>72</sup> The consensus among non-Kurds (both in Kirkuk and in Iraq more broadly) appears to be that Kirkuk should stay outside the Kurdistan region. A possible compromise might be the designation of Kirkuk governorate as a federal region all its own, like Baghdad.<sup>73</sup>

**Religion and state.** The drafters will have to define the precise role of Iraq's dominant religion, Islam, which the TAL defines as "the official religion of the State" that "is

to be considered a source of legislation". It also declares that "[n]o law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law [Fundamental Rights] may be enacted during the transitional period". At the time, this was an acceptable compromise between the secular parties (the Kurdish parties prominent among them) and the Islamist parties such as SCIRI and Da'wa, and seemed to reflect in particular Ayatollah Sistani's views. The chairman of the constitutional committee, Sheikh Humam Hamoudi, has been quoted as saying that the relevant paragraphs in the TAL "represent the middle ground between the secularists and those who want Islamic government, and I think the wisest course of action is to keep them as they are. Opening up the subject for discussion would provoke religious sentiments in the street".<sup>74</sup>

The question is unlikely to be as controversial as many in the media have made it out to be and may be settled with relative ease. In any case, the definition in the constitution may turn out to be less important than its subsequent interpretation and implementation by state institutions. This will require establishing a strong constitutional court representing a cross-section of society to adjudicate disputes. Moreover, if Iraq is decentralised, relevant legislation will almost certainly become the responsibility of regional bodies; this is bound to lead to variations, with the Kurdistan region promoting a clearer separation of religion and state, and governorates in the Sunni and Shiite heartland seeking a more prominent role for religion. It is notable that no party is proposing a constitutionally-enshrined political role for Muslim clerics.

**National identity and citizenship.** The TAL defines Iraq as "a country of many nationalities" but adds that "the Arab people in Iraq are an inseparable part of the Arab nation". It recognises Arabic and Kurdish as "the two official languages of Iraq" and accords ethnic/linguistic minorities the right to "educate their children in their mother tongue...in government educational institutions". The Kurdish parties may push for recognition of Iraq's Kurds as being "an inseparable part of the Kurdish nation", which would cause unease among some of Iraq's neighbours, especially Turkey, and trigger calls for similar language by the Turkomans. The drafters may wish to hew closely to the language of the TAL as an acceptable compromise. They will also have to decide who is an Iraqi citizen, doing away with some of the former regime's most repressive and discriminatory practices, including the designation of some Iraqis as of

<sup>71</sup> The Kurdish notion of a Kurdistan region involves a nominally geographic federalism that coincides imprecisely with an ethnic Kurdish population (incorporating minorities living in that region, such as Turkomans, Arabs and Chaldo Assyrians, while excluding the sizable Kurdish population of Baghdad).

<sup>72</sup> See Crisis Group Report, *Iraq's Kurds: Toward an Historic Compromise?*, op. cit.

<sup>73</sup> A Kirkuk federal region would likely include districts severed from the governorate by the Baath regime, such as Kifri, Tuz Khurmatu and Chamchamal, an eventuality envisioned by the TAL in Art. 58 B.

<sup>74</sup> Quoted in Sly, op. cit.

Iranian origin.<sup>75</sup> These are all difficult but certainly not insuperable issues.

**Separation of powers and elections.** The drafters will have to decide whether they prefer a presidential or a parliamentary system of government, and a unicameral or a bicameral national assembly. They will have to define the separation of executive, legislative and judiciary powers and choose an electoral system (e.g., proportional representation with Iraq treated as a single district, the system used for the 30 January 2005 elections; or district-based voting, which would require a delineation of electoral districts).

**Fundamental rights.** The TAL lists a number of these, and there will be a good deal of back-and-forth over them, with a cleavage set to emerge between Islamists and secularists, in particular over women's rights. In the end, the matter may be decided by a prior agreement on how to define the role of Islam in the constitution.

## IV. CONCLUSION

The international community has invested considerable resources and credibility in Iraq's political process. With a raging insurgency, stunted economic reconstruction and dubious standing with the public because of continuing instability, it needs to get things right so that, as one UN official put it, the political process can translate into important security dividends. The drafting of the permanent constitution stands at the centre of this process, and no one can afford to see this effort founder.

It has become clear that, as a result of many delays, drafting is highly unlikely to be concluded successfully by 15 August 2005. If all issues are in fact resolved by that time, it will be at the expense of a principle with which Iraqis can ill afford to dispense: extensive public consultation and participation so as to ensure that the product is a durable compact from which future generations will benefit. An inclusive constitutional drafting process is essential to creating stability by reducing mistrust between communities. A participatory process creates an opportunity for public debate and dialogue to broaden the circle of input. Instead of perpetuating divisions and power struggles, by involving a wide range of actors, the constitutional drafting process can serve as a positive tool for peacebuilding and reconciliation.

Iraq's drafting process should, therefore, be inclusive, bringing in even those who absented themselves on election day, and it should draw broadly on all sectors of society for input and comment. If Iraqi leaders produce a final document through opaque backroom bargaining and even get it ratified in a referendum, they may not be able to win over the public decisively and wean support from the insurgency, especially in predominantly Sunni Arab regions.

The urge to fight the insurgency by sticking to the current timetable is understandable, and it may be difficult to suppress. But a superior approach with long-term dividends would be to accept the inevitability of a delay beyond the 15 August deadline, state up front that an extension will be necessary, and start planning accordingly. Not only would this lead to a more broadly accepted document, it would also allow for a better use of resources. If the drafters knew today that they had eight months to finish the constitution instead of two, the necessary infrastructure and procedural mechanics could be put in place to make it happen within the new timeframe, integrating public outreach and input with their work. Conversely, efforts undertaken with the two-month deadline in mind inevitably would sacrifice some elements of inclusiveness, transparency and participation,

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<sup>75</sup> For a brief discussion of this, see Crisis Group Middle East Report N°38, *Iran in Iraq: How Much Influence?*, 21 March 2005, pp. 4-5.

and would almost certainly be disrupted by the TNA's belated realisation, on 1 August, that an extension was inescapable.

The United Nations Assistance Mission in Iraq (UNAMI) possesses the expertise to coordinate international support for the drafting enterprise and technical experience from other transitional societies to advise the TNA while avoiding the perception of foreign imposition. Knowing it had eight months ahead of it would help the TNA establish a detailed timetable by which to meet interim deadlines -- benchmarks aimed at keeping the drafters' eyes on the ball. These would include deadlines to set up the relevant agencies and mechanisms to communicate with the public; to launch an outreach and educational campaign about the process and key

constitutional questions; to synthesise views and forward these to the drafters; and to circulate a high-quality first draft for public comment before final changes are made and the document is submitted to a public vote.

Whatever mistakes are made in the preparation and adoption of a constitution cannot be easily or quickly corrected. Iraqis who feel excluded from the political process should be brought in; the drafting exercise should be experienced as transparent and legitimate; and as many Iraqis as possible should share in a sense of ownership. This is a prescription for limited delay. But it is the best and most realistic recipe for success.

**Amman/Brussels, 8 June 2005**



## APPENDIX A MAP OF IRAQ



## APPENDIX B

### ABOUT THE INTERNATIONAL CRISIS GROUP

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The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with over 110 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group'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, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-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.

Crisis Group's reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made available simultaneously on the website, [www.crisisgroup.org](http://www.crisisgroup.org). Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board -- which includes prominent figures from the fields of politics, diplomacy, business and the media -- is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is chaired by Lord Patten of Barnes, former European Commissioner for External Relations. President and Chief Executive since January 2000 is former Australian Foreign Minister Gareth Evans.

Crisis Group's international headquarters are in Brussels, with advocacy offices in Washington DC (where it is based as a legal entity), New York, London and Moscow. The organisation currently operates sixteen field offices (in Amman, Belgrade, Bishkek, Dakar, Dushanbe, Islamabad, Jakarta, Kabul, Nairobi, Port-au-Prince, Pretoria, Pristina, Quito, Seoul, Skopje and Tbilisi), with analysts working in over 50 crisis-affected countries and territories across four continents. In Africa, this includes Angola, Burundi, Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Guinea, Liberia, Rwanda, the Sahel region, Sierra Leone, Somalia, Sudan, Uganda

and Zimbabwe; in Asia, Afghanistan, Indonesia, Kashmir, Kazakhstan, Kyrgyzstan, Myanmar/Burma, Nepal, North Korea, Pakistan, Tajikistan, Turkmenistan and Uzbekistan; in Europe, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Kosovo, Macedonia, Moldova, Montenegro and Serbia; in the Middle East, the whole region from North Africa to Iran; and in Latin America, Colombia, the Andean region and Haiti.

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**June 2005**

## APPENDIX C

### CRISIS GROUP REPORTS AND BRIEFINGS ON THE MIDDLE EAST AND NORTH AFRICA SINCE 2002

#### ARAB-ISRAELI CONFLICT

*A Time to Lead: The International Community and the Israeli-Palestinian Conflict*, Middle East Report N°1, 10 April 2002

*Middle East Endgame I: Getting to a Comprehensive Arab-Israeli Peace Settlement*, Middle East Report N°2, 16 July 2002

*Middle East Endgame II: How a Comprehensive Israeli-Palestinian Settlement Would Look*, Middle East Report N°3; 16 July 2002

*Middle East Endgame III: Israel, Syria and Lebanon – How Comprehensive Peace Settlements Would Look*, Middle East Report N°4, 16 July 2002

*The Meanings of Palestinian Reform*, Middle East Briefing N°2, 12 November 2002

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