

## Unmaking Iraq: A Constitutional Process Gone Awry

### I. OVERVIEW

Instead of healing the growing divisions between Iraq's three principal communities -- Shiites, Kurds and Sunni Arabs -- a rushed constitutional process has deepened rifts and hardened feelings. Without a strong U.S.-led initiative to assuage Sunni Arab concerns, the constitution is likely to fuel rather than dampen the insurgency, encourage ethnic and sectarian violence, and hasten the country's violent break-up.

At the outset of the drafting process in June-July 2005, Sunni Arab inclusion was the litmus test of Iraqi and U.S. ability to defeat the insurgency through a political strategy. When U.S. brokering brought fifteen Sunni Arab political leaders onto the Constitutional Committee, hopes were raised that an all-encompassing compact between the communities might be reached as a starting point for stabilising the country. Regrettably, the Bush administration chose to sacrifice inclusiveness for the sake of an arbitrary deadline, apparently in hopes of preparing the ground for a significant military draw-down in 2006. As a result, the constitution-making process became a new stake in the political battle rather than an instrument to resolve it.

Rushing the constitution produced two casualties. The first was consensus. Sunni Arabs felt increasingly marginalised from negotiations beginning in early August when these were moved from the Constitutional Committee to an informal forum of Shiite and Kurdish leaders, and have refused to sign on to the various drafts they were shown since that time. The text that has now been accepted by the Transitional National Assembly, in their view, threatens their existential interests by implicitly facilitating the country's dissolution, which would leave them landlocked and bereft of resources.

The second casualty was the text itself. Key passages, such as those dealing with decentralisation and with the responsibility for the power of taxation, are both vague and ambiguous and so carry the seeds of future discord. Many vital areas are left for future legislation that will have less standing than the constitution, be more vulnerable to amendment and bear the sectarian imprint of the Shiite community given its likely dominance of future legislatures.

On 15 October 2005, Iraqis will be asked, in an up-or-down referendum, to embrace a weak document that lacks consensus. In what may be the worst possible outcome, it is likely to pass, despite overwhelming Sunni Arab opposition. The Kurdish parties and Grand Ayatollah Ali al-Sistani have a proven ability to bring out their followers, and the Sunni Arabs are unlikely to clear the threshold of two thirds in three provinces required to defeat it. Such a result would leave Iraq divided, an easy prey to both insurgents and sectarian tensions that have dramatically increased over the past year.

The U.S. has repeatedly stated that it has a strategic interest in Iraq's territorial integrity but today the situation appears to be heading toward de facto partition and full-scale civil war. Options for salvaging the situation gradually are running out. Unfortunately, it is now too late to renegotiate the current document before the 15 October constitutional referendum or to set it aside altogether, postpone the referendum and start the process afresh with a new, more representative parliament following new legislative elections. The best of bad options having evaporated, all that may be left is for the U.S. to embark on a last-ditch, determined effort to broker a true compromise between Shiites, Kurds and Sunni Arabs that addresses core Sunni Arab concerns without crossing Shiite or Kurdish red lines. This would require that:

- the U.S. sponsor negotiations to reach a political agreement prior to 15 October concerning steps the parties would commit to take after the December elections, whether through legislation or constitutional amendment. Should such an agreement be achieved, its implementation would be guaranteed by the U.S.;
- the parties agree, as part of this process, to limit to four the number of governorates that could become a region through fusion, thereby assuaging Sunni Arab fears of a Shiite super region in the South;
- the parties also agree that Iraqis will not be excluded from public office or managerial positions on the basis of mere membership in the Baath Party.

With positions having become more polarised and entrenched, there is strong reason to doubt whether such a strategy can succeed. But given the stakes, the U.S. cannot afford not to try.

## II. DRAFTING THE CONSTITUTION

On 28 August 2005, Iraq's Constitutional Committee submitted its draft permanent constitution to the Transitional National Assembly (TNA), declaring its work done. The assembly accepted the draft without a vote and called for preparations for a popular referendum to be held no later than 15 October, in keeping with the timetable laid down by the Transitional Administrative Law (TAL), the interim constitution adopted in March 2004.<sup>1</sup>

The drafting process had not gone entirely according to plan. The drafters' intention had been to complete their work by 15 August, the TAL deadline. But, failing to reach consensus in the late evening of that day, they asked for, and received, a one-week extension from the TNA, which had hastily convened in the hour before midnight. At the end of that week, they sought an additional extension of three days, and when that period also passed, deliberations continued, apparently without a legal basis.<sup>2</sup> On 28 August, the leadership of the Shiite and Kurdish communities decided that an agreement with Sunni Arabs could not be reached and presented the draft to the TNA as final over the latter's angry objections. But even then, negotiations continued as if there was no final draft. The process reached a new dénouement on 13 September when another "final" draft was presented to the TNA.<sup>3</sup>

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<sup>1</sup> For the (original) English text of the TAL, see <http://www.cpa-iraq.org/government/TAL.html>.

<sup>2</sup> Sunni Arab leaders have challenged the legality of any delay beyond 15 August, claiming that the TAL does not allow for an extension at that point. The TAL states (Art. 61A) that, "the National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005". "If necessary", the TNA president, with the agreement of the majority of assembly members, 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 constitution for only six months" (Art. 61F). The drafters did not avail themselves of this option, the Sunni Arabs say, so any later attempt to extend the 15 August deadline is in direct violation of the TAL, therefore illegal, and should automatically trigger dissolution of the assembly and new elections. Art. 61G of the TAL states explicitly: "If the National Assembly does not complete writing the draft permanent constitution by 15 August 2005 and does not request extension of the deadline in Article 61F above, the provisions of Article 61E, above, shall be applied". Art. 61E posits dissolution of the TNA if the draft constitution is defeated in the referendum. The TAL itself can be amended by a three-fourths majority in the TNA and the unanimous approval of the Presidency Council (Art. 3A) but these steps were not taken.

<sup>3</sup> For detail on the 13 September developments, see Robert F. Worth, "75 killed in Baghdad blast; amended charter approved", *The New York Times*, 14 September 2005.

The drafting process was exceptionally short.<sup>4</sup> Following the 30 January 2005 elections, it took a full three months before a government was formed and another month before the TNA established a committee to write the constitution.<sup>5</sup> This left less than three months to complete the draft. As negotiations between primarily Kurdish and Shiite legislators commenced, pressure on the committee to accommodate the Sunni Arab community increased. The Sunni Arabs had largely absented themselves from the January elections -- either voluntarily, because they had deemed the process illegitimate, or out of fear of violence -- but, regretting their lack of presence in the parliament, were now expressing readiness to join the negotiations for a permanent constitution. The Shiites' foremost religious leader, Grand Ayatollah Ali Sistani, repeatedly urged an inclusive process, and the U.S. considered that bringing the Sunni Arabs back into the fold would strengthen efforts to combat an insurgency feeding on pervasive disaffection with the new order within that community.

Thus, fifteen Sunni Arab representatives were added to the 55-member Constitutional Committee as full voting members on 5 July, as well as one representative of the small Sabean minority.<sup>6</sup> There has been controversy over whether the Sunni Arabs properly reflected their

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<sup>4</sup> For analysis of the potential pitfalls of rushing the constitution, see Crisis Group Middle East Report N°42, *Iraq: Don't Rush the Constitution*, 8 June 2005.

<sup>5</sup> The government of Prime Minister Ibrahim al-Ja'fari was sworn in on 3 May 2005. The 55 members of the Constitutional Committee were appointed one week later, on 10 May, but its chairman and vice chairmen received were appointed only on 24 May, at which time the committee was able to start work.

<sup>6</sup> The Sabeans, or Sabean-Mandeans, who call themselves "Sabe'a Manda'iyoun", are a small minority present predominantly in Baghdad and the southern governorates. Followers of John the Baptist, they do not consider themselves to be Baptists, or Christians, adhering to a separate religion altogether. They speak Mandaean, a dialect of Aramaic. Claiming that some 25,000 of their community remain in Iraq, they failed to achieve representation in the TNA. Other minority groups had placed their representatives in the various larger lists for the January 2005 elections. For example, Fayli Kurds -- ethnic Kurds who are Shiites -- ran on either the Kurdish or the main Shiite list, the United Iraqi Alliance (UIA). Leaders of the Shabak, a small ethnic group in Nineveh governorate who are predominantly Shiites, joined the UIA. The Yazidis, non-Muslims who are predominantly Kurds (with a smattering of Arabs), ran on the Kurdish list. Representatives of the Christian Assyrian/Chaldean/Syriac and Armenian communities predominant in the north either ran on their own (small) lists or joined the Kurds. Sunni Turkomans had their own list, while Shiite Turkomans joined the UIA. Even smaller minorities, such as the Baha'i and the Jews, were not represented. Crisis Group interviews with representatives of Iraq's minority groups, Jordan, 17 July 2005.

community, with some arguing that ex-Baathists who would accept no compromise were overrepresented.<sup>7</sup> In fact, and quite to the contrary, it is precisely *because* they were fairly representative of their community and sensitive to its concerns that negotiations stalled. While unelected, the fifteen appeared to enjoy at least tacit community support.<sup>8</sup>

When on 13 July they arrived at the Convention Centre in Baghdad to join the drafters, they were shown texts of sections that had been agreed upon by the Constitutional Committee's thematic subcommittees. Half an hour before he was gunned down, Mijbel Sheikh Issa, one of the new Sunni Arab members, told Crisis Group:

Our Kurdish and Shiite brothers are trying to impose their notion of federalism without consulting us. They have already made their own decision. We Sunnis joined the committee very late. They thought they had chosen the Sunnis who would not discuss matters with them. They thought that we would come and sign the papers. They were not expecting us to respond to them and make comments. They were surprised when they read all our comments on their drafts.<sup>9</sup>

While Sunni Arab members appear to have made a good-faith effort to participate,<sup>10</sup> they complained repeatedly and bitterly that they were not always included in backroom negotiations. This was especially so after 1 August, when the drafters, under heavy U.S. pressure

to get the job done,<sup>11</sup> passed up the opportunity to seek a six-month extension and moved negotiations from the Constitutional Committee to an informal leadership council of Shiites and Kurds. They did so to speed up the process and in implicit acknowledgment that real power to take durable decisions lay with the heads of these two communities.

From that point on, key negotiations took place in the homes or offices of Iraq's Kurdish president, Jalal Talabani, the leader of the powerful Supreme Council of the Islamic Revolution in Iraq (SCIRI), Abd-al-Aziz al-Hakim, and -- after he arrived from the north to join the talks shortly before the original 15 August deadline -- the president of the Kurdistan region, Masoud Barzani. Here they were joined by other Iraqi leaders, as well as by U.S. Ambassador Zalmay Khalilzad and by Peter Galbraith, a former U.S. Ambassador serving as an adviser to the Kurds, and -- once Shiites and Kurds had worked out the basic agreement among themselves -- the Sunni Arab drafters.<sup>12</sup>

Some other members of the Constitutional Committee also complained that they were shut out. For example, Hunein Qaddo, a member of the dominant United Iraqi Alliance (UIA) who represents the minority Shabak community, complained: "We don't know what is going on. Political leaders are meeting behind closed doors. Changes may have been made to the draft, but we don't know what they are. This is not right; it will only bring instability. It is a very bad sign".<sup>13</sup>

The delays that occurred after 15 August were aimed at finding a compromise acceptable to the Sunni Arabs, as all the parties, including the U.S., acknowledged the importance of having them on board. They proved unwilling, however, to make significant compromises.<sup>14</sup>

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<sup>7</sup> Iraq's defence minister, Sa'doun al-Dulaimi, a Sunni Arab from Ramadi who returned to Iraq in 2003 after a long exile, criticised the choice of the fifteen Sunni Arab members on the committee in an interview in August 2005, almost two months after their selection. "Those who chose them made a big mistake", he said, "because they represent the Baath Party ideology, not the Sunni interests". Quoted in James Glanz, "Sunnis on constitution panel: determined but impugned", *The New York Times*, 5 August 2005. Peter Galbraith, a former U.S. ambassador who was a member of the Kurdish team that helped draft the constitution, has also claimed that the Sunni Arab members "for the most part" were not representative of their community. See Peter W. Galbraith, "Last chance for Iraq", *The New York Review of Books*, vol. 52, no. 15, 6 October 2005.

<sup>8</sup> There was no public outcry over their selection. Their participation, rather than their representativeness, was denounced, however, by insurgents. One of the fifteen, Mijbel Sheikh Issa, was assassinated in Baghdad, along with an aide, on 19 July 2005. While the perpetrators have not been found, the assumption has been that they were Sunni Arab insurgents.

<sup>9</sup> Crisis Group interview, Baghdad, 19 July 2005.

<sup>10</sup> This is not the Kurdish view, however. For example, a member of the Kurdish negotiating team accused the Sunni Arabs of being "anti-everything. They are anti-Shiite, they are anti-Kurd, they are anti-women, and they never said what they wanted". Crisis Group interview, Salah al-Din, 19 September 2005.

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<sup>11</sup> While U.S. pressure was great, some Iraqi leaders themselves were also keen on strict compliance with the TAL timetable. See Crisis Group Report, *Iraq: Don't Rush the Constitution*, op. cit., pp. 8-9.

<sup>12</sup> At the end of August, some Sunni Arab drafters invited to the headquarters of the Kurdistan Democratic Party complained that Shiite negotiators were snubbing them, preferring to communicate by sending messages. This so angered Sunni Arab negotiators that they left the meeting. Crisis Group interview with Saleh Mutlaq, who was one of the negotiators present that evening, Baghdad, 27 August 2005. At this point, the Kurds, having seen their basic demands met in negotiations with the Shiites, were acting as mediators between the Shiites and Sunni Arabs. See Galbraith, op. cit.

<sup>13</sup> Crisis Group interview, Baghdad, 25 August 2005. Numerous Iraqi citizens, including representatives from non-governmental organisations, women's groups and political parties, challenged the constitutional committee's non-inclusive process.

<sup>14</sup> For example, Laith Kubba, spokesman for Prime Minister Ibrahim al-Ja'fari, declared: "The draft that was submitted

Finally, on 28 August, the Sunni Arab members withdrew from the negotiations, accusing their Shiite and Kurdish partners of seeking to impose a document inimical to their community's interests. "During the last weeks", complained Tareq al-Hashimi, secretary general of the Iraqi Islamic Party, "we struggled to participate in the drafting, but at the end of the day our role was one of advisers at most. We are very frustrated and disappointed".<sup>15</sup> Left without a consensus, the Shiite and Kurdish blocs presented the draft to the TNA, where it was read out aloud and accepted as final without a vote.<sup>16</sup>

In the immediate aftermath, it became clear that, instead of a single authoritative text, there were at least three slightly varying drafts in circulation. This made it unlikely that the UN would be able to make good on its pledge to promote public education about the draft constitution well ahead of the referendum by printing five million copies to be distributed to all corners of Iraq. This was deemed particularly important because the two-month drafting period had been characterised by a relatively feeble effort at educating the public and soliciting its input.<sup>17</sup>

No sooner had the constitution been presented to the national assembly on 28 August than Ambassador Khalilzad suggested it might not be final after all.<sup>18</sup> The subsequent period saw renewed effort to reach a compromise that representatives of all three communities

could embrace. This sputtered on but Shiite and Kurdish negotiators appeared intent merely to sweeten the deal for Sunni Arabs, for example by tweaking the wording on federalism, de-Baathification and national identity.<sup>19</sup> When the Sunnis did not bite, the leaders of the Constitutional Committee, excluding the Sunni Arabs, submitted a new "final" draft to the TNA on 13 September; four relatively minor amendments were read out and the draft approved on 18 September.<sup>20</sup>

Throughout the post-15 August period, U.S. policy appeared confused. The Bush administration had entered the drafting process with two policy imperatives: that the drafting include all three principal communities and yield a document based on broad consensus; and that the TAL timetable be adhered to strictly.<sup>21</sup> As the drafting process reached its second dénouement on 13 September, it became clear that the administration had sacrificed the principle of inclusiveness for the sake of an arbitrary timetable driven at least to a large extent by domestic U.S. concerns.<sup>22</sup> Throughout 2005, pressures have been

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[on 22 August] is approximately the draft that will be implemented." Quoted in "Iraq faces Sunni rage over draft", *International Herald Tribune*, 24 August 2005.

<sup>15</sup> Crisis Group interview, Baghdad, 5 September 2005. At a press conference at the Convention Centre in Baghdad on 20 July 2005, the chairman of the Constitutional Committee, Humam Hamoudi, declared that "the Sunnis have been very active and cooperative. Their points of view have been taken into account in the drafting." Three days earlier, he had told Crisis Group: "There is a lot of disagreement with the new Sunni members [of the Constitutional Committee]. The members of the National Assembly will be the final judge". Crisis Group interview, Baghdad, 17 July 2005. Given that the TNA has only seventeen Sunni Arab members out of 275, the warning that it will be the final judge, even if technically correct, could only be read by Sunni Arabs as a threat that their positions could be easily overridden.

<sup>16</sup> See Jonathan Finan and Omar Fekiiki, "Iraqis finish draft charter that Sunnis vow to defeat", *The Washington Post*, 29 August 2005.

<sup>17</sup> Robert F. Worth, "75 killed in Baghdad blast; amended charter approved", *The New York Times*, 14 September 2005. Printing alone of so many copies is said to take ten days. The text was reportedly sent to New York to begin the printing process only after the 13 September session of the TNA.

<sup>18</sup> Khalilzad told reporters on 30 August that he believed "a final, final draft has not yet been, or the edits have not been, presented yet". Quoted in Robert H. Reid, "U.S. Envoy: Iraq constitution may change", Associated Press, 31 August 2005.

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<sup>19</sup> There was discussion, for example, over extending the period of time before the Council of Representatives to be elected in December 2005 can enact a law defining the procedures to form regions from six months (in the 13 September draft) to eighteen months. Moreover, Shiite and Kurdish negotiators agreed to change the language on national identity in the 28 August draft from defining Iraq as a state whose "Arab people are part of the Arab nation" to defining it as "a founding member of the Arab League". See further below.

<sup>20</sup> The four amendments concerned: federal vs. regional control over external and internal water sources; the identity of the Iraqi state (see previous footnote and below); the application of international human rights treaties; and the creation of a second post of deputy prime minister in addition to the one deputy prime minister stipulated in the draft of 28 August. Only the second of these amendments addresses Sunni Arab concerns -- and does so unsatisfactorily from the Sunni Arab perspective.

<sup>21</sup> Many Iraqis who understood the importance of doing it right over doing it fast resented the U.S.-driven rush to complete the constitution, which they widely attributed to domestic concerns. A Kurdish observer, for example, asserted: "Bush wants to show his people that everything is going well in Iraq. But the constitution is my future, and it will require time to do it right". Crisis Group interview with Asos Hardi, editor of the independent Kurdish newspaper, *Hawlati*, Amman, 19 July 2005.

<sup>22</sup> U.S. officials were adamant that the drafters should not avail themselves of the six-month extension permitted by the TAL. Secretary of Defence Donald Rumsfeld, for example, declared at the end of July: "We don't want any delays [in the constitutional process]. They're simply going to have to make the compromises necessary and get on with it". Quoted in Eric Schmitt, "Iraq gets blunt talk from Rumsfeld", *International Herald Tribune*, 28 July 2005. An independent Kurdish drafter told Crisis Group: "We, the members of the Constitutional Committee, demanded a one-month delay. But Human Hamoudi [the committee chairman] said we had to finish on time. The political leaders all

building in the U.S. to draw-down troops in light of rising casualties, growing strains on U.S. forces worldwide, and scant evidence of progress on the ground.<sup>23</sup> In the absence of other indicators of success, meeting political deadlines has become a substitute for genuine progress.<sup>24</sup>

If the 15 August deadline proved to be flexible, the overall timetable, including assembly elections by the end of the year, appeared immutable.<sup>25</sup> "The Americans", contended an informed Jordanian observer, "are more concerned with their timetable than with stabilising Iraq. They want to disengage politically and become less visible militarily".<sup>26</sup> However, the result of rushing the political process in the absence of a stable national compact is that intercommunal rifts become greater, setting the country on a path toward civil war and/or disintegration.<sup>27</sup>

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want to get it done on time. They are following American orders. Bush, you see, is waiting on the phone". Crisis Group interview with Mahmoud Othman, Baghdad, 15 August 2005. Another drafter, Raja Habib Khuza'i, said that in mid-July, just after Sunni Arabs had joined the drafting committee, there was a growing call for extending the drafting process, especially from UIA members: "This was the first time that so many people were calling for it". Crisis Group interview, Baghdad, 13 July 2005.

<sup>23</sup> Both the UK and Italy have signalled their intent to withdraw, or sharply reduce, their forces deployed in Iraq in 2006. See Daniel Williams and Caryle Murphy, "Italy plans to pull troops out of Iraq", *The Washington Post*, 16 March 2005; and Jimmy Burns and Peter Spiegel, "MoD plans Iraq troop withdrawal", *The Financial Times*, 4 July 2005.

<sup>24</sup> See Crisis Group Middle East Report N°34, *What Can the U.S. Do in Iraq?*, 22 December 2004.

<sup>25</sup> One additional factor was that, having set the timetable, the U.S. started to plan activities around it, including a major troop rotation scheduled for December 2005-January 2006. The rationale for the rotation at that time was to have additional boots on the ground to provide security for the 15 December elections, with new troops arriving before the elections and the troops being replaced staying on for a short period.

<sup>26</sup> Crisis Group interview with Adnan Abu Odeh, a former adviser to King Hussein and King Abdullah II, Amman, 8 September 2005. Abu Odeh is a member of Crisis Group's board of trustees.

<sup>27</sup> U.S. officials have suggested that strict adherence to the TAL's timetable, the creation of an Iraqi government enjoying public support and the transfer of security responsibilities to such a government constitute the best way to fight the insurgency. The flip side of this approach is that, in the absence of a national compact, there will not be a government with public support. Instead, the legitimacy deficit that has beset all transitional Iraqi governments since July 2003 would continue to afflict whatever government was elected on the basis of the current constitution. Such a development could only play into the hands of insurgents, who have fed on unhappiness with daily living conditions and with the successive governments that have signally failed to improve them.

Another independent Iraqi observer blamed religious Shiite political leaders for pursuing a winner-take-all strategy in drafting the constitution, drawing on sectarian differences to broaden popular support, a strategy he said would lead to civil war: "When religious men start governing Iraq, we will land in a dangerous situation. These people think they have the right solution because they have been authorised by God".<sup>28</sup> "Civil war and the partitioning of Iraq may now be difficult to avoid", lamented Ghassan Attiyah, an independent Iraqi observer, who asked incredulously: "Is this what the Americans want?"<sup>29</sup>

Clearly, the constitutional process has further entrenched ethnic-sectarian identities in ways that bode ill for the country's future. Indeed, the now widespread use in Iraq of the terms "Shiites" and "Sunni Arabs" reveals the extent of this phenomenon, as these are by no means homogeneous communities but rather uneasy amalgams whose many components follow different leaders. The Shiites, for example, broadly comprise both secular and religious individuals. Among the latter, there are some who seek a prominent role for clerics in politics and others who abhor the notion. Shiites can also be of various ethnic backgrounds -- Arab, Kurd, Turkoman, Shabak -- and this, too, may shape their political orientation.

A similar problem exists with the designation "Sunni Arabs". The simple term "Sunnis" would incorporate the Kurds, the majority of whom are adherents of Sunni Islam; the term "Sunni Arabs", in turn, excludes by definition not only the Kurds but those Turkomans who are also Sunnis and who, on some issues such as Kirkuk, may have an outlook similar to that of their Arab co-religionists. Today, however, these terms have become common usage to an alarming extent, even among Iraqis who hitherto would never have agreed to such simplifications of identity. As Adnan Dulaimi, spokesman of the "Conference of Sunnis", stated at an event in July, "if we are attending this conference in the name of the Sunnis, this does not mean that we subscribe to sectarianism... We are merely reflecting the reality on the ground".<sup>30</sup>

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<sup>28</sup> Crisis Group interview with Munqeth Dagher, manager of the Independent Institute for Administration and Civil Society Studies, which conducts opinion polls, Baghdad, 30 August 2005.

<sup>29</sup> Crisis Group interview, Amman, 1 September 2005.

<sup>30</sup> Speech after Friday prayers at the Al-Nida' mosque, Baghdad, 14 July 2005.

### III. PRIMARY ISSUES IN DISPUTE

The constitutional process was supposed to heal the growing rifts between Iraq's communities, producing a consensus document that would become the nation's political pillar and, as such, help undermine the insurgency's support among Sunni Arabs. Instead, the process rendered the text general and vague and compromise with Sunni Arabs elusive. Worse, by laying bare differences that could not be bridged, the negotiations hardened feelings on all sides and deepened sectarian polarisation.

The draft constitution published on 29 August and slightly amended on 13 September reveals an overall compact between Shiites and Kurds, winners of the 30 January elections.<sup>31</sup> The text is notable as much for what it leaves out as for what it contains, deferring many critical decisions to a future elected national assembly. For example, the draft fails to fill in any of the procedures and prerogatives of the future Federation Council (the assembly's upper chamber), the presidential deputies, the Supreme Judicial Council or the Federal Supreme Court, and it leaves unresolved key provisions of the future federal structure, in particular concerning the process by which regions (other than the Kurdish region) are to be formed.<sup>32</sup> These omissions can be explained, in part, by the rushed nature of the constitutional process and the difficulty of reaching compromise on principles, let alone detail. But a third, equally powerful factor, may be, as Nathan Brown, an expert on Arab constitutionalism has pointed out, the Shiite drafters' anticipation that their community, by dint of its demographic majority, will dominate any legislature and can thus have a decisive role in drafting the laws.<sup>33</sup>

<sup>31</sup> The draft constitution is available at: <http://www.iraqfoundation.org/projects/constitution/constitutionindex.htm>.

<sup>32</sup> The draft of 13 September states in Article 114: "The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority". For insightful commentary on the final draft, including language on federalism, see Nathan J. Brown, "The final draft of the Iraqi constitution: analysis and commentary", at: <http://www.carnegieendowment.org/files/FinalDraftSept16.pdf>.

<sup>33</sup> The draft constitution is generally weak on human rights, including women's rights. This problem is compounded by the fact that the text leaves interpretation and implementation to authorities who will be appointed by a future legislature, one in which socially conservative Islamists are likely to exert a strong influence. On this, see Nathan J. Brown, "Iraq's constitutional process plunges ahead", Carnegie Endowment for International Peace, *Policy Outlook*, July 2005, at: <http://www.carnegieendowment.org/files/PO19Brown.pdf>

Another striking feature of the draft constitution is the degree to which the political system has been decentralised. Any governorate other than Baghdad will be able to join with any other governorate(s) to create a region, and two or more regions may join to become a new region.<sup>34</sup> Regions and governorates will enjoy considerable autonomy, leaving only defence, foreign policy and fiscal<sup>35</sup> and customs policy to the central government's exclusive control,<sup>36</sup> while sharing other responsibilities, such as health, education, infrastructure and the administration of customs, and assuming full control over any other areas, including the organisation of internal security forces and preparation of annual regional budgets.

Moreover, the draft stipulates that a regional government can amend any federal law deemed inconsistent with its own legislation if it concerns a matter not within the federal government's exclusive remit; in areas of shared responsibility, priority clearly is given to the region's law in the event of a dispute. Significantly, regions are responsible for their internal security, through "police, security and regional guards", a de facto endorsement of

<sup>34</sup> Unlike the TAL, which barred Baghdad and Kirkuk governorates from forming or joining a region, the current draft constitution mentions only Baghdad in this respect. This leaves the status of Kirkuk open to the wishes of its population which, according to the draft, can decide by a simple majority in a referendum to be held no later than 2007 whether it wants to unite with another region. This provision may well be the Kurds' most significant gain, as the incorporation of Kirkuk has been their long-term objective, and they have been working hard in the past two and a half years to return displaced Kurds and push out Arab settlers so as to shift the population balance. The resolution of Kirkuk's status will be the subject of a forthcoming Crisis Group report.

<sup>35</sup> The Arabic word *maliyya* can be translated as either "financial" or "fiscal". This, combined with the absence of any specific reference to taxation, has given rise to an argument as to whether general taxing powers are vested by the constitution in the centre or regions: see text below. The better translation of *maliyya* in the present context would appear to be "fiscal": in Art. 107 (see fn. 36 following) it appears yoked with "customs policy"; moreover, "monetary policy" -- normally at the heart of what one would think of as "financial policy" is referred to separately later in the article. That there is even the possibility of confusion, however, on so basic an issue of power distribution testifies to the haste with which the constitution was drafted and the potential for real discord it has created. Crisis Group e-mail exchanges and telephone conversations with Nathan Brown and a former adviser to the Coalition Provisional Authority, September 2005.

<sup>36</sup> Article 107 states as the third of the federal government's exclusive authorities: "Formulating fiscal and customs policy, issuing currency, regulating commercial policy across regional and governorate boundaries in Iraq, drawing up the national budget of the State, formulating monetary policy and establishing and administering a central bank".

the practice of local military forces (typically formed along ethnic, sectarian and partisan lines), that already pervades the country.

But while the principle of decentralisation was enshrined, not all its details were ironed out, and both vagueness and ambiguity are seeds of potential future discord. Other than the Kurdish region, whose existence is recognised, the process for forming regions is deferred to the next assembly. There are also serious issues still in play about taxation and revenue distribution. As to taxation, the absence of any specific reference in the constitution to this has allowed Peter Galbraith -- an adviser to the Kurdish delegation who likely reflects its views -- to argue, albeit implausibly, that it falls within the regions' authority.<sup>37</sup> Likewise, in an ambiguously phrased article, oil and gas are considered "the property of all the Iraqi people in all the regions and provinces". The addition "in all the regions and provinces" seems redundant if the drafters' intent was to grant ownership of gas and oil to the Iraqi people. The language leaves open the possibility that the people of each region will have ownership of gas and oil found within that region.

On revenues from exploitation, the text stipulates that "the federal government will administer oil and gas extracted from current fields in cooperation with the governments of the producing regions and provinces on condition that the revenues are distributed fairly in a manner compatible with the population distribution throughout the country" -- with a temporary quota for regions that suffered official neglect in the past "to ensure balanced development". The more important ambiguity concerns production not covered by the phrase "extracted from current fields", including current fields yet to be exploited and any fields found in the future: because such production is not explicitly mentioned, Kurds take the view that it does not by definition fall within the exclusive powers of the federal government, but rather is the responsibility of the regions. As one Kurdish negotiator explained, in the case of Kirkuk, for instance, the production of currently known but unexploited fields would fall under the exclusive control of the region, which in his view would be the Kurdistan region (after the expected incorporation of Kirkuk following a 2007 referendum).<sup>38</sup>

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<sup>37</sup> Galbraith, op. cit. and see fn. 35 above. Nathan Brown makes the further point against Galbraith and any suggestion that no general taxing powers were intended to be vested in the centre, that in all Arab states it is the *Wizarat al Maliyya* -- same word, but here invariably translated as "finance" -- that oversees taxation. Crisis Group e-mail exchange with Nathan Brown, 20 September 2005.

<sup>38</sup> Crisis Group interview with Safeen Dizayee, director of the KDP's International Relations Bureau, Salah al-Din, 19 September 2005. See also Galbraith, op. cit.

The compromise inherent in this article reportedly stems from Ayatollah Sistani's insistence that natural wealth -- both currently available and expected from future exploration -- be shared fairly among all Iraqis over a Kurdish attempt to retain a greater regional share of oil income and the Kurds' insistence that the word "future" not appear in the text.<sup>39</sup> The assumption among U.S. policy makers has been that if the distribution of such revenues remains within the exclusive powers of the federal government, the Kurds' appetite for Kirkuk -- and their desire to incorporate it into the Kurdish region -- might diminish, and with it their ability to secede.<sup>40</sup> Ambiguity in the wording of the constitution can be used by a future Shiite majority in the national assembly to reassert federal control over Iraq's key resources or by a Kurdish leadership intent on establishing an independent Kurdistan.

Sunni Arabs will be the obvious losers if the present document is adopted. As the new underdog after decades (some would say centuries) of enjoying supremacy,<sup>41</sup> they

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<sup>39</sup> Crisis Group telephone interview with an Iraqi policy maker, Amman, 10 September 2005. Early in the negotiations, the Kurds had asked that "each region controls its own oil and gas resources and their extraction. Revenues must be shared between the centre and the region, with 30 per cent going to the federal government, 5 per cent to the governorate in which the oil is located, and 65 per cent to the region in which the oil is located. But this is negotiable". Crisis Group interview with Sa'di Barzinji, a senior aide to Masoud Barzani of the Kurdistan Democratic Party who served as chairman of the sub-committee on federalism, Baghdad, 18 July 2005. This demand was dropped in the final negotiations. Since most northern oil lies in the governorate of Kirkuk, Barzinji and Dizayee both evidently presume as a given the incorporation of the Kirkuk governorate into the Kurdish region.

<sup>40</sup> The Kurds scoff at this notion, claiming that Kirkuk was historically theirs and that they attach great symbolic importance to it. Oil, they say, has nothing to do with it. Other Iraqis accuse the Kurds of being motivated precisely by the desire to grab Kirkuk's significant oil resources as a stepping-stone toward secession. See Crisis Group Middle East Report N°35, *Iraq: Allaying Turkey's Fears Over Kurdish Ambitions*, 26 January 2005. For the conflicting claims of Kirkuk's communities, see Crisis Group Middle East Report N°26, *Iraq's Kurds: Toward an Historic Compromise?*, 8 April 2004.

<sup>41</sup> Sunni Arabs and many other Iraqis do not consider the former regime's repression ethno-sectarian in character and reject the notion that they, as a community, have dominated Shiites and Kurds since the founding of the modern state in the 1920s. This argument enjoys a certain legitimacy, as the regime targeted primarily those who expressed dissent, regardless of their ethnic or religious background. At the same time, serious opposition to the regime arose particularly within the Kurdish and Shiite communities, expressing itself respectively as Kurdish nationalism (after 1961, and especially during the Iran-Iraq war in 1980-1988) and political Islam. In response, the regime began to entrench itself within the Sunni Arab community, especially

were not in a position to present their agenda. What they have are red lines, and in their view all three of these have been crossed:

- **Iraq's new federal structure.** At the outset of negotiations, Sunni Arabs rejected any notion of federalism, equating it with the break-up of the country. As the talks progressed, however, they indicated they had come around to the idea of a Kurdish region but made clear it would have to stay within the boundaries that existed at the start of the war on 19 March 2003 (the so-called Green Line).<sup>42</sup> They expressed a distinct preference for a strong central state, but were willing to consider a certain degree of decentralisation based on the fifteen remaining governorates.

Subsequent developments set off new alarm bells. In apparent response to Kurdish demands for broad powers for their region, some Shiite negotiators introduced the notion that other regions could be established as well with no limit on the number of governorates that could join, leaving open the possibility of a "super" region of nine predominantly Shiite governorates.<sup>43</sup> Sunni Arabs saw this as a

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Sunni Arab tribes, and as a consequence, repression increasingly assumed an ethno-sectarian colouration. In the 1990s, however, after the regime had put an end to the Kurdish and Shiite rebellions, its repression again became largely non-sectarian, including the campaign to weaken the Sunni Arab tribes it had built up previously, the execution of key members of Saddam Hussein's own clan and the killing of eminent Tikritis, such as the descendants of Mawloud Mukhlis, to whom Tikritis owed much of their influence in the armed forces in the first place.

<sup>42</sup> One Sunni Arab leader, for example, told Crisis Group: "We accept federalism for the Kurds, but only for the Kurds, as an exception. Kurdistan would consist of the three governorates of Erbil, Suleimaniyeh and Dohuk, with the borders written down in black and white". Crisis Group interview with Mijbel Sheikh Issa, a member of the Constitutional Committee, Baghdad, 13 July 2005.

<sup>43</sup> Ghassan Attiyah claims the initiative came from negotiators for the Supreme Council for the Islamic Revolution in Iraq (SCIRI) as a trump card to persuade the Kurds that not only they but all sides would have to concede certain powers. Crisis Group interview, Amman, 1 September 2005. If this was indeed a Shiite bid to curb Kurdish demands for maximum powers for the regions, as several observers suggested, it backfired. Instead of scaling down their demands, the Kurds saw the possible emergence of other regions as a powerful vindication of their own claim to a Kurdish region. There has been a "southern federalism" movement for some time that is concentrated in Basra and motivated by realisation that official neglect is something not limited to the previous regime but a disposition common to all strong central governments. To ensure the development of the south, using the region's significant oil wealth, a loose coalition of mainly secular forces there has called for establishment of a southern region with considerable control over its own resources.

sectarian plot to partition Iraq that would leave them with a landlocked central region lacking significant resources.<sup>44</sup> In the current draft, the principle of multiple regions is embraced but the decision on a mechanism by which regions are to be set up has been deferred to a future assembly.<sup>45</sup> Even though Sunni Arab negotiators themselves called for such a delay,<sup>46</sup> this particular provision will give them little solace, owing to the certainty they will be a minority in the next assembly with at most the ability to amend, not block, Shiite legislative initiatives.

- **The Baath Party.** The draft outlaws the "Saddamist Baath".<sup>47</sup> The text is an extension of the Coalition Provisional Authority's indiscriminate de-Baathification order of May 2003 that judged Iraqis not by their past conduct but by their membership in the party. Sunni Arabs protested that this blanket ban could be used to arbitrarily lustrate or otherwise punish them, with de-Baathification turning into "de-Sunnification", in the words of one

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Crisis Group interviews with a wide range of political actors, Basra, 22-27 March 2005. See also, Edward Wong, "Secular Shiites in Iraq seek autonomy in oil-rich south", *The New York Times*, 30 June 2005.

<sup>44</sup> For example, Adnan Dulaimi, a prominent Sunni Arab leader, declared in a statement in August: "We reject federalism in the central and southern areas of Iraq, because it has no foundation other than sectarianism. Any honourable Iraqi should stand up against those who seek to deepen sectarianism in Iraq. Iraq will remain consolidated and one, with Baghdad as its capital". Speech at the "General Conference of the Ahl al-Sunna in Iraq", Baghdad, 24 August 2005. Nabil Younes, a Sunni Arab professor at Baghdad University, said: "This constitution will increase sectarian tensions. It is a sectarian text that is going to partition the state, the land and the people". Crisis Group interview, Baghdad, 30 August 2005.

<sup>45</sup> This, apparently, was the concession to the Sunni Arabs that U.S. President George W. Bush requested in a telephone call to SCIRI leader, Abd-al-Aziz al-Hakim, on 25 August in an eleventh-hour bid to save the drafting process from total collapse. Crisis Group interview with Ghassan Attiyah, Amman, 1 September 2005.

<sup>46</sup> For example, Iyad al-Samarra'i, a leader of the Iraqi Islamic Party and a member of the drafting committee, told Crisis Group: "We will leave contentious issues for the next national assembly to address. The main one is the federal system. The next assembly could study this issue; it will give people the time they need to decide their preference". Crisis Group interview, Baghdad, 14 August 2005.

<sup>47</sup> Article 7 of the draft constitution reads: "Entities or trends that embrace, instigate, facilitate, glorify, propagate or justify racism, terrorism, accusations of unbelief [*takfir*] or sectarian cleansing are banned, especially the Saddamist Baath in Iraq and its symbols, under any name. It will not be allowed to be part of political pluralism in Iraq, as shall be set in law".



commentator.<sup>48</sup> Distrust of Sunni Arabs runs so high, however, that their complaints could conveniently be dismissed as a last-ditch defence of the *ancien régime*.

- **National Identity.** Iraq, the draft of 28 August says, is part of the Islamic world, "and its Arab people are part of the Arab nation". This phrasing reflects Kurdish unwillingness to accept the language of previous Iraqi constitutions -- and the constitutions of other Arab countries -- that defines the country as "an Arab nation". Predictably, though, it infuriated Sunni Arabs (and some Shiites as well), who considered it a denial of Iraq's identity and thus as ratification of the country's future break-up. Under pressure from the Arab League, the 13 September draft amended this to say that Iraq is "a founding member of the Arab League and is committed to its charter". A concession to Arab states, this version scarcely satisfied Iraq's Sunni Arabs, however, who still read it as a denial of what they consider Iraq's "true", i.e. Arab, identity.

Sunni Arabs also objected to some smaller points but what is virtually certain is that if these questions are not addressed in some way prior to 15 October, they will mobilise their community to vote against the constitution in the referendum. Several outcomes, none appealing, are possible: a majority will vote for the constitution, but Sunni Arabs will garner the required two thirds "no" votes in three provinces to defeat it, and the entire process will begin from scratch; a majority will vote for the constitution, Sunni Arabs will marshal sufficient numbers to defeat it, but Shiites and Kurds will cry foul and consider it adopted anyway; or (the most likely at this point) a majority will vote for the constitution, most Sunni Arabs will oppose it, but not in sufficient numbers to defeat it. Under any of these circumstances, Iraq will either lack a constitution or have a constitution that lacks critical support from Sunni Arabs and significant buy-in by many ordinary Iraqis, who may well follow their leaders' call to vote "yes" but have observed the constitution-drafting process, if at all, with disinterest, if not contempt.

#### IV. IS AN UNDERSTANDING ATTAINABLE?

A stable and viable compromise, while unlikely, may still be possible but not without strong outside pressure. Iraq's constituencies have shown they lack the incentive, ability or political maturity to reach an acceptable compromise

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<sup>48</sup> Crisis Group interview with Nabil Younes, a Sunni Arab professor at Baghdad University, Baghdad, 30 August 2005.

text. The U.S. may well be the sole actor capable of playing a mediating role.

Ideally, the U.S. would now be embarked on a full-scale effort to reach a constitutional compromise ahead of the 15 October referendum or, failing that, put its weight behind a decision to postpone that referendum to after the December parliamentary elections. Under the latter option, the new parliament would take up the task of renegotiating constitutional language; Sunni Arabs would have additional incentive to participate in the parliamentary elections and, with greater representation in the assembly, would have a stronger and more legitimate voice in the constitutional drafting. Such a decision might also be viewed as a goodwill gesture by Sunni Arabs, whose faith in the overall political process might thereby be enhanced.<sup>49</sup>

At this point, however, both options have been rendered moot. The text has been finalised, preparations for the referendum are ongoing, and the U.S. time and again has proved inflexible in its opposition to any extension of the political timetable. With the referendum only three weeks away, an agreement will have to come, if at all, in the form of a political deal between representatives of the three key communities, brokered by the U.S., and concluded before 15 October. This could be achieved through a public commitment by all principal parties, guaranteed by Washington, that necessary steps will be taken through either legislation or constitutional amendment after the parliamentary elections to address certain specified Sunni Arab concerns.

Indeed, with Kurds and Shiites having reached broad agreement on the outlines of the new Iraq, the key at this point lies in accommodating fundamental Sunni Arab concerns without crossing Shiite or Kurdish red lines. Internally divided and forced to walk a fine line between fear of being marginalised by the Kurdish-Shiite juggernaut and of being killed by insurgents if they are seen to be over-involved in the political process -- as happened to one of them<sup>50</sup> -- the Sunni Arabs have negotiated from a position of extreme weakness, compelled to reject what was on offer and unable themselves to propose viable

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<sup>49</sup> This option was suggested by U.S. Senator Joseph Biden, who argued that a postponement "would encourage the growing desire among Sunnis to participate in the political process. It would empower legitimate Sunni leaders who can sell the constitution to their community. And it could split the Sunni population from the insurgents and foreign jihadists". *The Washington Post*, 14 September 2005.

<sup>50</sup> As a Western diplomat put it, the Sunni Arabs "have this fear of being marginalised, but at the same time they are scared of coming under pressure from extremists for participating too much". Crisis Group interview, Baghdad, 18 July 2005. Mijbel Sheikh Issa was gunned down the next day.

alternatives. U.S. intervention is now required to balance the scales and produce a post-constitution agreement that could allay Sunni Arab fears that future Shiite-dominated legislatures will draft laws that threaten the viability of the Iraqi state and their rights as a minority community.

The most divisive issue is, without doubt, federalism. Still, a compromise acceptable to Sunni Arabs may be possible, bearing in mind deep divisions among Shiites over whether non-Kurdish Iraq should be decentralised according to existing governorates or new regions. Among Shiites, "southern federalism" is highly controversial, embraced by SCIRI apparently for tactical reasons yet strongly opposed by Muqtada al-Sadr and his large popular following (who are concentrated in Baghdad, not in the South). Baha al-Araji, a UIA member of the drafting committee who supports Muqtada al-Sadr, expressed strong doubts about the notion of southern federalism, arguing that it would fuel sectarianism under current circumstances. He said the Iraqi people had not had time to gain an understanding of federalism in general and would, therefore, not support it and so proposed to postpone the question of setting up a region in the south.<sup>51</sup> Many other Shiite religious and political leaders reportedly also are highly sceptical of the notion; after all, their ambition has been to rule Iraq, not merely Shiite-dominated regions.<sup>52</sup>

The compromise on which they settled was to accept the notion of multiple regions while leaving decisions on precise modalities for creating them to a future assembly. To allay Sunni Arab concerns, Kurds and Shiites could agree -- *in advance of the constitutional referendum* -- to support legislation in the new assembly that would specify that the federal system would be organised according to existing governorates, with the option of establishing regions consisting of no more than four governorates -- thereby protecting core Kurdish interests (the possibility of incorporating Kirkuk) without raising the spectre of a super-Shiite region in the south.<sup>53</sup>

On the question of the Baath party, it is again SCIRI that has set the tone, calling for its total elimination (Art. 7 A of the draft constitution) and keeping in place the National De-Baathification Commission set up by the

Coalition Provisional Authority in May 2003. In this it has found willing allies among other Shiites, as well as Kurds, all victims of the previous regime. Yet, if the primary concern of these victimised communities is that the perpetrators, depending on the magnitude of their crimes, either be punished or excluded from managerial positions and public office -- a position even Sunni Arabs could not legitimately oppose<sup>54</sup> -- an acceptable compromise would be to make clear that former Baath party members, or indeed any Iraqi,<sup>55</sup> should be judged by past conduct, not mere membership in a given organisation.

Again, this could be done prior to 15 October with a commitment to pass legislation or amend the constitution so as to reflect the basic principle. Most likely, Kurds and Shiites will not give in on the party's banning (although with the above criterion in place and enforced, the continued existence of the Baath party, reformed to exclude racist and similar ideals, should become less of a concern, much like the reformed communist parties in Eastern Europe). In exchange for the concession on judging Baath party members, Sunni Arabs would thus have to accept Article 7 A as written.

The finally matter concerns Iraq's national identity. Arguably, one of the draft constitution's principal failings is the absence of any language defining an identity acceptable to all communities, reducing the country to a multicultural patchwork whose stitching has begun to fray. The only unifying element is the country's past, contained in a grandiose preamble reference to "We, the sons of Mesopotamia". Moreover, in a bow to the ascendant conservative Islamists, the foundation of society is placed in the family, not the citizen; citizenship is mentioned only in relation to the right to hold a passport.<sup>56</sup> The assignation of such unifying symbols as the flag, emblem and national anthem is postponed.

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<sup>51</sup> Crisis Group interviews, Baghdad, 13 July and 5 September 2005.

<sup>52</sup> Crisis Group interview with a Western diplomat, Baghdad, 16 July 2005.

<sup>53</sup> This is consistent with language in the TAL, which states (Art. 53 C): "Any group of no more than three governorates outside the Kurdistan region, with the exception of Baghdad and Kirkuk, shall have the right to form regions from amongst themselves". The TAL left the mechanism for creating regions to be decided by the TNA and approved in a referendum in the pertinent governorates.

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<sup>54</sup> As Wamidh Nadhmi put it, "it would be unfair to dismiss former Baath party members, unless legal charges have been brought against them for crimes such as corruption, torture or killing. You cannot judge someone just because he is an ex-Baathist. Some people were forced to join the Baath". Crisis Group interview, Baghdad, 6 September 2005.

<sup>55</sup> Many Baath party members never committed a crime, while many of the worst henchmen of the former regime were ensconced in the security apparatus (as enforcers and interrogators), where Baath party membership was not a requirement. Moreover, membership in the Shiite south may well have been greater than in Sunni Arab areas, as survival there was particularly challenging, and membership promised a ticket out of misery.

<sup>56</sup> Crisis Group interview with Ghassan Attiyah, Amman, 1 September 2005. Article 29 of the draft constitution states: "The family is the foundation of society; the state should protect it and its religious, moral and patriotic values".

Regrettably, the text may merely reflect the emerging reality, in which Iraqis have started to define themselves by community rather than nation, or even as separate nations -- a process set in motion by decisions taken immediately after the occupation and accelerated both by the January 2005 elections and the constitutional process.<sup>57</sup> Kurds, for example, who have long argued and fought for their independence, initially wanted language to the effect that if Iraq's Arabs are part of the Arab nation, its Kurds should be declared part of the Kurdish nation,<sup>58</sup> a phrase that would have set off alarm bells in Turkey, Iran and Syria. On this issue, compromise simply may be too hard to reach, and Sunni Arabs may have to accept what has been drafted.

In short, the U.S. should strive now for a political agreement signed by leaders of the three communities and guaranteed by Washington that assures Sunni Arabs the number of governorates that can fuse to become a region will be limited to four, and Iraqis will not be excluded from public office or managerial positions on the basis of mere membership in the Baath party.

## V. CONCLUSION

The process of drafting a constitution has revealed -- indeed, exacerbated -- profound truths about the current state of Iraqi politics and society. First of all, the polity is marked by growing ethno-sectarianism in which Iraqis identify strictly with their own preferred, self-defined community and interpret events exclusively through an ethno-sectarian lens. Like the 30 January elections, the rushed constitutional process encouraged such polarisation as Iraqis sought to maximise their political gains on the basis of group identity. The political process thereby has become a dangerous sociological process of affirmation of one's ethnic/sectarian identity. The Kurds are a prime example, as they seek to maximise the possibility of later

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<sup>57</sup> The recent past has seen the growing use of references to the "Sabeen-Mandean nation" and the "Assyrian/Chaldean/Syriac nation", ethnic minorities both of whose members claim original ancestry in Mesopotamia, as well as the "Turkoman nation" and the "Shabak nation". See the brochure, "Iraqi Minorities' First National Conference", Baghdad, July 2005. The conference, which took place in Baghdad on 2 July 2005, established the Iraqi Minorities Council, with Dr Hunein al-Qaddo as its founding president.

<sup>58</sup> Crisis Group interview with Sa'di Barzinji, constitutional advisor to Masoud Barzani, Baghdad, 18 July 2005. The Sunni Arabs in fact encouraged the Kurds to add language to that effect, realising full well, a Kurdish politician said, that it would never be acceptable to Turkey. Crisis Group interview with Adnan Mufti, president of the Kurdistan National Assembly, Erbil, 19 September 2005.

secession.<sup>59</sup> But they are not alone. The Shiite political parties are also seeking to maximise their benefits regardless of the viability of the future Iraqi state, and Sunni Arabs are in a reflexive, "anti-everything" mode to protect what they have left. Initiatives to establish non-sectarian political parties or movements have largely failed.<sup>60</sup> The only such movement of any significance today is the highly informal and purely tactical alliance between Muqtada al-Sadr's Shiite followers and segments of the Sunni Arab community.<sup>61</sup>

A second truth is that the disparate class of former exiles and expatriates that has ruled Iraq since the war and has drafted both the TAL and the current constitution is virtually as out of touch with popular sentiment as it was in April 2003.<sup>62</sup> Some are seen, with a certain

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<sup>59</sup> One drafter complained that during a debate over the women's quota in the National Assembly, "no one supported me [in a demand to raise the quota from 25 to 31 per cent in perpetuity], not even the Kurds". The latter, she said, did not seem willing to take a position on anything, except on matters pertaining to federalism and the status of Kirkuk. Crisis Group interview, Baghdad, 15 July 2005.

<sup>60</sup> One such initiative was headed by Ghassan Attiyah, who has become increasingly demoralised about the possibility of non-sectarian politics in Iraq. Iyad Allawi lost his non-sectarian credentials, at least in the eyes of Sunni Arabs, when as prime minister of the Interim Government in November 2004 he authorised the U.S. assault on Falluja. Crisis Group interviews, Baghdad, September 2005. Wamidh Nadhmi, a professor of political science at Baghdad University, helped set up a group calling itself the "Arab National Current", a self-professed non-sectarian coalition whose secretary general, Ayatollah al-Khalisi, is a Shiite. Nadhmi himself is a Sunni Arab. Crisis Group interview, Baghdad, 6 September 2005.

<sup>61</sup> Muqtada al-Sadr has gained considerable popularity among Sunni Arabs for his consistent opposition to the presence of foreign military forces in Iraq and his condemnation of the U.S. assault on Falluja in November 2004. For example, Isam Kadhem al-Rawi, a member of the Muslim Scholars Association, said: "Muqtada is a real Iraqi and a real Arab. We share the same basic principles: We are Iraqis, and we aspire to national unity. He is not like al-Hakim or al-Ja'fari. Those guys are Persians. I respect Muqtada al-Sadr, and I have a good relationship with his followers". Crisis Group interview, Baghdad, 28 August 2005. How popular Sunni Arabs are in al-Sadr's eyes is a different question altogether, given the support many of them provided to a regime accused of killing al-Sadr's father and two brothers in 1999 and oppressing Shiite political activists more broadly during its 35-year reign. Still, a member of al-Sadr's Mehdi Army told Crisis Group: "We feel close to the Sunnis. During the Falluja crisis we supported them with weapons and food. We feel closer to them than to the 169 [Shiite] list. The Sadr movement is the only one, along with the Sunnis, to reject the occupation". Crisis Group interview, Baghdad/Sadr City, 30 August 2005.

<sup>62</sup> The Kurds are not included in this group, having controlled their own territory since late 1991.

justification, as carpet-baggers intent on capitalising on skills learned in exile.<sup>63</sup> Others have proved incapable of bridging the yawning gap between their worldview and that of most Iraqis, who have never had the chance to express themselves freely, develop their political views or travel outside the country. Muqtada al-Sadr's brand of fiery nationalism feeds in part on the resentment many ordinary Iraqis feel toward these outsiders, who arrived to take power on the heels of a foreign military intervention that many experienced as liberating and humiliating in equal measure.

What these suggest is that the fissures tearing apart Iraq's body politic may be too deep to heal, certainly by a process as contentious as the drafting of a constitution. Such a process and its end product were never deemed sufficient by themselves to calm the feuding communities. Unfortunately, the way in which drafting was conducted has excited rather than pacified the situation.<sup>64</sup> At this point, however, without a national consensus embodied in a permanent constitution, there is little that can halt the slide toward civil war, chaos and dissolution. Drafting a constitution based on compromise and consensus arguably could have been a first step in a healing process. Instead, it is proving yet another step in a process of depressing decline.

Today, only a determined political intervention by the U.S. might be capable of creating the elusive political consensus that could help prevent the country's violent break-up. Only Washington may have the leverage necessary to bring the sides around the table to forge a durable compact, as leaders of all three communities readily acknowledge. If the U.S. tries, it should suggest language to bridge existing gaps. The questions of federalism and Baath party membership will need to be addressed head-on. The administration should push leaders

of the three communities to continue negotiations, not over amendments to the constitution, but over a political agreement that would serve as a guarantee that future legislatures would not threaten the existential interests of one of Iraq's principal communities.

Ultimately, while the successful negotiation of an agreement embraced by Shiites, Kurds and Sunni Arabs may help restabilise Iraq, there is no guarantee it will do so. It must be accompanied by concerted steps to halt sectarian strife and pursue a broadly acceptable solution to the question of Kirkuk, whose unresolved status may ignite a war between Arabs and Kurds.

If the U.S. fails to pick up the baton, Iraq may face a scenario in which the constitution is adopted on 15 October and a government is elected by 15 December that will lack a strong political compact underpinning its legitimacy. In that case, the country's feared descent into civil war and disintegration, with mass expulsions in areas of mixed population (including Baghdad, Basra, Mosul and Kirkuk), could well become a reality.

It has been suggested that the constitution could be rejected on 15 October, opening the way for new elections (one in which Sunni Arabs are presumed to drop their boycott and participate in large numbers), a new national assembly, and a renewed effort to draft the constitution within a year. This assumes the Sunni Arabs' ability to muster a two-thirds majority in any three governorates or, in alliance with other disaffected elements, a simple majority nationwide.<sup>65</sup> While Sunni Arabs are thought to constitute the demographic majority in four governorates (al-Anbar, Nineveh, Salah al-Din and Diyala), the community is probably too divided -- over whether to vote and thereby legitimise the process or stay home and suffer a constitution harmful to their interests -- to be able to mobilise sufficient turn-out. And while other Iraqis opposed to the constitution, such as, potentially, followers

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<sup>63</sup> Government officials, members of the TNA and constitution drafters stand accused of spending relatively little time at work in Baghdad, preferring to go on trips abroad to attend conferences and such in an effort to find respite from the tensions and security concerns that dominate their lives in Iraq. One Western diplomat, for example, noted with dismay: "I am disappointed with the new government. They are never there. It is an invisible government. They are always travelling abroad. When I try to make an appointment with a government official, I invariably have to wait a month and a half". Crisis Group interview, Baghdad, 18 July 2005.

<sup>64</sup> Peter Galbraith, *op. cit.*, has argued that the constitution provides "a formula that could reduce the likelihood of a full-scale conflict...a peace plan that might work", and that "far from igniting a widespread civil war, the constitution provides ways of resolving the very issues that could provoke such a war: oil and territory". Regrettably, the current constitution is far more likely to aggravate greatly existing forces tearing the country apart.

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<sup>65</sup> Article 61 C reads: "The general referendum will be successful and the draft constitution 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". There has been some discussion about what is meant by "voters": those whose names appear on the electoral roll or those who actually turn out to cast (valid) votes. It is in the interest of the TNA, which is dominated by Shiites and Kurds, to adhere to the first definition, which is more likely -- assuming a sizable turn-out of Shiites and Kurds and at least a partial boycott by Sunni Arabs -- to prevent the constitution's rejection in three governorates. On the other hand, as Nathan Brown has pointed out in reference to the need for "a majority of the voters" to approve the constitution, "I have not heard anybody say that means that the constitution needs to get half of all eligible or registered voters to pass". Crisis Group e-mail exchange with Nathan Brown, 20 September 2005.

of Muqtada Sadr,<sup>66</sup> may come out in large numbers to vote "no", they are largely absent in predominantly Sunni Arab governorates, and along with the Sunni Arabs are unlikely to clear the 50+ per cent threshold needed to defeat the constitution nationwide.

Amid this depressing environment are two brighter spots. First, Sunni Arab leaders now acknowledge that their boycott of the polls in January 2005 was a strategic error, one they say they will not repeat in December;<sup>67</sup> secondly, a new electoral law was adopted on 12 September that constructs a district-based system of proportional representation within the eighteen governorates and, as such, automatically sets aside a certain number of seats for Sunni Arabs (particularly in the four governorates mentioned above), regardless of whether they participate on election day.<sup>68</sup> That is all the more reason to ensure that Sunni Arabs participate in the elections and that they do so on the basis of a broad and inclusive political agreement.

#### **Amman/Brussels, 26 September 2005**

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<sup>66</sup> Muqtada al-Sadr has stayed mute on whether he supports the constitution. Speculation has arisen over whether he will either embrace or denounce it once a final draft is accomplished, or remain neutral and allow his followers to vote according to their own preference. Kurdish leaders said they expected that irrespective of Muqtada Sadr's position on the draft constitution, he will not be prepared to contradict its anticipated endorsement by Ayatollah Sistani. Crisis Group interviews, Erbil and Salah al-Din, 18-19 September 2005.

<sup>67</sup> For example, at a conference in Baghdad on 14 July 2005, Sunni Arab politicians adopted the following resolution: "It is in the public interest for all Iraqis to prepare themselves for participation in the next elections by registering their names in the polling stations". A separate resolution reads: "We reject the occupation and demand a timetable for the withdrawal of occupation forces". It is notable that whereas prior to January 2005 a majority of Sunni Arab leaders had insisted that no legitimate elections could take place during the occupation, they separated the two issues on this occasion.

<sup>68</sup> Of the National Assembly's 275 seats, 230 would be elected based on the eighteen governorates, with the remaining 45 reserved for a so-called national list for which expatriate Iraqis can vote. An additional benefit of this system is that it may shift the weight in the National Assembly from the former exiles and expatriates to Iraqis who never left and so lead to a more accurate representation of public sentiments and interests.

## APPENDIX A MAP OF IRAQ

