

**IRAQ AFTER THE SURGE II:
THE NEED FOR A NEW POLITICAL STRATEGY**

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

This is the second of two companion reports on Iraq after the Surge, which Crisis Group is publishing simultaneously, with identical Executive Summaries and policy Recommendations. Part I analyses changes in the Sunni landscape. Part II analyses the state of political progress.

Against the odds, the U.S. military surge contributed to a significant reduction in violence. Its achievements should not be understated. But in the absence of the fundamental political changes in Iraq the surge was meant to facilitate, its successes will remain insufficient, fragile and reversible. The ever-more relative lull is an opportunity for the U.S. to focus on two missing ingredients: pressuring the Iraqi government to take long overdue steps toward political compromise and altering the regional climate so that Iraq's neighbours use their leverage to encourage that compromise and make it stick. As shown in these two companion reports, this entails ceasing to provide the Iraqi government with unconditional military support; reaching out to what remains of the insurgency; using its leverage to encourage free and fair provincial elections and progress toward a broad national dialogue and compact; and engaging in real diplomacy with all Iraq's neighbours, Iran and Syria included.

Many factors account for the reduction in violence: the surge in some cases benefited from, in others encouraged, and in the remainder produced, a series of politico-military shifts affecting the Sunni and Shiite communities. But there is little doubt that U.S. field commanders displayed sophistication and knowledge of local dynamics without precedent during a conflict characterised from the outset by U.S. policy misguided in its assumptions and flawed in its execution. A conceptual revolution within the military leadership gave U.S. forces the ability to carry out new policies and take advantage of new dynamics. Had they remained mired in past conceptions, propitious evolutions on the ground notwithstanding, the situation today would be far bleaker.

One of the more remarkable changes has been the realignment of tribal elements in Anbar, known as the *sahwat*, and of former insurgents, collectively known as the "Sons of Iraq". This was largely due to increased

friction over al-Qaeda in Iraq's brutal tactics, proclamation of an Islamic state and escalating assaults on ordinary citizens. But the tribal and insurgent decisions also were aided by enhanced military pressure on the jihadi movement resulting from augmented U.S. troops: in both instances U.S. forces demonstrated more subtle understanding of existing tensions and intra-Sunni fault lines. Overall, the military campaign calmed areas that had become particularly violent and inaccessible, such as Anbar and several Baghdad neighbourhoods, and essentially halted sectarian warfare.

But on their own, without an overarching strategy for Iraq and the region, these tactical victories cannot turn into lasting success. The mood among Sunnis could alter. The turn against al-Qaeda in Iraq is not necessarily the end of the story. While some tribal chiefs, left in the cold after Saddam's fall, found in the U.S. a new patron ready and able to provide resources, this hardly equates with a genuine, durable trend toward Sunni Arab acceptance of the political process. For these chiefs, as for the former insurgents, it mainly is a tactical alliance, forged to confront an immediate enemy (al-Qaeda in Iraq) or the central one (Iran). Any accommodation has been with the U.S., not between them and their government. It risks unravelling if the ruling parties do not agree to greater power sharing and if Sunni Arabs become convinced the U.S. is not prepared to side with them against Iran or its perceived proxies; at that point, confronting the greater foe (Shiite militias or the Shiite-dominated government) once again will take precedence.

Forces combating the U.S. have been weakened but not vanquished. The insurgency has been cut down to more manageable size and, after believing victory was within reach, now appears eager for negotiations with the U.S. Still, what remains is an enduring source of violence and instability that could be revived should political progress lag or the Sons of

Iraq experiment falter. Even al-Qaeda in Iraq cannot be decisively defeated through U.S. military means alone. While the organisation has been significantly weakened and its operational capacity severely degraded, its deep pockets, fluid structure and ideological appeal to many young Iraqis mean it will not be irrevocably vanquished. The only lasting solution is a state that extends its intelligence and coercive apparatus throughout its territory, while offering credible alternatives and socio-economic opportunities to younger generations.

The U.S. approach suffers from another drawback. It is bolstering a set of local actors operating beyond the state's realm or the rule of law and who impose their authority by force of arms. The *sahwat* in particular has generated new divisions in an already divided society and new potential sources of violence in an already multilayered conflict. Some tribes have benefited heavily from U.S. assistance, others less so. This redistribution of power almost certainly will engender instability and rivalry, which in turn could trigger intense feuds – an outcome on which still-active insurgent groups are banking. None of this constitutes progress toward consolidation of the central government or institutions; all of it could amount to little more than the U.S. boosting specific actors in an increasingly fragmented civil war and unbridled scramble for power and resources. Short-term achievement could threaten long-term stability.

By President Bush's own standards, the military surge was useful primarily insofar as it led the Iraqi government to forge a national consensus, recalibrate power relations and provide Sunni Arabs in particular with a sense their future was secure. Observers may legitimately differ over how many of the administration's so-called benchmarks have been met. None could reasonably dispute that the government's performance has been utterly lacking. Its absence of capacity cannot conceal or excuse its absence of will. True to its sectarian nature and loath to share power, the ruling coalition has actively resisted compromise. Why not? It has no reason to alienate its constituency, jeopardise its political makeup or relinquish its perks and privileges when inaction has no consequence and the U.S. will always back it.

The surge is the latest instalment in a stop-and-start project to build a functioning state and legitimate institutions. All along, the fundamental challenge has been to settle major disputes and end a chaotic scramble for power, positions and resources in a society that, after a reign of terror, finds itself without accepted rules of the game or means to enforce them. Politically, this conflict has expressed itself in disputes, both violent and non-violent, over the structure of the state

system (federalism/regionalisation and the degree of power devolution); ownership, management and distribution of oil and gas wealth (a hydrocarbons law); internal boundaries (particularly of the Kurdistan region); mechanisms for settling relations between post-Saddam "winners" and "losers" (for example, de-Baathification, amnesty, reintegration); and the way in which groups gain power (elections vs. force).

A small number of agreements have been reached and are regularly trumpeted. But they have made virtually no difference. Without basic political consensus over the nature of the state and the distribution of power and resources, passage of legislation is only the first step, and often the least meaningful one. Most of these laws are ambiguous enough to ensure that implementation is postponed, or that the battle over substance becomes a struggle over interpretation. Moreover, in the absence of legitimate and effective state and local institutions, implementation by definition will be partisan and politicised. What matters is not principally whether a law is passed in the Green Zone. It is how the law is carried out in the Red Zone.

Three things are becoming increasingly clear: First, the issues at the heart of the political struggle cannot be solved individually or sequentially. Secondly, the current governing structure does not want, nor is it able, to take advantage of the surge to produce agreement on fundamentals. Thirdly, without cooperation from regional actors, progress will be unsustainable, with dissatisfied groups seeking help from neighbouring states to promote their interests. All this suggests that the current piecemeal approach toward deal making should be replaced with efforts to bring about a broad agreement that deals with federalism, oil and internal boundaries; encourages reconciliation/accommodation; and ensures provincial and national elections as a means of renewing and expanding the political class. It also suggests yet again the need for the U.S. to engage in both genuine negotiations with the insurgency and for vigorous regional diplomacy to achieve agreement on rules of the game for outside actors in Iraq.

In the U.S., much of the debate has focused on whether to maintain or withdraw troops. But this puts the question the wrong way, and spawns misguided answers. The issue, rather, should be whether the U.S. is pursuing a policy that, by laying the foundations of legitimate, functional institutions and rules of the game, will minimise the costs to itself, the Iraqi people and regional stability of a withdrawal that sooner or later must occur – or whether it is simply postponing a scenario of Iraq's collapse into a failed and fragmented state, protracted and multilayered violence, as well as increased foreign meddling.

The surge clearly has contributed to a series of notable successes. But the question is: Now what? What higher purpose will they serve? For the first four years of the war, the U.S. administration pursued a lofty strategy – the spread of democracy; Iraq as a regional model – detached from any realistic tactics. The risk today is that, having finally adopted a set of smart, pragmatic tactics, it finds itself devoid of any overarching strategy.

RECOMMENDATIONS

To the Government of Iraq:

1. Organise provincial council elections no later than 1 October 2008, and ensure these are inclusive of all parties, groups and individuals that publicly accept non-violence (rather than, at this stage, disband their militias).
 2. Create an environment in which these elections will be free and fair, specifically by:
 - (a) allowing and encouraging refugees and the internally displaced to vote in their places of current abode;
 - (b) providing free and equal state media access to all parties and individual candidates; and
 - (c) encouraging independent Iraqi and international election monitors to attend elections preparations and be present at polling stations on election day.
 3. Remove officials and commanders guilty of sectarian behaviour from government agencies, the security forces and intelligence services.
 4. Engage with a wide spectrum of political actors, both within and outside the council of representatives, to reach a broad new integrated political accord on issues of territory, power and resources, key elements of which should include:
 - (a) the status of so-called disputed territories: by recognising the rights of all their communities and inhabitants, including through power-sharing arrangements and protection of minority rights;
 - (b) the hydrocarbons law: by allowing and encouraging the Kurdistan Regional Government to explore and exploit the oil and gas resources located in the Kurdistan region through production-sharing contracts;
- (c) federalism: by encouraging asymmetric federalism that recognises the Kurdistan region but decentralises power in the rest of Iraq by governorates rather than regions; and
 - (d) constitutional review: by revising the constitution according to agreements reached on the above three elements and submitting the package deal to popular referendum.
5. Encourage reconciliation by:
 - (a) amending the January 2008 de-Baathification law to allow former Baath officials who committed no crimes to regain positions in the government and security agencies;
 - (b) implementing on a non-partisan basis the February 2008 amnesty law and calling on the U.S. to transfer detainees held in Iraq to government custody; and
 - (c) integrating (through vetting and retraining) Sons of Iraq into the civil service and security agencies on condition they make a public commitment to refrain from violence, and create jobs for those who cannot so be integrated.

To the U.S. Government:

6. Press and assist the Iraqi government in organising free, fair, inclusive and secure provincial council elections by 1 October 2008.
7. Adjust the basis on which military support is provided by:
 - (a) only supporting Iraqi military operations consistent with its own strategy and objectives;
 - (b) conditioning training and assistance on the professionalism and non-partisan behaviour of its recipients;
 - (c) refusing to back sectarian ministers or sectarian army units and their commanders; and
 - (d) focusing on vetting and retraining existing units.
8. Press Iraqi political actors to reach a comprehensive political accord, and assist them to do so, in particular by:
 - (a) conditioning support to the government and its allies on their agreeing to the

- political compromises on disputed territories, federalism, the hydrocarbon law and reconciliation as described above;
- (b) seeking through UN mediation to engage in negotiations with what remains of the insurgency (minus al-Qaeda in Iraq), making clear at the outset that it intends to bring its military presence to an end and not to establish permanent bases; and
 - (c) undertaking regional diplomacy with a view to reducing interference in Iraq and agreeing on rules of the game, notably through engaging Iran and Syria (as described in earlier Crisis Group reports) and encouraging Iranian-Saudi dialogue.
9. Adopt as a goal, should these efforts fail, the convening, under UN auspices, of a broad and inclusive conference bringing together Iraqi actors, regional states and key members of the international community with a view to reaching a new political compact.
- To the United Nations Secretary-General:**
10. Assist the government of Iraq in preparing free, fair and inclusive provincial council elections to be held no later than 1 October 2008 (and national elections before the end of 2009) by:
 - (a) providing independent monitors;
 - (b) publicly withdrawing support if these elections threaten to be less than inclusive, free and fair, or take place in a non-permissive security environment; and
 - (c) publicly condemning the results if elections are carried out under such conditions.
 11. Assist the U.S. and other members of the international community in engaging Iraq's neighbours in discussions over Iraq's future with a view to lessening tensions and interference.
 12. Mandate an envoy to reach out to the insurgency (al-Qaeda in Iraq excepted) to pave the way for negotiations with the U.S.
 13. Encourage and assist Iraqi political actors in reaching a comprehensive political accord as described above.
 14. Adopt as a goal, should these efforts fail, the convening of a broad and inclusive conference bringing together Iraqi actors, regional states and key members of the international community with a view to reaching a new political compact.
 15. Increase staff and resources to reflect the UN's growing political role in Iraq.

**Baghdad/Istanbul/Damascus/Brussels,
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IRAQ AFTER THE SURGE II: THE NEED FOR A NEW POLITICAL STRATEGY

I. INTRODUCTION

In enumerating the surge's successes and setbacks and warning of the challenges still ahead, Gen. David Petraeus, the top U.S. commander in Iraq, used his April 2008 testimony before the U.S. Congress to ask for more time and a pause in troop withdrawals. With both, the administration argued, the relative calm generated by the surge could yet be parlayed into a set of critical deals needed to provide a stronger foundation for a reborn but highly dysfunctional Iraq. What the past year has shown, however, is that what Iraq needs is not a respite but a brand new strategy.

The challenge the Bush administration gave itself in early 2007 was to help Iraqis overcome their divisions through a combination of military might and political arm-twisting. In announcing the military surge, it proclaimed a series of benchmarks purportedly formulated by the Iraqi government.¹ A year later, the U.S. could claim significant credit for ending sectarian fighting in Baghdad and bringing a fragile calm to Anbar. But it has had little to show for its declared objective of translating such successes into political agreements to reunite Iraqis around a shared national agenda.

The benchmarks are an odd, uneven mix of concrete objectives and vague aspirations. Some concern agreements that have been reached only on paper; virtually none has been carried out. Others are so ambiguous as to simply transfer the conflict over legislation to a dispute over implementation. Nor do

they truly reflect core disputes or constitute a reliable measure of political progress. They do not include, for example, two key concerns: the fate of so-called disputed territories and the absorption of former insurgents into the state's institutions and security forces.² Even assuming all were met, problems at the local level – the scramble for power and resources – would remain, and Iraq would be a long way from enjoying legitimate institutions, representative government or a functional state. If an agreement were reached on the management of the oil wealth, who would ensure compliance by all sides? Who would guarantee that former insurgents being absorbed into the security forces will not become a fifth column able to strike from within? There are no ready answers to these questions; worse, the absence of a common vision and broad compromise between all relevant Iraqi forces – inside and outside of government, among insurgents, militias and political parties – precludes even the possibility of such answers being formulated.

In forging a new strategy, it is important to understand the current state of political play. Two primary, intersecting fault lines have emerged, the first confronting former regime elements with their erstwhile victims-turned-rulers, the second pitting Kurdish against Arab nationalism. Both divides are being expressed in communal terms: Kurd vs. Arab, but also “Sunni Arabs” (somehow broadly representing the

¹ As a measure of political progress, the Bush administration defined eighteen benchmarks the Iraqi government was to meet. These involved actions “believed to be important to advance reconciliation within Iraqi society, to improve the security of the Iraqi population, to provide essential services to the population, and to promote its economic well-being”, in pursuit of the “common goal: a democratic Iraq that can govern, defend, and sustain itself and be an ally in the War on Terror”, “Initial Benchmark Assessment Report”, The White House, 12 July 2007, at www.whitehouse.gov/news/releases/2007/07/20070712.html.

² The White House's ratings of progress in meeting the benchmarks are highly problematic. For example, they include a benchmark that was reached even before the White House had set it (legislation on forming regions, passed in October 2006). And they declare satisfactory progress on issues that were completely stuck in September 2007 and are still so today (for example, constitutional review, see below) or that eventually yielded legislation that could even be viewed as a step backward (de-Baathification, see below). The White House also claimed progress on what it called “lagging” indicators – “‘effects’ the benchmarks were intended to produce, even if the formal benchmarks themselves have not been met”. An example is the effective distribution of revenues from oil and gas sales in the absence of a hydrocarbons law codifying the principle of doing so. “Benchmark Assessment Report”, The White House, 14 September 2007, at www.whitehouse.gov/news/releases/2007/09/20070914.html.

ousted regime) vs. “Shiites” and “Kurds” (“their” victims). Although many Iraqis have rejected such categorisation, inasmuch as these “communities” are heterogeneous, internally divided and overlapping, the post-2003 period has seen a destructive trend in this direction: a perceived black-and-white struggle between irreconcilable communities drenched in ancient, reciprocal hatred.³

In fact, the defining trend has been accelerating *intra*-communal conflicts. The 2005-2007 sectarian war has given way, for now, to a battle that has seen constantly shifting alliances among political parties that represent, in addition to their own narrow partisan interests, population groups than cannot easily be pigeonholed:

- Sunni tribal elements, organised in so-called Awakening councils or *sahwat*, are pushing back al-Qaeda in Iraq, a group with a partially foreign leadership but an almost entirely Iraqi base;
- these tribal elements have little relation to former insurgent groups that established “concerned local citizen” councils in Baghdad neighbourhoods;
- both sets of actors, collectively known as “Sons of Iraq”, maintain only tenuous links to Sunni Arab parties that have played a largely ineffective role in government since standing in parliamentary elections in December 2005;
- a major struggle is shaping up between Shiite Islamist parties that represent different strata in the Shiite community: the Sadr movement, which has mobilised slum dwellers in Baghdad and towns in the south, and the Islamic Supreme Council of Iraq (ISCI) and Prime Minister Nouri al-Maliki’s Islamic Daawa Party, which derive their support from the country’s Shiite middle class (even if impoverished); their rivalry is at heart a class struggle;
- both the Sadr movement and ISCI and its Badr militia have alienated (through their sectarian role in government since 2005 and in the street during the worst violence in 2006) not only Sunnis but also large segments of the Shiite population, including secular as well as religious Shiites who reject clerical rule; and
- the Kurdish parties, although strategically aligned after several years of internecine conflict, de facto are still administering separate parts of

the Kurdistan region⁴ and face a population increasingly disaffected by deprivation, corruption and mismanagement.

These conflicts have arisen in addition to, not instead of, inter-communal strife. The sectarian war over Baghdad, suspended at best, could re-ignite suddenly and swiftly, especially once the surge comes to an end. Moreover, inter-ethnic conflicts between Kurds, Arabs and Turkomans are looming in Kirkuk and Ninewa (Mosul), with other minorities also playing a role.

Politically, each of the major disputes today has tended to bring a different ad hoc and cross-communal coalition of parties to the table and, at times, into the street:

- The Kurdistan Alliance’s and ISCI’s push for extreme decentralisation – the former to cement Kurdistan’s separate status and, eventually, promote independence; the latter to push its own agenda of creating a Shiite “super” region in the south⁵ – has been opposed by a loose and fragile counter-alliance of Sunni, Shiite and secular parties, in which each propounds a different view on the acceptable degree of decentralisation or how and when it should be effected. The ISCI-Kurdish alliance bore fruit in an important backroom deal on federalism and the status of disputed territories, including Kirkuk, in 2005 negotiations over the new constitution⁶ and has held ever since.
- Progress in negotiations over a hydrocarbons law has been blocked by a fundamental Arab-Kurdish divide that is compounded by deep Sunni Arab unease over the fact that the vast majority of Arab Iraq’s oil wealth is located in predominantly Shiite areas.
- The boundary question is another example of primarily Arab-Kurdish enmity, but in this case the debate is complicated by a boundary dispute

⁴In 2005 the Patriotic Union of Kurdistan and the Kurdistan Democratic Party nominally unified their two parallel administrations into the Kurdistan Regional Government (KRG) headquartered in Erbil. In effect, however, the two parties continue to administer their respective areas of influence, a fact institutionalised in the appointment of alternating ministers and deputies for all executive KRG posts.

⁵ISCI and the Kurdish parties have a longstanding relationship, dating from the Iran-Iraq war. See Crisis Group Middle East Report N°70, *Shiite Politics in Iraq: The Role of the Supreme Council*, 15 November 2007.

⁶See Crisis Group Middle East Briefing N°19, *Unmaking Iraq: A Constitutional Process Gone Awry*, 26 September 2005.

³See Crisis Group Middle East Report N°52, *The Next Iraqi War? Sectarianism and Civil Conflict*, 27 February 2006.

among the (Arab) governorates of Anbar, Karbala and Najaf.

- In seeking to reverse the most offensive aspects of post-2003 de-Baathification, Sunni Arab and secular parties encountered strong resistance from Shiite Islamist parties who faced heavy repression under the former regime, while finding unlikely allies in the Kurds, who suffered similarly but successfully integrated former Baathists into their own society after they gained de facto autonomy in late 1991 – a model they seek to emulate in all of Iraq. Resistance may prove even stronger when the issue is absorption of erstwhile insurgents into the security forces and state institutions.
- Finally, the prospect of provincial council elections later this year has brought a spasm of intra-Shiite violence between the Sadrists and ISCI; the latter, backed by the Maliki government in which it is a dominant partner, has little interest in such elections or in the Sadrists' participation in them, as it would stand to lose significant ground given its poor governance record of the past three years.⁷

Some of the parties that are negotiating these issues poorly reflect the political forces at play. The strongest actors among Sunni Arabs, for example, are the tribal Awakening councils and both current and former insurgent groups, not the two coalitions that won seats in the December 2005 elections, the Iraqi Consensus Front (aka Al-Tawafuq) and the Iraqi National Dialogue Front (aka Al-Hiwar). On the Shiite side, ISCI and Daawa may be able to win elections as part of larger coalitions, but as individual parties they do not enjoy broad popular support; the Sadrists, by contrast, have a significant popular base but lack unity and internal discipline, as well as consensus over the best strategy to gain power – through politics, violence or a combination of both – and this has rendered their parliamentary bloc weaker than their movement's numbers would suggest.

The Kurds have become key players as protagonists in both the nationalist and the winners-vs.-losers contests. Their principal goal, and the reason they willingly play the political game in Baghdad, is to expand both territory (and thereby resources) under

their control and the powers they enjoy within that territory, hoping to maximise their chances of future independence. The constitution survived a massive Sunni Arab “no” vote that failed to clear the required threshold; today, subject to review, it in effect cannot be amended without the approval of ISCI and the Kurds, who oppose any major change.

This means that a breakthrough in negotiations on the essential concerns outlined above is extremely difficult. Having gained central power, the ruling alliance is blocking any attempt to roll back regions' authority accorded in the constitution; sparring with other factions inside and outside the federal government over a comprehensive oil and gas law; using the constitution in its quest to incorporate oil-rich territory into powerful regions only nominally linked to the federal government; and resisting provincial council elections, the outcome of which could curb its federal and territorial ambitions. By linking implementation of the constitution on the status of disputed territories (Art. 140), in particular, to its cooperation on other issues, including the oil law and constitutional review, it has intertwined and locked up all the key concerns that must be settled if Iraq is to regain its footing.

Two things are becoming increasingly clear: The interlocking nature of these issues means they cannot be solved individually or sequentially. And this government, these politicians – in the current power balance produced by the 2005 elections – do not want, nor are able, to take advantage of the surge to produce agreement on fundamentals. As an Iraqi official put it, progress on political reform has been slow because the parties that control the system benefit from it and therefore resist changing it.⁸

This suggests that the current piecemeal approach toward deal-making should be replaced with efforts to bring about a package deal that goes to the very heart of questions about power and resources, and therefore about federalism, oil and internal boundaries; encourages reconciliation/accommodation; and ensures provincial and national elections.

If indeed the political parties prove unable to accomplish such a deal, all energies should be invested in an alternative involving, not a toothless parliament, but a national conference in which the UN, U.S. and other organising states press a broad range of Iraqi leaders, drawn from both ruling and opposition parties, insurgent groups (other than al-Qaeda in Iraq), militias,

⁷ Although the Kurdish parties and ISCI are strong allies and dislike the Sadrists in equal measure, no predominantly Kurdish unit of the Iraqi army was sent to Basra to fight the Sadrists, as the ISCI-Kurdish alliance is tempered by the Kurds' need to secure, first and foremost, the territory and powers of the Kurdistan region.

⁸ Presentation by Safa Rasul Husein, deputy national security adviser of the government of Iraq, EU Institute for Security Studies, Paris, 14 April 2008.

local communities and tribal units, to forge a national consensus that produces a new political compact based on all the issues detailed in this report. As Crisis Group has proposed previously,⁹ such an approach will require a U.S. regional strategy that takes into account legitimate interests of Iraq's neighbours, Iran and Syria included, and is coordinated with U.S. allies acting as true partners rather than mere water carriers. This is essential both to pressure local parties and to prevent them from turning to regional sponsors as an alternative to compromise.

The alternative would be dire: today the battle over power and resources is being conducted largely inside the political arena, but if and when U.S. forces draw down, and absent an overall agreement, it will be fought far more violently in the streets. Then, once the ensuing civil war finally draws to a close, Iraqis will still need to return to these fundamental concerns and settle them. Far better to use the current window and act now. Unfortunately, there is every sign the Bush administration is not prepared to do this. In that case, it should become the top priority of its successor.

II. A HYDROCARBONS LAW

A transparent, efficient and equitable framework for the management of oil and gas wealth arguably is the most important building block of a new Iraq. The country derives the bulk of its budget from these revenues,¹⁰ having no comparable export product or other income source of significant value.¹¹ Moreover, a single agreed system for sharing oil wealth could enhance Iraq's chances of remaining a single political unit, regardless of whether it has a centralised, semi-decentralised or highly decentralised system of government – an interest the U.S. shares with Iraq's neighbours. As a U.S. official put it, “a hydrocarbons law, if passed, would instil revenue sharing and thus help keep the country together”.¹² As such, an agreement on management of oil and gas wealth would be critical evidence of Iraqis' ability and willingness to share power and resources.

In light of its importance, it is no surprise that the oil question has given rise to deep suspicions on the part of political actors about each other's motives; these, in turn, have hobbled negotiations over a comprehensive hydrocarbons legislative package. After months of wrangling, the parties have not been able to agree on a law.

This has real, immediate consequences. Without a law, large international oil companies have been reluctant to invest in the oil industry¹³ and the country may not

¹⁰In 2007, the Iraqi government earned \$39.8 billion from foreign sales of oil or about 95 per cent of its total income. *The New York Times*, 11 March 2008.

¹¹The White House put it this way: “The Hydrocarbon Framework Law and the companion Revenue Sharing Law are fundamentally important to defining federalism in Iraq. If adopted, they would: catalyze new sources of investment capital and technology for the oil and gas sector; facilitate substantial near term increases in government revenues which could be used for the benefit of Iraq's people; and serve as a vehicle for political reconciliation between regions and communities”, “Benchmark Assessment Report”, The White House, op. cit.

¹²Crisis Group interview, U.S. official, Baghdad, 28 March 2008.

¹³This should be qualified: five major oil companies, as well as a host of national oil companies, have been negotiating with the federal government for technical-service contracts and to revive Saddam-era contracts. Moreover, over a hundred companies, including all majors, competed to be shortlisted by the ministry of oil; 35 were indeed shortlisted for an upcoming round of tenders. Finally, Japan and the World Bank have made loans to the energy sector despite the absence of the law. In February 2008, the Iraqi government announced it might issue temporary (two- or three-year)

⁹See Crisis Group Middle East Report N°60, *After Baker-Hamilton: What to Do in Iraq*, 19 December 2006.

meet its production targets.¹⁴ The absence of a clear and uniform legal framework perpetuates uncertainty and is bound to hamper efforts at developing the hydrocarbon sector. Together with insecurity, it creates an added disincentive for investment. Moreover, the Kurdistan Regional Government (KRG) has begun exploring its own energy potential without the federal government's consent, encouraging oil companies to invest in the region pursuant to the KRG's own oil and gas law, which the Kurdistan National Assembly passed in August 2007.¹⁵ It has done so at least in part to put pressure on its (Iraqi Arab) counterparts to make concessions and come to an agreement over a law (see below).¹⁶

To date, the KRG has issued unilaterally some 21 contracts to international oil companies, provoking great tensions with the federal government. Iraq's oil minister, Hussain al-Shahristani, declared the KRG contracts illegal and warned oil companies that those found to be doing business with the KRG could be excluded from future contracts with the federal government;¹⁷ as a result, none of the largest oil companies has signed a contract with the KRG so far.¹⁸

contracts to international companies to rehabilitate and expand oil facilities. Several companies expressed interest but made clear that major investments will have to wait for greater security as well as a legal framework to be in place. Reuters, 19 February 2008. For contracts issued by the Kurdistan Regional Government, see below.

¹⁴ Iraq produced 2.4 million barrels per day (bpd) of crude oil in February 2008; its goal for 2010 is 3.4 million bpd. The Pentagon has questioned whether the government will be able to meet this target in the absence of a hydrocarbons law. "If the uncertain legal environment and the lack of a hydrocarbon legislation package continue to stifle foreign investment in production, refinery and transport infrastructure, meeting the ICI [International Compact with Iraq] goal for 2010 will be in jeopardy", "Measuring Stability and Security in Iraq", U.S. Department of Defense, report to Congress, 7 March 2008, p. 11, at www.defenselink.mil/home/features/Iraq_Reports/index.html.

¹⁵ "Oil and Gas Law of the Kurdistan Region – Iraq", 6 September 2007, at www.krg.org/articles/detail.asp?rnr=107&lngnr=12&smap=04030000&anr=20267.

¹⁶ A Kurdish oil expert argued that the KRG passed its own oil law in order to accelerate discussions over a federal law, with results: "After our draft law was published, a [federal] oil committee was set up in a hurry". He added that the KRG's law would have to be consistent with the eventual federal law and might therefore have to be amended. Presentation and comments at a Centre for Global Energy Studies conference, London, 7 December 2006.

¹⁷ Shahristani declared: "All these contracts have no legal base and do not fit with the existing laws, nor with the draft [oil law] which has been agreed", and added: "We hold these firms to be legally responsible ... and we have warned

At the core of the oil dispute lie two opposing views on the role of the state in the economy as well as the struggle between Kurdish and Arab nationalism: The Kurds want to minimise the role of the state in managing the oil sector and have final say over the development of fields on their territory. This reflects a deep-seated mistrust of Baghdad based on both distant and recent historical experience: the use of oil wealth by successive regimes to oppress the Kurds or the erratic release of agreed budgetary resources by the current government.¹⁹ The Kurds appear to be seeking to enhance economic self-reliance to maximise their autonomy and chances of future secession. Most other Iraqis, including some Shiite political leaders, do not view the emerging Iraqi state as a threat. They seek to strengthen it economically and institutionally and hope to dominate it in the future. Finally, resource nationalism is an important component of political culture for most Iraqis.

The negotiations have given rise to a new cross-sectarian, all-Arab alliance between the (Shiite) United Iraqi Alliance (UIA) and the (Sunni) Iraqi Consensus

them that they will bear the consequences", Reuters, 24 September 2007. The KRG's prime minister, Nechirvan Barzani, countered: "I'd like to say frankly that Iraq's oil minister, Hussain al-Shahristani, cannot nullify any contract the Kurdistan government has concluded with the foreign companies....And the Kurdistan government will continue with concluding contracts within the context of Iraq's constitution. And if there is any problem of such kind, we have a constitutional court, and al-Shahristani can resort to this court", quoted by Associated Press, 26 November 2007. For the KRG's official (angry) response, see www.krg.org/articles/detail.asp?anr=20130&rnr=223&lngnr=12&smap=02010100.

¹⁸ Several big oil companies have signed contracts with the KRG (Hunt Oil, OMV, Reliant Oil, as well as TNK-BP, a Russian company half-owned by BP), but none of the largest, the so-called Supermajors Group (ExxonMobil, Chevron, Shell, Total, Conocophillips and BP), nor of the "New Seven Sisters" (Saudi Aramco of Saudi Arabia, JSC Gazprom of Russia, CNPC of China, NIOC of Iran, PDVSA of Venezuela, Petrobras of Brazil and Petronas of Malaysia – all state-owned national oil and gas companies).

¹⁹ Crisis Group interview, senior KRG official, Salah al-Din, 28 January 2008. There already have been disputes over prompt payment of the 17 per cent of the Iraqi budget to which the Kurdistan region is entitled by law. According to the *Los Angeles Times*, 14 February 2008, passage of the 2008 annual budget bill was delayed by "squabbling over a demand by the Kurdish north that 17 per cent of central government spending be directed to that region. Some Sunni and Shiite politicians argued that the region no longer accounts for that much of the Iraqi population, but agreed to allow it to retain 17 per cent pending a census this year".

Front (ICF).²⁰ Even the Islamic Supreme Council for Iraq (ISCI), whose alliance with the Kurds has defined power and governance since 2003,²¹ opposed the Kurds.²² One of its senior officials, Sheikh Jalal al-Din al-Saghir, said:

I asked the Kurds what they would do if southern governorates established a federal region and closed the ports [at Basra] and if Turkey attacked the Kurds from the north. The point is that no group in Iraq can claim to be the only representative of all Iraqi communities. This is why the groups should sit at the negotiating table and discuss these problems with each other. The oil problem is at the top of the list and the political leadership should be able to solve it.²³

The oil law battle has expressed itself primarily in technical terms and has centred on two core issues: the right to manage fields and sign contracts on the one hand, and the fields' location and classification on the other.

Kurdish authorities insist on their right as a regional government to develop oil fields they suspect exist within their territory and assert that their contracts, so-called production-sharing contracts (PSCs), are consistent not only with the KRG's oil law but also

with the Iraqi constitution. A senior KRG official contended:

We need PSCs here for exploration. Why would we want to give a penny to oil companies? We need their money and management skills and their willingness to be in it for twenty years. They may find nothing and lose. They get barely 11 per cent of profits. This is not a lot, given the risk, the cash flow and the technology. We can only entice them with longer-term contracts. And we have chopped up the area in order to encourage competition.²⁴

Many Iraqis oppose PSCs, because these give oil companies a far greater share of profits than any other contracts in the industry, such as service contracts (see below), and they accuse the Kurds of selling out the country.²⁵ The leader of the Iraqi Communist Party, which has historically been close to the Kurdish parties,²⁶ put it this way:

We oppose PSCs because the majority of oil countries no longer use them. It's not reasonable to give such a percentage [of revenues] to oil companies. In some countries, like Russia, they accept these deals either because of corruption or because of technical problems, such as presented by rock formations. In Iraq such difficult areas [fields] amount to no more than 2 or 3 per cent. We can put these aside perhaps

²⁰The UIA consists overwhelmingly of Shiite Arab parties and personalities (it contains a Shiite Kurdish and a Shiite Turkoman party as well); the ICF, also known as Al-Tawafuq, is a Sunni Arab coalition.

²¹ See Crisis Group Report, *Shiite Politics in Iraq*, op. cit.

²²The only one to have come out on the Kurds' side is the Iraqi National Accord, a small party with limited support whose leader, Iyad Allawi, lives in exile. Allawi has a longstanding alliance with the Kurdish parties, especially Masoud Barzani's KDP, dating from the early 1990s. The INA has been part of the National Iraqi List, a coalition of secular parties that gained 25 seats in the December 2005 parliamentary elections. Only the INA has supported the Kurds on the oil issue, not the National Iraqi List as a whole. See "Iraqi National Accord shares KRG's position on revenue sharing and oil contracts", 3 March 2008, at www.krg.org/articles/detail.asp?lngnr=12&smap=02010200&rn=73&nr=23127.

²³He also said: "our brothers in the Kurdish Alliance are divided into two schools: the school of Mr Talabani, which believes in compromise, and that of Mr Barzani, which believes that now is a historical moment that the Kurds should exploit", Crisis Group interview, Sheikh Jalal al-Din al-Saghir, member of the council of representatives for the UIA, a senior official of ISCI and member of the constitution review committee, Baghdad, 7 January 2008.

²⁴Crisis Group interview, senior KRG official, Salah al-Din, 28 January 2008. The pertinent language in the Iraqi constitution (Arts. 111 and 112) is overly broad and therefore particularly amenable to contradictory interpretations. An English translation of the constitution can be found at www.krg.org/articles/detail.asp?lngnr=12&smap=04030000&rn=107&nr=12329. Regrettably, English translations of the constitution have tended to be very poor. The translations rendered in this report are Crisis Group's own.

²⁵The contracts issue has caused controversy in the Kurdistan region itself as well. Kurdish critics have questioned the contracts' content, which has remained secret, and have alleged malfeasance on the KRG's part. Accusations of corruption have been rife in the Kurdistan region for some time; given the amount of money suspected to be involved, the contracts question has only poured oil on the fire. Crisis Group interviews, independent Kurds, Erbil and Suleimaniya, January 2008.

²⁶During the years of exile (1980s mostly), the Iraqi Communist Party ran a guerrilla outfit that operated alongside Kurdish *peshmergas* in northern Iraq. The party was headquartered in the Kurdistan region in the 1991-2003 period.

until we have developed our own capacity to exploit them.²⁷

Likewise, the Iraqi Consensus Front, a coalition of Sunni Islamist parties, has opposed the KRG's draft version of the federal hydrocarbons law because it invests the right to sign contracts in regional governments, not the federal oil council, and because it "does not prevent PSCs, which should be used in exceptional cases only".²⁸

PSCs are the preferred type of contracts when oil fields remain unexplored and infrastructure must still be established. This involves unusual risks and attendant high costs. As an oil expert summed up prospects in the Kurdistan region, "A lot of oil will be found, but a lot of companies will not find oil".²⁹ To make their investments worthwhile, oil companies require long-term contracts that yield large returns. By contrast, the industry uses "technical-service" contracts (TSCs) for existing oil fields, where the key concern is infrastructure rehabilitation and maintenance. Most existing fields are in the south, whereas many new fields with real potential lie in the Kurdistan region.

Iraqi officials working on the hydrocarbons law have argued that current fields, once rehabilitated, will yield sufficient crude oil to meet OPEC's export quota and that therefore no new fields need to be brought on-stream. They argue that it would be more efficient to develop the cheaper resources in the already discovered fields, especially since the returns are to be shared equitably and efficiently.³⁰ This sounds reasonable until one realises, as Kurdish officials are quick to point out, that this implies that new fields in the Kurdistan region will not be exploited. Kurdish leaders accuse the federal government of perpetrating an updated version of one component of Saddam Hussein's Arabisation campaign: the refusal to develop

the Kurdish governorates.³¹ In other words, the Kurds need PSCs to develop their own wealth; the rest of Iraq can do with standard contracts and has no interest in furthering Kurdish interests. So far a workable compromise has eluded negotiators.

The location of oil fields is another key sticking point. The Kurds' principal short-term ambition is to bring a huge swath of so-called disputed territories under the KRG's control, using a process and timetable laid out in Art. 140 of the constitution.³² They covet these areas in part because, they claim, they had a majority-Kurdish population historically but also because some are rich in oil. The Kirkuk fields alone contain 13 per cent of Iraq's proven reserves (15 billion out of 115 billion barrels).³³ Other areas claimed by the Kurds may also contain oil, although no development has yet taken place.³⁴

The Kurds have repeatedly asserted that it should not matter who controls the oil fields – the federal government or the KRG – and therefore whether the disputed territories are incorporated into the Kurdistan region, because the KRG has agreed to transfer revenues from oil sales from fields in the Kurdistan region to the federal government.³⁵ But although this may not matter today, it will if and when the Kurdistan region seeks or declares its independence: Why would

²⁷ Crisis Group interview, Hamid Majid Mousa, a council of representatives member for the National Iraqi List, leader of the Iraqi Communist Party and member of the constitution review committee, Baghdad, 18 February 2008.

²⁸ Crisis Group interview, Salim al-Jubouri, council of representatives member for the ICF, an official of the Iraqi Islamic Party and a member of the constitution review committee, Baghdad, 8 January 2008.

²⁹ Crisis Group interview, Istanbul, January 2008.

³⁰ Tariq Shafiq, a former oil minister who assisted in drafting the oil law until he resigned over differences concerning the version that was eventually presented to the council of representatives in July 2007, has said that the country's oil and gas resources could be over-developed if oil management strategy were decentralised. Regional/provincial control over oil fields would bring new fields on-line, flooding the market, United Press International, 21 June 2007.

³¹ Crisis Group interviews, KRG officials, Erbil and Suleimaniya, 2003-2008. The former regime's Arabisation policy had other dimensions, for example, discouraging investments in the three Kurdish governorates and barring oil refineries from being based there.

³² Art. 140 of the constitution refers to "Kirkuk and other disputed areas/territories [*al-manateq al-ukhra al-mutanaazea*]", without specifying what these other areas are. It prescribes a process it calls "normalisation" (reversal of realities stemming from Arabisation policies), a census and a referendum. The latter was supposed to have taken place by 31 December 2007. For a brief discussion, see Section IV below.

³³ See Crisis Group Middle East Report N°64, *Iraq and the Kurds: Resolving the Kirkuk Crisis*, 19 April 2007, and Crisis Group Middle East Report N°56, *Iraq and the Kurds: The Brewing Battle over Kirkuk*, 18 July 2006.

³⁴ The Iraqi government has accused the KRG of issuing two contracts to foreign companies that concern fields located in disputed areas. One concerns a contract involving the Zakho field, the other a contract involving the Khurmala Dome field, which is part of the large Kirkuk field. The KRG's minister for natural resources, Ashti Hawrami, gave technical reasons to explain that while these fields might not lie in the Kurdistan region, the contracts were neither illegal nor improper. Crisis Group interview, Salah al-Din, 28 January 2008. See also, Ben Lando, "Kirkuk project battle heats up", United Press International, 28 November 2007.

³⁵ Crisis Group interview, Ashti Hawrami, KRG minister of natural resources, Erbil, 19 February 2007.

an independent Kurdistan agree to transfer oil and gas revenues to a neighbouring state, Iraq, if these revenues are a key to its own survival?

Revenues are not the only relevant factor. According to the constitution, management of “current” fields must be shared between the federal government and the government of the region in which a given field is located.³⁶ Should Kirkuk become part of the Kurdistan region, the KRG would still have to share management of its oil fields, as the Kirkuk field is long established and was producing at the time the constitution came into force.³⁷ But according to the KRG’s interpretation of Arts. 111 and 112(2) of the constitution, the KRG would exercise its exclusive right to develop any *suspected* fields both in the Kurdistan region and in disputed areas if and when these areas are incorporated into the Kurdistan region, because none of these fields have been explored, much less brought into production.³⁸

Art. 111 of the constitution states: “Oil and gas are the property of all the Iraqi people in all the regions and governorates”. Art 112(2) states in full:

The federal government, with the governments of producing regions and governorates, shall together formulate the required strategic policies to develop the oil and gas wealth in such a way as to achieve the highest benefit to the Iraqi people, relying on the most advanced techniques of market principles and investment promotion.

The KRG interprets this article to mean that because fields that are not yet producing – ie, not “current”, as in Art. 112(1) – are not mentioned explicitly in this article, their management falls exclusively under the region’s authority. It bases this on Art. 115, which

states: “All powers not stipulated as exclusive powers of the federal government are powers of the regions and governorates not organised in a region”.

Iraqi Arab officials hold a different view about how Art. 112(2) should be interpreted. An adviser to the prime minister said:

This article covers the discovery of oil fields, their development and their production, and these should be managed by the two sides – the federal government and the regions’ governments. Neither one should be the only side to formulate policy.³⁹

The fight, therefore, concerns the oil fields’ location and their classification: “current” or “prospective”, as well as the definition of “current”. Iraqi Arab officials hold that there are 75 “current” fields (as per the language of Art. 112(1)); these include 25 producing fields, 25 partially developed fields and 25 fields it calls “discovered but not yet developed”.⁴⁰ The KRG, by contrast, defines “current” fields as fields that are actually producing and has argued that partially and undeveloped fields should, therefore, be re-classified as “prospective” fields.⁴¹ If this were done, fields inside the Kurdistan region, as well as fields in disputed areas that eventually may be incorporated into the Kurdistan region, could fall under the region’s exclusive management (pursuant to the Kurds’ reading of Art. 112(2)). Iraqi Arab officials are vigorously resisting such re-classification.

For all the above reasons, efforts to achieve a hydrocarbons law to date have failed, despite several moments of apparent breakthrough in late 2006 and 2007,⁴² and again in April 2008, as well as new

³⁶ Art. 112(1) states: “The federal government, with the governments of producing regions and governorates, shall undertake management of oil and gas extracted from *current* fields, provided that it distributes its revenues in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a limited period to damaged regions that were unjustly deprived of them by the former regime or that were damaged afterwards, in such a way as to ensure balanced development in different parts of the country. This shall be regulated by law” (emphasis added).

³⁷ Crisis Group interview, senior KRG official, Salah al-Din, 28 January 2008.

³⁸ This explains the KRG’s anger at the federal government’s failure to implement Art. 140 of the constitution, which provided a roadmap toward solving the status of Kirkuk and other (undefined) disputed territories by 31 December 2007. The government postponed the deadline by six months, but it is highly unlikely that the process will be completed by 30 June 2008 either.

³⁹ Crisis Group interview, Ibrahim Bahr al-Uloum, adviser to the prime minister and a former oil minister, Baghdad, 16 January 2008. Another Iraqi official declared that oil management should be the sole authority of the government but should be effected in coordination with the regions. Presentation by Safa Rasul Husein, deputy national security adviser of the government of Iraq, EU Institute for Security Studies, Paris, 14 April 2008.

⁴⁰ Ibid.

⁴¹ In April 2007, the KRG minister of natural resources, Ashti Hawrami, contested oil field allocations in a federal government list (an annex to the draft oil law) on the basis that some of them were not producing fields and should, therefore, be re-classified; many of these fields were located in disputed areas in Diyala, Salah al-Din, Kirkuk and Ninewa governorates. “The Kurdistan Regional Government (KRG) clarifies its position regarding the latest developments on the Draft Oil Law”, 27 April 2007.

⁴² For example, Iraqi officials reported a breakthrough in talks over the distribution of oil and gas revenues in late

pressures on all sides generated by the surge.⁴³ The law has four components: a framework law governing management of the country's oil and gas fields, a revenue management law, a law to reconstitute the national oil company and a law to reorganise the oil ministry.

The main parties initially agreed to a framework law in February 2007, but following review by the consultative (*shura*) council, the Kurdish parties rejected it, alleging the council had amended the draft in a manner exceeding its remit and that the ministry of oil had added annexes that ceded greater control over currently producing oil fields and existing contracts to the Iraqi National Oil Company; INOC was given control over the 25 currently producing fields, which account for 93 per cent of proven oil reserves.⁴⁴ The Kurds argued this would be far too much control vested in a federal agency, a virtual throwback to the days of a centralised state. Unable to resolve the dispute, the prime minister and the Kurdistan Alliance (the main coalition of Kurdish parties) submitted two competing drafts to the council of representatives in July 2007. There the matter has languished.⁴⁵

The revenue management law has proven the least controversial. Indeed, the principle of equitable distribution of oil and gas wealth enjoys wide consensus. Art. 112(1) of the constitution states: "The federal government, with the governments of producing regions and governorates, shall undertake management of oil and gas extracted from current fields, provided that it distributes revenues fairly in proportion to the population distribution in all parts of the country...." Revenue effectively is already being spread evenly to the

2006 after Kurdish leaders indicated they would agree to the notion that revenues from fields *both current and future* should be shared. *The New York Times*, 9 December 2006. (Under Art. 112 of the constitution, only revenues from "current" fields must be shared nationwide; see below.)

⁴³The U.S. surge was meant to create space for political deals by suppressing the most violent non-state actors, such as al-Qaeda in Iraq and the Sadr movement's Mahdi Army. As a relative calm was established in Baghdad and some other key areas in late 2007, U.S. officials began to put pressure on Iraqi politicians to get on with the task of negotiating such deals.

⁴⁴Lionel Beehner, "Why Iraqis cannot agree on an oil law", Council on Foreign Relations, 9 May 2007.

⁴⁵Just as the KRG issued its own oil and gas law and started to issue contracts as a way of putting pressure on the government to agree to a federal oil and gas law friendly to KRG interests, so the oil ministry may now be attracting international investment in the oil and gas industry to increase its leverage in negotiations with the KRG. Crisis Group e-mail communication, oil expert, 19 April 2008.

governorates and Kurdistan region via the annual budget⁴⁶ notwithstanding the absence of a law. But the devil is in the mechanism. The Kurds do not trust the federal government to be the impartial repository of oil revenues. They fear it will withhold funds from the KRG or develop into another repressive Arab regime that, through use of this wealth, could once again seek to dominate the Kurds.⁴⁷ Kurdish negotiators, therefore, proposed a separate account in which royalties from oil and gas sales would be deposited, to be maintained either inside or outside Iraq but controlled by a nominally neutral body established on the basis of *muhasasa* (the apportionment of power and positions by an ethnic or religious community) over which the Kurds would have veto power.⁴⁸ This proposal has not been accepted by the other parties on the claim it violates the integrity of the budget process.

The council of representatives sent the draft revenue management law to the *shura* council for review in June 2007, and it remains there today, as do the other two subsidiary laws. In any case, the council of representatives cannot move on the revenue management law by itself: Kurdish negotiators have insisted that the council pass all four laws as a single package.⁴⁹

To break the deadlock some legislators have suggested that the matter be resolved through constitutional revision.

⁴⁶This point is controversial, as there is no recent reliable population census. During negotiations over the annual budget in January 2008, some political parties tried to change the standard allotment of 17 per cent of the budget for the Kurdistan region, claiming that that region's population did not represent that share of the total population. The effort failed, but a clause was added to the budget law to the effect that the Kurds' percentage would be revised as soon as a census was held.

⁴⁷The Iraqi regime used its post-1973 oil wealth not only to establish an impressive infrastructure, provide free health care to all its citizens and send its best students abroad for higher education, among other benefits of the welfare state; it also raised a large army that invaded Iran in 1980 and suppressed a Kurdish insurgency with increasingly brutal means, including the massive use of chemical weapons and the extermination of tens of thousands of Kurdish villagers. See Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven and London, 1995).

⁴⁸Crisis Group interview, Ashti Hawrami, KRG minister of natural resources, Erbil, 19 February 2007.

⁴⁹The most recent declaration to this effect came from Nechirvan Barzani, the KRG prime minister, in a speech in Erbil on 22 April 2008: "We have also agreed that the national oil law, the revenue sharing law, and the laws concerning the Iraqi National Oil Company and the Oil Ministry in Baghdad will be submitted as one package", at www.krg.org.

A UIA legislator pointed to Art. 112's ambiguous wording:

First, Art. 112(1) includes the word "with" and Art. 112(2) includes the word "together".⁵⁰ This shows that a regional government cannot act alone concerning contracts. Secondly, Art. 112(1) ends with: "This shall be regulated by law". But because there is no law yet we should base ourselves on the current law and the current oil ministry until the new law is ready. The current oil law does not permit or authorise a regional government to sign contracts.⁵¹

Hussam al-Aazawi, a lawmaker with the National Iraqi List, a small coalition of secular parties, put it more bluntly: "We believe that the central government should have the final word on such matters. We therefore want the constitution review committee to change Article 112 to give the central government sole authority over oil policy now and in the future".⁵²

Kurdish officials disagree. A council of representatives member claimed that the Kurds' detractors

want management of oil wealth to be in the hands of the central government. But Kurdistan is a federal region, and federalism means not only administering but also having the authority to manage that region's oil wealth. Articles 111 and 112 give the government of Kurdistan the

right to formulate its own oil policy and manage its own fields.⁵³

As a senior KRG official put it, "what they [the federal government] cannot accept is that they are not the sole beneficiaries of this nation. We are not robbing them".⁵⁴

In any event, the constitution review also has hit a major roadblock because of the oil issue as well as other matters (see below). As a result, another legislator, Nadim al-Jaberi of the Islamic Virtue (Al-Fadhila) Party, has proposed circumventing the council of representatives altogether by staging a popular referendum:

While the council of representatives is the representative of the people, it should not decide the fateful issues but return these to their real "owners". Since oil revenues are the basis of the economy, a referendum will be necessary, because this issue will determine people's lives and destinies. The Iraqi people should take the decision.⁵⁵

This approach is also unlikely to receive significant support, however, and the oil legislation is likely to remain deadlocked.

⁵⁰ Art. 112(1) states: "The federal government, *with* the governments of producing regions and governorates, shall undertake management...." Art. 112(2) states: "The federal government, with the governments of producing regions and governorates, shall *together* formulate the necessary strategic policies..." (emphasis added).

⁵¹ Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008. In June 2007 the Constitution Review Committee, which has five Kurdish members, proposed to eliminate the distinction between current and future fields altogether and resolve remaining ambiguities to the benefit of the federal government. The committee's draft report was subsequently rejected by the Kurdish political leadership.

⁵² Crisis Group interview, Baghdad, 11 January 2008. The National Iraqi List, also known as Al-Iraqiya, was the 2005 electoral incarnation of Iyad Allawi's Iraqi National Accord, a staunchly secular party bred in exile that has enjoyed scant popularity following its return in 2003 but that now plays a bridging role between nationalist Shiite and Sunni parties that have been divided along sectarian lines (especially the Sadrists and Al-Tawafuq).

⁵³ Crisis Group interview, Friad Rawanduzi, a council of representatives member for the Kurdish Alliance, a PUK official and member of the constitution review committee, Baghdad, 10 January 2008.

⁵⁴ Crisis Group interview, Salah al-Din, 28 January 2008.

⁵⁵ Crisis Group interview, Baghdad, 25 February 2008. The Islamic Virtue Party (Al-Fadhila) is a party that is strong particularly in Basra, much less so in Baghdad. It has profiled itself as an Islamist and nationalist party and has supported regionalism only in relation to the greater Basra area.

III. FEDERALISM

A significant reason for lack of progress on the oil law is the unresolved question of how territory will be divided and power allocated in the new federal system, including a region's right to manage resources within its territory. In October 2006, the council of representatives passed a law creating a mechanism for establishing federal regions.⁵⁶ Sponsored by parties that reject a strong central state – the Kurdistan Alliance and ISCI – it met fierce opposition from an array of parties that project themselves as nationalist but are divided on just about everything else. They argued that the law represents the first step toward creating an extremely loose federal system that will be ill equipped to resist strong centrifugal forces. An official of the Iraqi Consensus Front, for example, contended that the federal system prescribed by the constitution is essentially a form of confederation based on sect or ethnicity that will keep the central government weak and unable to address problems in the regions. This, he said, “is going to lead to Iraq's partitioning”.⁵⁷

The draft law proved highly divisive. Only a last-minute compromise to delay its implementation by eighteen months allowed it to be brought to a vote; it squeaked through on the narrowest of majorities. The law was to come into force in April 2008 but had not at the time of this report's publication; its active implementation is likely to be accompanied by great acrimony, as the basic political line-up remains unchanged and the federalism issue continues to provoke heated sentiments on all sides.

In the meantime, the council of representatives began work on a number of other laws, including a provincial powers law, a draft of which it completed in February 2008. However, the same parties that favour extreme decentralisation, ISCI and the Kurdistan Alliance,

opposed the draft law on three grounds: a provision allowing the council of representatives to remove provincial governors in certain circumstances, a provision giving the council of representatives control over aspects of individual provincial budgets and the inclusion of a deadline for provincial council elections, 1 October 2008. Both ISCI and the Kurdistan Alliance have stood for maximum powers of not only regions but also individual governorates (the subject of the draft bill). As a council of representatives member explained it:

The Kurds and the Supreme Council want to give more powers to the governorates while the others want to give the governorates only a minor role. The latter believe that giving the governorates a bigger role will make the federal government powerless. Daawa and the Sadrists are of that view. The Kurds reject any amendment concerning provincial powers because they think any change would give more power to the federal government at their expense.⁵⁸

Moreover, both ISCI and the Kurdistan Alliance have resisted early provincial elections, as they fear losing some of the power they won in the January 2005 elections (see below).

To overcome their opposition, the president of the council of representatives, Mahmoud Mashadani, decided to bundle the provincial powers law with two other pieces of legislation, the annual budget and an amnesty law, and bring the three draft bills to a joint vote. Because this package provided something for everyone, it mustered majority support and was sent to the three-member presidency council for approval.⁵⁹ The latter body signed off on the budget and amnesty law, but one of its members, ISCI's Adel Abd-al-Mahdi, withheld his signature from the provincial powers law, thus returning it to the council of representatives for amendment and another vote.⁶⁰

⁵⁶The Bush administration took credit for this law retroactively as evidence of progress on the benchmarks. The White House stated in September 2007: “The Government of Iraq has made satisfactory progress toward enacting and implementing legislation on procedures to form semi-autonomous regions. The COR passed the Regions Law [in October 2006] with a delayed effective date.... The United States Government encouraged Iraqi political parties to reach a compromise on this law”, “Benchmark Assessment Report”, The White House, 14 September 2007, at www.whitehouse.gov/news/releases/2007/09/20070914.html.

⁵⁷Crisis Group interview, Salim al-Jubouri, council of representatives member for the ICF, an official of the Iraqi Islamic Party and a member of the constitution review committee, Baghdad, 8 January 2008.

⁵⁸Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008.

⁵⁹Forces were arrayed in such a way that a compromise could be forged allowing for passage of all three laws simultaneously by having legislators approve each clause separately and then vote on the three bills as a package; this mollified supporters of each law who opposed one or both other laws. Council of representatives speaker Mahmoud al-Mashadani proclaimed afterwards: “Today is [like] a wedding celebration for the Iraqi parliament”, *Los Angeles Times*, 14 February 2008.

⁶⁰*The Washington Post*, 28 February 2008.

As the issue threatened to contaminate discussions on a host of other legislative matters⁶¹ and the U.S. was keen to see the provincial powers law approved and provincial council elections go forward,⁶² negotiations intensified first to prevent Abd-al-Mahdi from blocking the legislation and subsequently to drop his veto in exchange for unspecified amendments to the law, to be made after the elections. U.S. Ambassador Ryan Crocker visited ISCI leader Abd-al-Aziz al-Hakim in his Baghdad compound before Abd-al-Mahdi's veto and President George Bush telephoned Hakim after it. Finally, two days after a visit to Baghdad by U.S. Vice President Dick Cheney in March 2008, Abd-al-Mahdi dropped his resistance to the law, which subsequently was approved.⁶³

The provincial powers law is due to come into effect as soon as published in the Official Gazette. Proponents of extreme decentralisation will consider this a setback to their aspirations, but they have other cards they could play. For example, ISCI and the Kurdistan Alliance could seek to trump the provincial powers law with the law on the formation of regions, once it enters into force, by encouraging governorates to form regions, which enjoy broader powers than governorates. ISCI, for example, could press for provincial referendums in the south in pursuit of its declared aim of establishing a nine-governorate Shiite "super" region. The Kurdistan Alliance, in turn, has been pushing for implementation of Art. 140 of the constitution in its bid to expand the Kurdistan region by incorporating heavily Kurdish districts located in adjacent governorates. By this logic, the remaining governorates, by default heavily Sunni and Arab, could then consider joining as a counterweight against

the Kurdistan region and an ISCI-dominated southern region, both of which would be fuelled by the bulk of the country's oil wealth.

Although neither the Kurdistan Alliance nor ISCI may get very far in realising their ambitions,⁶⁴ in and of themselves the quests are inflaming and polarising the debate over how decentralised the country should be. Resistance is coming from a new ad hoc coalition of parties that opposes either decentralisation on principle or the extreme degree of decentralisation favoured by ISCI and the Kurds, including the notion of a Shiite "super" region.⁶⁵ In addition to fighting the law on the formation of regions, these parties seek to amend Art. 115 of the constitution, which states:

All powers not stipulated as exclusive powers of the federal government are powers of the regions and governorates not organised in a region. With regard to other powers shared between the federal government and regions' governments, the law of regions and governorates not organised in a region shall have precedence in case of dispute.

As the constitution accords very few exclusive powers to federal authorities, Art. 115 highlights the federal government's profound weakness and possibly even inferior status to that of regional entities. This makes for ineffective governance⁶⁶ and, moreover, could prevent it from managing conflict between regions and between itself and regions; in turn, this could lead to de facto regional secessions. It is this potential that enemies of

⁶¹ One of the bill's supporters said (before U.S. intervention): "The presidential council has the right to veto laws that were passed by the council of representatives. But because of this law's importance and because it was part of a political deal that was approved by the political leaderships (including the presidential council), this law was not supposed to be vetoed. The presidential council's rejection of the law will create a conflict in the council of representatives. It will take us back to square one, with major differences and a deep lack of trust. This will paralyze the council so that no law will be passed, even if a purely technical one, and the council still needs to vote on important laws, such as the oil law, the elections law and the political parties law. The basis of the political deal was the lack of trust between the blocs; this is what made them vote on the three laws as a single package", Crisis Group interview, Karim al-Ya'qoubi, council of representatives member for the Islamic Virtue Party, Baghdad, 5 March 2008.

⁶² Crisis Group interviews, U.S. State Department and National Security Council officials, Washington DC, February 2008.

⁶³ *Los Angeles Times*, 20 March 2008.

⁶⁴ The Kurds failed in realising their constitutionally mandated goal of determining the status of disputed territories through referendums by 31 December 2007 and now face an uphill battle to incorporate these areas into the Kurdistan region. ISCI, in its quest, will bank on its political power in southern governorates to stage referendums, but its lack of popular support may deprive it of the majorities it will need to create the sort of region it envisions.

⁶⁵ In January 2008, twelve parliamentary blocs and parties (Sunni, Shiite, as well as secular politicians) signed an agreement in which they opposed the creation of a Shiite "super" region, called for a negotiated solution to the Kirkuk problem and insisted on the federal government's right to manage the country's oil wealth. See the report on Juan Cole's blog, "Informed Comment", 14 January 2008, at www.juancole.com.

⁶⁶ An Iraqi official stated that the constitution provides for a weak federal government because it was written with "a sense of fear of central government". However, he said, it has become obvious that a weak government cannot deliver essential services. Presentation by Safa Rasul Husein, deputy national security adviser of the government of Iraq, EU Institute for Security Studies, Paris, 14 April 2008.

extreme decentralisation fear and oppose. As a politician affiliated with the Islamic Virtue Party put it:

We don't want to deprive regions and governorates of their powers, but at the same time we don't want governorates and regions to be independent and the centre to be isolated. We want greater balance between centre and regions. We therefore oppose the constitutional article about disputes between centre and regions where a region's law prevails.⁶⁷

Al-Fadhila favours decentralisation by governorates rather than federalisation (the creation of regions) and has urged that implementation of the law on the formation of regions be postponed once more, given the risk of political violence and popular lack of familiarity with the concept of federalism.⁶⁸ The secular National Iraqi List has also called for further postponement:

We are not against federalism but against its implementation now. Federalism today is

sectarian. It should be postponed for five years until the state and its institutions become stronger and the government performs better. We are in a chaotic situation right now.⁶⁹

The federalism debate has created serious dissension within the United Iraqi Alliance, of which ISCI is the most powerful member. Always a very loose coalition, the UIA has become increasingly divided between those favouring and those opposing extreme decentralisation, with the latter defecting in 2007.⁷⁰ No issue has more focused the debate than the country's oil wealth. For example, Abbas Bayati, a UIA member who sits on the constitution review committee, declared:

We believe that the federal government and the regions' governments should cooperate in managing oil fields and that the federal government should be in charge of distributing revenues. The Iraqi economy depends on oil revenues; no region or governorate should be allowed to earn oil revenues and provide only a small share to the federal government. This would weaken the federal government. We believe that the federal government and regional governments should be equally strong.⁷¹

An official of the Islamic Virtue Party concurred: "Oil contracts should be handled by the federal government. We would face a lot of trouble if the governorates took control of these".⁷²

The Sadr movement strongly opposes any federal solution that, in its view, could lead to partition;⁷³ moreover, it has repeatedly asserted that no federal schemes should be implemented as long as the country remains under U.S. occupation. The (Sunni Arab) Iraqi Consensus Front has indicated it accepts federalism in principle but not the type of regionalisation

⁶⁷ Crisis Group interview, Hassan al-Shammari, head of the Islamic Virtue Party in the council of representatives and member of the constitution review committee, Baghdad, 23 February 2008. He also contended that "the problem is that we don't live in conditions of political stability, and so this is not the time to decide the shape of government. We cannot decide now because Mosul and Kirkuk are not stable. Who would govern these federal regions? Do we just want to give an impression that there is a democratic process or do we want real solutions and real stability?" He also suggested that some parties (a reference to ISCI) are using the example of the Kurdistan region to claim that federalism will solve the country's woes, but that "Kurdistan has a lot of problems; only rich people are making use of the huge investments there. Services are still bad and so citizens are not living in good conditions. As for stability there, I think it's temporary". Moreover, he suggested that a Shiite "super" region would deter international support and investment: "Decentralisation by governorates will not threaten U.S. interests, but 'federalism of the centre and south' will. Such a [Shiite 'super'] region would fall under Iranian influence and thus would threaten the U.S. and Arab countries. It would be a time bomb and the people of the centre and south would pay the price. For example, there wouldn't be any U.S. or Arab investments. Look at Lebanon: Who wants to invest money in the south with all its links to Iran and Syria?"

⁶⁸ Crisis Group interview, Nadim al-Jaberi, head of the Islamic Virtue Party and council of representatives member, Baghdad, 23 February 2008. He said, "although the constitution provides for a federal system, the notion has not entered the culture of the political elites or consciousness of the Iraqi people. It is considered an 'imported' culture and, except for the Kurds, didn't appear into Iraqi political thinking until April 2003. Because of this the issue is still controversial".

⁶⁹ Crisis Group interview, Hussam al-Aazawi, council of representatives member for the National Iraqi List, Baghdad, 11 January 2008.

⁷⁰ In 2007 both the Sadrist and the Islamic Virtue Party withdrew from the UIA, leaving behind ISCI, Prime Minister Maliki's faction of the Daawa Party and a number of independents and representatives of smaller Shiite parties.

⁷¹ Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008.

⁷² Crisis Group interview, Hassan al-Shammari, head of the Islamic Virtue Party in the council of representatives and member of the constitution review committee, Baghdad, 23 February 2008.

⁷³ See Crisis Group Middle East Report N°55, *Iraq's Muqtada Al-Sadr: Spoiler or Stabiliser?*, 11 July 2006, p. 15.

advocated by ISCI, which it considers sectarian.⁷⁴ Iraq's smaller minorities – Turkmens, Yazidis, Shabak, Chaldo-Assyrians, Sabeen-Mandean and others – have responded to the federalisation debate in two opposing ways. One current wants a limit on decentralisation with enhanced minority rights; the other supports regionalisation but takes it a step further, advocating the creation of mini-regions for these minorities.⁷⁵

Is compromise possible? At the moment, forces seem diametrically opposed without a clear mechanism for resolving the question. The constitutional review would be the preferred method, but the Kurds' support of regionalisation and their ability to veto constitutional amendments (see below) make it highly unlikely that they would cede ground on an issue they deem existential.⁷⁶ One possible way out of the current stalemate may well lie in new local and national elections, which could decisively reshape the political landscape.

⁷⁴ Crisis Group interview, Salim al-Jubouri, council of representatives member for the ICF, an official of the Iraqi Islamic Party and a member of the constitution review committee, Baghdad, 8 January 2008.

⁷⁵ Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008. At least one Turkmen party has proposed creation of a Turkmen region, the Turkmen Ele (ie, region) Party. Some Assyrian groups are pushing for a Chaldo-Assyrian region in the Ninewa plain, where that community's non-urbanised remnants have their strongest presence. See "Proposing the Operationalisation of the Art. 125 Solution: Establishing the Nineveh Plain Administrative Unit", Iraq Sustainable Democracy Project, October 2007, at www.iraqdemocracyproject.org/policy_brief_3.html.

⁷⁶ The Kurdish parties have supported ISCI's bid for a Shiite "super" region, but this may not be a red-line demand. Kurdish politicians have indicated that the number and size of federal regions outside Kurdistan is not a matter of overriding concern. For example, one legislator said, "We are with a federal system, no matter whether federalism in the south [ie, outside Kurdistan] will be the federalism of one governorate or three governorates or nine governorates", Crisis Group interview, Abd-al-Khaneq Zangana, a council of representatives member for the Kurdistan Alliance and a member of the KDP, Baghdad, 8 January 2008.

IV. LOCAL ELECTIONS

Now that an outer date for provincial council elections has been set (1 October 2008)⁷⁷, the question is whether these will take place on schedule and free of fraud – in other words, whether they will produce new, representative and legitimate local councils. This is critical, given current councils' relative illegitimacy.

Iraqis on all sides have strong feelings about the January 2005 elections. One moderately critical opinion was offered by Hunain al-Qaddu, a parliamentarian from Ninewa who heads the Iraqi Minorities Council: "There were a lot of troubles with the previous elections. The UN was not able to monitor them, and we all know there was a lot of fraud. As a result, many people distrust the results".⁷⁸

It is useful to remember what happened. On 30 January 2005, Iraq held its first post-Saddam elections, including for provincial councils. A Sunni Arab boycott, as well as violence and intimidation in areas with heavy Sunni Arab populations, led to skewed results that disfavoured that community.⁷⁹ This set the stage for Sunni Arabs' institutional exclusion from power: unrepresented in the new legislature, they could not join the drafting of a permanent constitution.⁸⁰ And although some Sadrists participated in the polls, often as members of other parties, the Sadrist movement as such did not (see below).⁸¹ As a result, a number of new councils offered only a poor reflection of their

⁷⁷ Art. 54(2) of the provincial powers law states: "The next council elections shall be held by a date not to exceed 1/10/08". In principle, they were due to take place in 2009; more important than the fact that the date as been moved up is the fact that an outer limit has been defined.

⁷⁸ Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008.

⁷⁹ The Iraqi Islamic Party, a small Sunni Arab party that constitutes the political expression of the Muslim Brotherhood in Iraq, did not participate in the boycott and as a result gained council seats in constituencies where ordinarily it might have received far fewer, such as Anbar, but also Ninewa.

⁸⁰ To partially rectify this problem, the government agreed to add fifteen unelected Sunni Arabs to the drafting committee. However, they played only a marginal role in the proceedings. See Crisis Group Briefing, *Unmaking Iraq*, op. cit.

⁸¹ For an announcement by a Sadr spokesman in Sadr City in favour of participation in the Baghdad council elections as part of the United Iraqi Alliance, which gave them 12 per cent of the candidates on its 275-name list, see "Sadr's men to stand for election in Iraqi poll", *Financial Times*, 8 November 2004.

constituencies.⁸² Because of this, as well as a profound disconnect between the federal government and the governorates that impeded the flow of trained personnel and designated budget funds, local governments have governed with difficulty, if at all. This has been true in Baghdad, Anbar, Ninewa, Kirkuk, Salah al-Din, Diyala and several southern governorates.

Prior to the October 2005 constitutional referendum, the U.S. brokered an agreement with Sunni Arab parties whereby they would participate in the referendum in exchange for the constitution's early review. Absence of progress on the broader issue of Sunni Arabs' political reintegration led to stalemate coupled with escalating violence and this, in turn, contributed to the U.S. decision to launch the surge in early 2007. Today, with the changed political landscape, fresh provincial elections could redistribute power consistent with proven representativeness in most governorates and create non-violent channels for exercising power in previously ungovernable ones, such as Anbar. Holding provincial elections as a way of recalibrating the political balance, therefore, has become a U.S. priority and an important marker of political progress.⁸³

The issue has further exposed fault lines between parties that lost out in 2005 (the Sadr movement, most Sunni Arabs) and those that benefited (ISCI, Daawa, the Kurdish parties, the Iraqi Islamic Party). The former argue that the councils were elected before adoption of the new constitution and, therefore, lack a constitutional basis. By contrast, ISCI and the Kurdish parties, while publicly supporting provincial council elections, fear losing their disproportionate power if their adversaries participate. As one parliamentarian explained the state of play:

Some political blocs don't want to hold provincial elections until the next parliamentary elections [in late 2009]. These are the blocs that dominate some provincial councils, ie, ISCI, the Kurdistan Alliance and the Iraqi Islamic Party. Other blocs say that provincial elections are necessary this year, because these will help us build a sound democratic foundation for the future. They argue that the councils lack a constitutional basis because they were formed before the constitution was adopted, while they should have been formed afterwards. They see in these elections the best tool for evaluating the provincial councils'

performance in providing and improving services for their citizens. They include Al-Fadhila, the Sadrist current and Daawa.⁸⁴

This debate has now been overtaken by the setting of a deadline and has shifted to a new debate on both whether elections can take place on schedule given security conditions and how they should be structured.

The stakes are very high. ISCI in particular (along with other parties that have a high proportion of former exiles) would stand to lose significant ground, as the new provincial powers law states (Art. 5(4)) that a candidate for council membership must have been a resident of the pertinent governorate for a period not less than ten years. Moreover, ISCI will face the grassroots popularity in Shiite areas of the Sadrists, who may benefit from widespread discontent at poor governance over the past three years.⁸⁵ The Sadr movement's formal absence from the January 2005 polls was felt mainly in predominantly Shiite governorates. In these constituencies, Sadrists often ran as independents or as members of other parties, but their boycott as a group contributed to ISCI's disproportionate victory. Since then, ISCI has controlled most local politics in the centre and south except for Basra, where it has had to share power with Al-Fadhila and the Sadrists, and Baghdad and Misan, where the Sadrists dominate.⁸⁶

The Kurds may see their dominance clipped by resurgent Sunni Arabs, who are now better organised and highly motivated to run. Generally, Sunni Arabs have been under-represented in mixed-population governorates (Baghdad, Ninewa, Diyala and Salah al-Din), with the

⁸² See, for example, "Lopsided provincial councils keep Iraq off balance", *Los Angeles Times*, 11 March 2007.

⁸³ In Ninawa, elections may be the U.S.'s only political asset, given the Kurds' resistance to the formation of Awakening councils by Sunni Arab tribes.

⁸⁴ Crisis Group interview, Karim al-Ya'qoubi, council of representatives member for the Islamic Virtue Party, Baghdad, 5 March 2008. He insisted that while "Al-Fadhila has representation in Basra, we still insist on the elections". Al-Fadhila holds the governor's position because it was the strongest member of an anti-ISCI coalition that commands a one-seat majority on the provincial council.

⁸⁵ The other party that will face a stiff challenge is the Iraqi Islamic Party, especially in Anbar.

⁸⁶ In January 2005, the Sadr movement was poorly organised and ill prepared for electoral politics, certainly compared with highly disciplined older parties such as ISCI and Daawa. The movement allowed its members to stand individually, and some did, but by and large the movement was severely under-represented on the councils that emerged, with the exception of Baghdad, Misan and Basra. In Misan the Sadrists took advantage of their great local popularity by presenting candidates for election. In Baghdad, they parlayed their numbers in Sadr City and other slums to strong representation on the city provincial council. In all three governorates, however, the Sadrists ran as individuals, not as party representatives.

exception of Kirkuk, where the electoral boycott was not widely observed.⁸⁷ For example, in Ninewa a council comprising mostly Kurds and Shiite Turkmens has sought to govern a governorate that has a majority Sunni Arab population. If Sunni Arabs make significant electoral gains, the Kurds could suffer a painful blow to their ambition to bring parts of Ninewa, Kirkuk, Salah al-Din and Diyala into the Kurdistan region, as they have used their local power as elected officials in these four governorates to create conditions favourable to accession to the KRG.

In Anbar, finally, a governorate with a vast Sunni Arab majority, a small Sunni Arab party, the Iraqi Islamic Party (IIP), bucked the boycott and walked away with most council seats. For that reason and because of overwhelming insurgent activity, the council has barely functioned.⁸⁸ Now that the insurgents have either turned into Awakening councils, gone underground or been driven out, a new political landscape has emerged dominated by tribal groups in which the (urban) IIP is unlikely to do well.

A central question is whether and how these parties, which control state levers of power, will seek to turn the elections in their favour. There will be ample opportunity to do so well before polling day. An early glimpse of this, besides ISCI's short-lived attempt to scuttle the provincial powers law through a vice-presidential veto, came in the government's offensive in Basra in late March, less than a week after the law's approval. Ostensibly, the objective was to wrest control from the militias that have been running Basra and restore law and order – in other words, a legitimate attempt by the central government to assert its sovereignty. However, coming from a ruling coalition dominated by ISCI – which opposes a strong central government, favours regionalism and has a powerful militia of its own – the campaign likely had other motivations. Among these, first and foremost, was ISCI/Daawa's bid to delegitimise the Sadr movement ahead of the elections by showing it to be violent and lawless rather than a political actor using strictly peaceful political means. Prime Minister Maliki acknowledged as much in the aftermath of his ill-fated military operation, which ran aground within days amid defections, supply shortages and other mishaps. By warning that the Sadr movement would be excluded from the elections if it failed to disband

its militia, the Mahdi Army⁸⁹, he lent credence both to the view that the campaign's target had been the Sadr movement rather than lawless elements in Basra generally, as he had claimed earlier, and to the notion that its objective had been to forestall the Sadrist's participation in provincial elections.

Many steps still need to be taken to enable the elections; each could become a point of dispute and individually or jointly could force a delay.⁹⁰ The council of representatives must pass an elections law within 90 days of approving the provincial powers law, in other words by 13 May.⁹¹ Such a law normally includes rules for, inter alia, the type of electoral system, voting-district boundaries as well as voter eligibility and registration.⁹² None of these is without controversy; settling them will require time.

Among these, one of the more critical and controversial issues is the type of electoral system. During the January 2005 provincial council elections, Iraq used a closed-list proportional representation system: governorate residents voted for a party or coalition, which ranked candidates on a list, rather than for individual candidates; the parties received council seats in proportion to their share of the vote in the governorate; winning candidates were taken in the order of their position on the list. This system served the parties currently in power, such as ISCI, because many of its candidates who had returned from exile were unknown to the electorate and won by virtue of being on a list.

Critics have attacked the closed-list system for producing representatives who are not widely known and are not individually accountable to the electorate⁹³ and for

⁸⁷The Kirkuk council, however, subsequently suffered from a debilitating prolonged boycott by its Arab and Turkoman members.

⁸⁸To address this problem, local authorities appointed additional members to the council in November 2006, but the council's composition remained problematic.

⁸⁹See also *The New York Times*, 8 April 2008.

⁹⁰In March 2007, the UN Assistance Mission for Iraq prepared a "non-paper" listing obstacles that would need to be cleared ahead of successful local elections. "Governorate elections in Iraq 2007: Necessary pre-conditions", UNAMI, 5 March 2007.

⁹¹The council of representatives passed the provincial powers law on 13 February 2008. By 13 May, 90 days will have passed.

⁹²These include rules for the campaign period, observation, media freedoms, balloting, counting and tabulation, and a complaints procedure. "Iraq Election Planning: Timeline Considerations", UNAMI Public Affairs Office, background paper, April 2007.

⁹³An Al-Fadhila official noted: "The system under which the current councils were formed was a 'closed-list' system. Based on the experience of the past three years, this system is unsuitable to develop the governorates. This is because people vote for a list on which candidates cannot be changed or re-arranged. This prevents citizens from choosing their representatives or effectively holding them to account. They

favouring ethno-sectarian rather than national political agendas.⁹⁴ They prefer an open-list system in which voters vote for individual candidates rather than a party or coalition and cast either as many votes as there are council seats (“free-vote open list”) or two votes: one for the party or coalition, the other for a candidate on that party’s slate (“limited open list”). This system favours parties whose candidates are already known to the public, in other words persons who enjoy local recognition because of their work or standing in their communities.

Because voters can override a party’s preferred ranking of its candidates, this system tends to give them greater control over parties, which in turn makes the parties more accountable. To organise a free-vote open-list ballot, however, is fraught with logistical obstacles. In a constituency such as Baghdad governorate, for example, voters could be entitled to mark up to 60 names out of several thousand candidates, all of whom would need to be listed on the ballot. This could cause voter confusion as well as exhaustion. Even a limited open list would present challenges to voters, who would have to identify a single candidate out of, potentially, thousands.⁹⁵

Other issues that must be settled include the appointment of directors of governorate elections offices (out of nineteen, only eleven have been appointed; the remaining eight concern heavily populated governorates where political disputes can be expected to be fierce),⁹⁶ a delimitation of governorate boundaries (given disputes originating during the era of Baath rule, including Arabisation in and around Kirkuk);⁹⁷ voter registration

simply don’t know them. Besides that, there are some areas and towns that are not represented at all because of this system; these still don’t have proper services, nor a channel for complaints”, Crisis Group interview, Karim al-Ya’qoubi, council of representatives member for the Islamic Virtue Party, Baghdad, 5 March 2008.

⁹⁴ Presentation by Safa Rasul Husein, deputy national security adviser of the government of Iraq, EU Institute for Security Studies, Paris, 14 April 2008.

⁹⁵ UNAMI fact sheets provided to the council of representatives, 2008.

⁹⁶ Iraq’s eighteen governorates each have an election office, except for Baghdad which has two (one for Rusafa, the other for Karkh). Each office is headed by a director. In late April 2008, directors had yet to be appointed for the following governorates: Baghdad (two), Ninewa, Diyala, Karbala, Najaf, Waset and Basra, in other words, governorates that together represent the majority of the population. These appointments have proven particularly controversial, causing a stalemate in the council of representatives. Crisis Group e-mail communication, UN official, 19 April 2008.

⁹⁷ Several governorates are affected by boundary disputes. These include the four governorates bordering the Kurdistan

(based either, as last time, on food ration cards or on an entirely new system);⁹⁸ a decision on whether and how to include refugees and the internally displaced;⁹⁹ rules governing use of the media; and independent oversight. Some parties have called for a political parties law as well.¹⁰⁰

Political parties will likely exploit any or all of these issues to promote their electoral interests. The

region (Ninewa, Kirkuk/Taamim, Salah al-Din and Diyala) and two governorates bordering Anbar (Najaf and Karbala). Art. 140 of the constitution provides for a process to resolve the status and boundaries of territories in these governorates, but this process has suffered serious delays. For a discussion, see Section IV below.

⁹⁸ According to UNAMI, the voters list used in the 2005 elections was based on the Public Distribution System (PDS), or food ration card system, which it says has become outdated. Moreover, “the PDS is not a voter registry, and it became an increasingly flawed instrument with each election in which it was used. For the December election, the voter registry was the object of 164 complaints (12 per cent of the total ‘non-red’ complaints) about omissions of voters’ names from polling station registry books. To compensate for these omissions, poll workers either added names to the lists according to procedures (with identification documents); added names without regard to procedures; or turned people away from the polls. Obviously, such deficiencies in the registry can undermine the credibility of the process and the acceptance of election outcomes. In order to correct these deficiencies, the PDS instrument should be abandoned and a new registry established”, “Governorate elections in Iraq 2007: Necessary pre-conditions”, UNAMI, 5 March 2007.

⁹⁹ This would be a departure from the past, as in January 2005 there were not yet significant refugee and internally displaced populations. The problem could be enormous: By current estimates, some four million Iraqis are either refugees or internally displaced. One challenge will be to organise provincial council elections for refugees. The other will be to encourage internally displaced Iraqis to vote. Although the surge has reduced sectarian violence in Baghdad and some other areas, it is unlikely that they could or would register in their original town or neighbourhood if these continue to be controlled by an enemy group (for example, a Sunni would be loath to register in a neighbourhood controlled by the Sadr movement). But to register in their new abode, they would have to de-register in their old one, which would present the same threat to their safety. A decision would, therefore, need to be taken to allow them to register in their safe haven without first de-registering in their original town or neighbourhood. Crisis Group interview, UN official, Amman, April 2007.

¹⁰⁰ A political parties law normally sets out conditions by which parties can register for an election and regulates political party financing. The Islamic Virtue Party (Al-Fadhila) has called for such a law in order to replace the Bremer-era law. Crisis Group interview, Karim al-Ya’qoubi, council of representatives member for the Islamic Virtue Party (Al-Fadhila), Baghdad, 5 March 2008.

question of district boundaries alone threatens to link provincial council elections to resolution of the status of disputed territories (see below), and thus could easily undermine the current timetable.

Both the UN and the U.S. will have critical roles to play: the UN is to provide technical assistance on the above issues, as well as election monitors; it will also have the ability, and responsibility, to take its hands off the elections if it determines that some of its conditions for successfully organising them will not be met. The U.S., which has pushed strongly for early elections, has promised to assist the government in securing polling stations;¹⁰¹ behind the scenes, it is putting pressure on Iraqi politicians to allow elections to occur on time. It, too, has a responsibility to condemn the elections should the procedures (and therefore the outcome) be less than acceptable by international standards. In this it will have to overcome a troubling legacy of overstating progress in Iraq, for example in the case of the deeply flawed January 2005 elections.

As precedent shows, Iraqi elections are a risky affair, often having yielded outcomes that have exacerbated rather than reduced tensions. Their mere prospect can serve as a trigger for pre-emptive moves by actors intent on shaping the playing field so as to maximise their gains or preventing a rival from competing; recent events in Basra are but one instance. Still, if held more or less on schedule and carried out freely and fairly, provincial council elections could produce representative local leaders with a popular mandate and begin to draw in a new generation of political actors who, over time, may graduate to national representation and office. These leaders will almost certainly be home-grown, a key factor that will set them apart from today's ruling parties (the Kurdish parties excepted), most of whose senior members were raised in exile. This is a transition Iraq will have to make; whether it can launch that process in 2008 remains to be seen. The opposite scenario – no or botched elections – would almost certainly prolong the current political stalemate and make all the more urgent an alternative process: an inclusive gathering of political forces under international and regional auspices to seek to forge a national compact.¹⁰²

¹⁰¹ In its September 2007 benchmark progress report to Congress, the White House stated: "The United States Government is working with Iraq Security Forces to ensure that they are adequately prepared to provide security for free and fair elections when a date is set", "Benchmark Assessment Report", The White House, op. cit.

¹⁰² See Crisis Group Report, *After Baker-Hamilton*, op. cit.

V. RECONCILIATION/ ACCOMMODATION

The January 2005 elections boycott by significant political actors led to more than their exclusion from drafting the permanent constitution and an imbalance in the composition of provincial councils. More broadly, because they represent sizeable constituencies, it severely undermined the country's stability.

Belatedly recognising the problem in September 2005, the U.S. made promises to Sunni Arab politicians: early review of the constitution, the creation of a government of national unity after the December 2005 elections and the gradual integration into the country's new security forces of vetted officers of the former regime's military. No significant progress was made on any of these fronts, a factor that contributed significantly to the expansion of the Sunni insurgency.

The surge represented a renewed U.S. attempt to facilitate "reconciliation" – a term later wisely replaced with the less ambitious "accommodation".¹⁰³ Among the most important steps urged by the U.S. have been a modification of the 2003 de-Baathification order issued by the Coalition Provisional Authority (CPA),¹⁰⁴ an amnesty law and integration of Sunni Arabs into the state's political and security structures.

In January 2008, after much wrangling, the council of representatives passed the Supreme National Commission for Accountability and Justice Law, which aimed to address both the status of former Baath party officials and the way in which the CPA had dealt with them. The CPA's May 2003 order, which codified the Baath Party's "disestablishment" effected a month earlier, had two key planks: removal from public office of senior party members¹⁰⁵ and

¹⁰³ In official documents as well as speeches by U.S. officials, "accommodation" gradually replaced "reconciliation" as the main U.S. goal, as the Maliki government failed to meaningfully reach out to its adversaries in 2007.

¹⁰⁴ According to the Bush administration, "the overarching goal of de-Ba'athification reform is political accommodation between the Shi'a and Sunni communities. The leaders' agreement combined with the return of former Ba'athists to civic life is a significant step in that regard. Debate on this draft law in the COR [council of representatives] is an integral part of developing the broad political acceptance needed to promote real reconciliation", "Benchmark Assessment Report", the White House, 14 September 2007, op. cit.

¹⁰⁵ "Full members of the Ba'ath Party holding the ranks of 'Udw Qutriyya (Regional Command Member), 'Udw Far' (Branch Member), 'Udw Shu'bah (Section Member), and

removal of all party members from the top three layers of management in ministries or other government institutions.¹⁰⁶ By declaring party membership rather than an individual's past conduct as the primary criterion for exclusion from public office, the order was so sweeping as to not only remove the regime but also decapitate the country's managerial class. As such, it gave rise to pervasive bureaucratic dysfunctionality and provoked deep resentment among its victims, many of whom had joined the party and moved up its ranks merely to advance their careers.¹⁰⁷

If, in passing the accountability and justice law, the council of representatives' objective was to redress the injustice inflicted by the CPA order, it may well have missed its target. The law does contain positive elements: it entitles senior party members to retirement and a pension; it allows Baath Party mid-level "Group" (*firqa*) members to return to work in the public sector; it threatens those suspected of crimes with prosecution, potentially placing individual criminal responsibility before collective guilt by association based on party membership;¹⁰⁸ and it abolishes the

'Udw Firqah (Group Member) (together, 'Senior Party Members') are hereby removed from their positions and banned from future employment in the public sector. These Senior Party Members shall be evaluated for criminal conduct or threat to the security of the Coalition. Those suspected of criminal conduct shall be investigated and, if deemed a threat to security or a flight risk, detained or placed under house arrest', Coalition Provisional Authority Order Number 1, "De-Ba'athification of Iraqi Society", 16 May 2003, signed by L. Paul Bremer, CPA administrator, at www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

¹⁰⁶ "Individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals) shall be interviewed for possible affiliation with the Ba'ath Party, and subject to investigation for criminal conduct and risk to security. Any such persons determined to be full members of the Ba'ath Party shall be removed from their employment. This includes those holding the more junior ranks of 'Udw (Member) and 'Udw 'Amil (Active Member), as well as those determined to be Senior Party Members", Coalition Provisional Authority Order Number 1, "De-Ba'athification of Iraqi Society", op. cit.

¹⁰⁷ The new law acknowledges the presence of many Iraqis who joined the Baath party without necessarily subscribing to its aims and methods. The law expressly recognises "cases of nominal membership in the dissolved party by some groups of society that did not believe in the Baath's dictatorial ideas and repressive practices".

¹⁰⁸ Art. 3(3) states: "Any member of the dissolved Baath Party or repressive agencies about whom an investigation establishes that he has committed criminal acts against the Iraqi people shall be referred to the competent courts to be dealt with in a fair manner".

hated de-Baathification committee established by the CPA.¹⁰⁹

But whatever goodwill the law may thus have hoped to create was threatened by a series of regulations that revive the very problems associated with the CPA order. It sends into compulsory retirement former party members above a certain rank, especially those who used to hold senior public sector positions, as well as all employees of the former regime's security agencies, regardless of their past conduct.¹¹⁰ The rule applies even to individuals who retained their jobs after April 2003 and have performed honourably since then,¹¹¹ including members of the security

¹⁰⁹ It replaces it with a new body, the Supreme National Commission for Accountability and Justice. As such, the move should be seen as symbolic rather than substantive, but it could have a positive effect in that the de-Baathification committee had become fatally tainted as a sectarian instrument. According to Iraq's former deputy permanent representative to the UN, Feisal al-Istrabadi, "the majority of the members of the Baath party were Shia, but in the manner in which [CPA administrator] Ambassador Bremer allowed the then-chairman of the de-Baathification commission, Dr Ahmad Chalabi, to apply the law, a very high proportion of the Shia who were members of the Baath party were allowed to continue to function in their positions. The burden of being removed from office fell disproportionately highly on Sunnis, to the extent that the Sunnis of Iraq began to call it 'de-Sunnification' rather than de-Ba'athification", quoted in "Seven Questions: The De-Bremerification of Iraq", *Foreign Policy*, January 2008, available at http://foreignpolicy.com/story/cms.php?story_id=4139.

¹¹⁰ The law (Arts. 6(1-4)) pensions off all former party members with the rank of Section member (*'udw shu'ba*) and above, all civil servants occupying positions equivalent to or above that of general director (*mudir 'aam*) who were party members with the rank of Group member (*'udw firqah*) and above, and all employees of the security agencies. Members of the Fedai'iyen Saddam are excluded from pension rights. Arts. 6(5-6) allow civil servants who did not occupy special positions and held the rank of Group member or below in the Baath Party to return to their previous departments or continue in their current public sector jobs, except in the three "presidential bodies" (the presidency council, prime ministry and presidency of the council of representatives), the Judicial Council (*majlis al-qadha*), security agencies and ministries, especially the ministries of foreign affairs and finance.

¹¹¹ Many former senior Baath party members were allowed to keep their jobs, either because U.S. advisers in various ministries prevailed on the de-Baathification commission in cases in which they recognised a person's competence, or because they were Shiites who were favoured by the new ruling parties. Under the new law, they all would lose their jobs and be sent into retirement, but selective application is likely, as it was under the previous law. Crisis Group telephone interview, Iraqi researcher, Amman, 27 March 2008.

agencies,¹¹² regardless of whether they were Baath party members or committed specific crimes.

As in the past, a person's party membership is to be established via Baath archives maintained by the government, a procedure many Sunnis claim has been misused to favour Shiites (some former senior Baath Party members were able to keep their jobs) and punish Sunnis (some low-level party members who should have been able to retain their jobs lost them).¹¹³ Furthermore, the law permits citizens to bring judicial cases against former party members whom they suspect of crimes but sets no time limit; this means that former party members will operate under a cloud of suspicion until their retirement. And persons under investigation who are seeking to retain their jobs will have to divulge a good deal of personal information, which will enter the public domain;¹¹⁴ in turn, release of such data could expose them to politically motivated attacks.¹¹⁵

An independent Iraqi living in exile listed a host of criticisms:

¹¹²The term security agencies (*ajhiza amniya*) is open to interpretation: Does it include the Republican Guards? Does it include Military Intelligence? The answers to these questions are unclear and may lead to fierce disputes.

¹¹³Crisis Group telephone interview, Iraqi researcher, Amman, 27 March 2008. The same argument of selective application could be made for Kurds. The council of representatives speaker, Mahmoud al-Mashadani, responded to Kurdish members' voting in the law's favour: "Now you raise your hands in favour of sending Saddam's security men to retirement, while earlier you reinstated the Kurds who collaborated with or worked for Saddam to government jobs in Kurdistan". Referring to the pro-regime Kurdish militias, whom nationalist Kurds call *jahsh* (donkey foal), he added: "Are your donkeys better than our donkeys?" Quoted by Associated Press, 12 January 2008. The absence of an impartial judiciary-based vetting process, or any sort of transitional justice mechanism, arguably has been one of the post-2003 policy's main failings.

¹¹⁴Art. 24 states: "The [Supreme National] Commission [for Accountability and Justice] shall establish an archive for all those covered by the procedures of Article 6 of this Law, their Party ranks, employment posts, and date of issuance of these procedures. The mentioned archive shall be referred to the Council of Ministers for circulation to all ministries, extra-ministerial departments, independent bodies and civil society organizations".

¹¹⁵For human rights critiques of the law, see "Iraq: Fix Flaws in Reconciliation Law", Human Rights Watch, 21 February 2008, at <http://hrw.org/english/docs/2008/02/21/iraq18125.htm>; and "Iraq's New 'Accountability and Justice' Law", the International Center for International Justice, 22 January 2008, at www.ictj.org/images/content/7/6/764.pdf.

The law's beneficiaries will receive their pensions only; they will never be employed, or trusted. Moreover, lower-ranking party members will not be allowed to head a directorate (known as "unit directors"). This is a disaster; it would even apply to headmasters of village primary schools. In addition, prisoners of war returning from Iran after 2000 were invariably awarded Baath party membership, regardless of any loyalty to the party. Finally, Baathists can receive a pension only if they are in Iraq, not if they have sought refugee status abroad. This is particularly cruel: the government is telling them to return to Iraq to be eligible for their pensions, but in reality this means they are telling them to come back to get killed, because their names have been published.¹¹⁶

Iraqi lawmakers engaged in vigorous debate in the days leading up to the vote. There were two intersecting fault lines: between those who had suffered grievously under the former regime and those adversely affected by de-Baathification; and between those favouring a tough line against the former regime in all its manifestations and those who, regardless of any past suffering, believed in the need for reconciliation. As a result, some parties were internally divided, the primary dispute being over whether the law was too lenient or too harsh; many lawmakers failed to show up for the vote.¹¹⁷ The Shiite Islamist parties took the toughest position, in particular the Sadr bloc, which some U.S. Embassy officials blamed for obstructing progress.¹¹⁸

On the other side were Sunni Arab and secular parties (both with constituencies that include high numbers of former functionaries), which argued that former officials should be entitled to due process. A member of Iyad Allawi's secular National Iraqi List, for example, stated shortly before the vote:

We are against the Accountability and Justice Law because it does wrong to a big part of society. We will not vote for it. We suggested that the courts are the proper place to punish or

¹¹⁶Crisis Group interview, former official in post-2003 Iraqi government who was not a Baath party member, Amman, 17 January 2008. The new law won't bring reconciliation, he said; it was "designed merely to please the U.S. as evidence of a reconciliation process".

¹¹⁷Reportedly just over half of the council of representatives' 275 members were present for the vote. *The New York Times*, 14 January 2008.

¹¹⁸Crisis Group interview, Baghdad, 27 March 2008. Many Sadrist bloc members supported the law after toughening it but still complained afterwards it was not tough enough. *Los Angeles Times*, 13 January 2008.

forgive the Baathists. If a Baathist is found guilty of crimes, he should be punished, but if the court finds he is not guilty, then he should not be prevented from returning to his previous job or carrying out his business inside Iraq.¹¹⁹

The Kurdish parties, despite the Kurds' past suffering, supported the law as essential for reconciliation. A Kurdish lawmaker declared:

We will vote for the accountability and justice law because de-Baathification has expired. Many high-ranking Baathists, such as *'udw firqa* and *'udw shu'ba*, have already returned to their posts in the directorates.¹²⁰ Those who have reached the age of retirement will now receive their pensions. Revenge is not a way to settle problems. In Kurdistan, after the 1991 uprising, we asked Baathists to return to their jobs and told them they would be forgiven. We made an amnesty. They accepted it and they returned to their jobs and this experience succeeded. Unfortunately, some of the Arab parties cannot forget the past.¹²¹

In the end, much will depend on the law's implementation: Will it be applied with a single standard or selectively, as a political weapon? Will, for example, the government dismiss former party members who committed crimes but regained their jobs after April 2003 because they switched their allegiance to one of the new ruling parties? In such cases, will anyone feel free to submit a complaint and will the government act on such complaints? Will the government deny jobs to former security officers if today they are serving their country honourably and are qualified and loyal? The law provides for exemptions, but these would need to be approved by the council of ministers and council of representatives (Art. 12) – a requirement that might prove prohibitive in the case of Sunni Arabs as long as the Shiite-led government proceeds on a sectarian course.

While granting retirement benefits to former party members who did not commit crimes is a positive step, it hardly addresses the current problem of dysfunctional management; in contrast, their reinstatement to former

jobs could help ease the difficult transition in administration from the previous centralised state to the current decentralised one. The law could also fail to appease former party members with clean records who want to retain their current jobs rather than being pensioned off; their sense of grievance could fuel a new round of political opposition and violence.

The U.S. hailed the law's passage as "a signal achievement in that Iraqi political leaders have collectively chosen to reform a de-Ba'athification process that many regarded as flawed, unfair, and a roadblock to reconciliation".¹²² On balance, however, the law continues rather than reforms de-Baathification. As a result, it is unlikely to contribute to reconciliation, as the acrimonious debate over the law's adoption demonstrated. Moreover, U.S. endorsement of it merely serves to expose satisfaction with achieving what are symbolic victories at most and spinning these into progress. This threatens to diminish U.S. leverage and thus comes at the expense of genuine success.

A second component of reconciliation/accommodation was the amnesty law. Unlike legislation on, for example, oil, federalism and de-Baathification, this was not a constitutional requirement. Still, a consensus emerged among political parties that a general amnesty was essential to reduce polarisation.¹²³ Although an accurate breakdown of the tens of thousands of detained Iraqis is not available, they are thought to include suspected insurgents (in most cases Sunni Arabs, but also Shiite Mahdi Army fighters) as well as common criminals, though the broad sweep of arrest campaigns make it likely that many detainees belong to neither category but remained in prison due to the absence of a functioning judicial system.

The demand for an amnesty was, therefore, voiced most loudly by Sunni Arab parties, such as those constituting the Iraqi Consensus Front (ICF), as well as the Sadrist. Thus, when the amnesty bill passed in February 2008, the ICF hailed it as a victory which it could sell to the Sunni Arab community.¹²⁴ Other Sunni Arab parties

¹¹⁹ Crisis Group interview, Hussam al-Aazawi, council of representatives member for the NIL, Baghdad, 11 January 2008.

¹²⁰ While some indeed did return to their positions via the selective application of the de-Baathification order, this could not reverse the adverse consequences of removing most senior managers from their posts.

¹²¹ Crisis Group interview, Abd-al-Khaleq Zangana, council of representatives member for the Kurdistan Alliance and a member of the KDP, Baghdad, 8 January 2008.

¹²² U.S. Embassy Baghdad, news release, 14 January 2008. U.S. Ambassador Ryan Crocker said the law "reflects a strengthened spirit of reconciliation", "Testimony of Ambassador Ryan C. Crocker before the Senate Armed Services Committee", 8 April 2008, at <http://armed-services.senate.gov/statemnt/2008/April/Crocker%2004-08-08.pdf>.

¹²³ Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008.

¹²⁴ ICF spokesman Salim al-Jubouri: "We consider it an important accomplishment that the front could market to its

were less sanguine, declaring the law insufficient in scope,¹²⁵ while the Sadrists complained that too few of their men would benefit.¹²⁶

The law offers amnesty to all detainees, except those convicted of major crimes, such as murder, kidnapping and rape,¹²⁷ and instructs the government to transfer Iraqis detained by the Multi-National Forces to Iraqi jails, so that they can also benefit from the measure.¹²⁸ As with other laws, impartial implementation will be key to success. Precedent suggests some ground for optimism. Even before the law was passed, detainees were being released selectively based on their readiness to abjure violence and agree to work with the new order. The U.S. freed several Sunni Arab insurgent leaders, for example, to encourage the emergence of an anti-al-Qaeda-in-Iraq movement in Anbar and parts of Baghdad.¹²⁹ In the capital's West Rashid neighbourhood, which is controlled by Sadr's Mahdi Army, U.S. forces went further, reviewing lists of names prepared by a local reconciliation committee and releasing those persons not deemed to represent a threat; this sharply reduced violence.¹³⁰

supporters", quoted in the *Los Angeles Times*, 14 February 2008.

¹²⁵ Saleh Mutlaq, leader of the Iraqi National Dialogue Front, reportedly said the amnesty did not go far enough and refused to vote on it, *Los Angeles Times*, 14 February 2008.

¹²⁶ Associated Press, 25 March 2008.

¹²⁷ The law lists several categories of crimes, including incest and smuggling of antiquities.

¹²⁸ The U.S. is unlikely to transfer detainees to Iraqi jails except on an individual basis. One of the issues on the table in current negotiations over a bilateral status of forces agreement between Iraq and the U.S. is the fate of Iraqis in U.S. custody. Iraq expects these detainees to be handed over as part of the agreement; since there are no cases against many of them, and in any event an amnesty law is in effect, most could subsequently be released. Presentation by Safa Rasul Husein, deputy national security adviser of the government of Iraq, EU Institute for Security Studies, Paris, 14 April 2008.

¹²⁹ In September 2007, the U.S. declared: "In the absence of legislation, the Government of Iraq – at the direction of the Prime Minister – has initiated a program of limited immunity for individuals who have turned away from supporting al-Qaeda and have now pledged support to the government.... Although the Government of Iraq has not enacted or implemented amnesty legislation, these local programs may be creating preconditions for future amnesty legislation". "Benchmark Assessment Report", The White House, op. cit.

¹³⁰ Presentation by official involved in surge planning, Washington DC, 21 February 2008. The effort was undertaken in part because of criticism voiced by the Iraqi government that the U.S. was favouring Sunnis for selective release. Emma Sky, "Iraq 2007: Moving Beyond Counterinsurgency Doctrine", draft paper to be published by the Royal United

The greatest challenge may well be to demobilise fighters and either integrate them into state security forces or absorb them into society by offering employment.¹³¹ This is the principal demand of the Awakening (*sahwat*) councils and former insurgents now collectively known as Sons of Iraq,¹³² which may have as many as 91,000 members,¹³³ all temporarily on the U.S. payroll and in need of jobs. A former official working with U.S. forces in Baghdad said lack of employment has been a key factor driving the insurgency and that U.S. counter-insurgency strategy during the surge was designed to address that and other local concerns:

The commanders have been given the flexibility to facilitate local reconciliation through encouraging the establishment of committees representing the leadership of different communities; designing projects which require different groups to work together; overseeing the return of displaced Iraqis to their homes; putting reconcilable militants on restricted-target lists;¹³⁴ releasing certain detainees; [conducting] targeted raids against irreconcilables; hiring "Sons of Iraq"; assisting the government to integrate "Sons of Iraq" into the ISF [Iraqi Security Forces] and other jobs programs; and facilitating the government to deliver public services.¹³⁵

Services Institute for Defence and Security Studies in the UK (RUSI), April 2008. Sky was a special adviser to Lt. Gen. Raymond Odierno, commander of the Multi-National Forces in Iraq in 2007.

¹³¹ This important issue was not included among the benchmarks, as the emergence of the Awakening councils was an unanticipated consequence of the surge that gathered speed only in the second half of 2007.

¹³² An adviser to U.S. commanders in Iraq has defined the Sons of Iraq as follows: "The term 'Sons of Iraq' covers a wide group of individuals with differing backgrounds and motivations. While the majority are Sunni, Shia have also been recruited in mixed neighbourhoods. Many 'Sons of Iraq' are simply local people who are stepping forward to protect their neighbourhoods from extremists. Many were formerly officers in the old Iraqi Army or police. Some used to be members of insurgent groups (and some probably still are); some belong to a broader Awakening and have connections beyond their local area. What is sure is that groups in Iraq are fickle, and that their motivation is liable to change", Emma Sky, "Iraq 2007", op. cit.

¹³³ Gen. David H. Petraeus, "Report to Congress on the Situation in Iraq", 8 April 2008, at <http://armedservices.senate.gov/statemnt/2008/April/Petraeus%2004-08-08.pdf>.

¹³⁴ Presence on a restricted-target list is supposed to ensure that the named individual is able to move around without fear of capture or killing by coalition forces.

¹³⁵ The principal mechanism to effect reconciliation at the local level has been the Implementation and Follow-Up

Some Iraqis agree that re-absorption via employment is the number one priority:

The main threat to security and stability is terrorism, which is caused by joblessness. Lack of jobs compelled people to join armed groups. These people need to provide for their families. Today they are fighting al-Qaeda and achieving many victories. The defence and interior ministries should bring in these fighters. We do not want all of them to join the security forces; those with academic degrees could be appointed in the ministries and directorates according to their specialisation. But the Shiites believe that if these fighters join the military and security forces, they will form a new kind of militia. The government does not seem to be seriously interested in solving this problem.¹³⁶

In testifying before the U.S. Congress in April 2008, Gen. Petraeus asserted that of the 91,000 men, some 21,000 had “already been accepted into the Police or the Army or other government jobs”.¹³⁷ For others, the government will need to create jobs, initially via community-based public works schemes. Added to this number are detainees released as part of the amnesty as well as, should conditions improve, returning refugees and displaced Iraqis. This is a huge burden that the U.S. expects the Iraqi government to bear. Given the government’s low capacity, however, and the prevalence of distrust and sectarian tendencies, this is an unrealistic expectation. So far, the process of vetting and approving job applicants has moved at a snail’s pace, allowing frustrations – and accusations aimed at the government – to build. A Sunni Arab politician charged:

The government promised to incorporate *sahwat* fighters into the state security forces and pay them money for fighting al-Qaeda. The *sahwat* groups have had a strong impact on improving security. These fighters fought against al-Qaeda, and it is therefore their right to share the duty of defending the country with the security forces. We have suggested that their background be checked and that those who are vouched for by their tribal sheikhs be allowed to join the security forces to fight the terrorists.

Committee for National Reconciliation (IFCNR), established by Prime Minister Maliki in mid-2007. The committee has acted as a go-between for the government and informal local groups and councils. Emma Sky, “Iraq 2007”, op. cit.

¹³⁶ Crisis Group interview, Hussam al-Aazawi, council of representatives member for the National Iraqi List, Baghdad, 11 January 2008.

¹³⁷ Gen. Petraeus, “Report to Congress”, op. cit.

Unfortunately, the government has not been serious about this and has not carried out the promises it gave to the *sahwat* leadership.¹³⁸

The problem is much broader, however. Iraq faces a huge unemployment problem, not just involving former insurgents but generally among the young population, Sunni or Shiite. This will need to be addressed if only to prevent young Iraqis from being drawn into militias, insurgent groups or criminal gangs. Moreover, Sunni Arabs in particular also complain of feeling cut out from positions of power and decision-making. An official of a Shiite Islamist party noted:

We haven’t seen any real incorporation of Sunnis into the decision-making process or security establishment. There have been some satisfactory developments in this regard but they didn’t meet our hopes. For that reason, you can feel Sunni anger coming from inside and outside the political process. This is what led Tawafuq [the Iraqi Consensus Front] to leave the government and Hiwar [Iraqi National Dialogue Front] to not participate at all.¹³⁹ These parties complain they are getting positions but not partnership. They are asking for true partnership in decision-making in politics and security. Overall, such progress has not happened enough to establish a new national consensus. The dominant culture is one of “winning” and there is a real problem of distrust.¹⁴⁰

The government, while expressing support for the integration of former insurgents and others into the security forces and various state institutions, has cited obstacles to a smooth process. A lawmaker for the ruling UIA, Abbas Bayati, explained:

We are not opposed to incorporating Sunni tribal *sahwat* fighters into the security and military forces, but this should be done according to conditions set by the ministries of interior and defence. Applicants should meet qualifications of age and physical fitness and undergo a

¹³⁸ Crisis Group interview, Salim al-Jubouri, council of representatives member for the ICF, an official of the Iraqi Islamic Party and a member of the constitution review committee, Baghdad, 8 January 2008.

¹³⁹ Six Iraqi Consensus Front ministers left the national unity government in August 2007, complaining that Shiite leaders refused to share power or accommodate some of Sunni Arabs’ main demands, including for an amnesty. Negotiations over their return have been ongoing.

¹⁴⁰ Crisis Group interview, Nadim al-Jaberi, head of the Islamic Virtue Party and council of representatives member, Baghdad, 23 February 2008.

background check. Moreover, our goal is to decrease the size of the security forces, not increase it. We do not want to turn our civil society into an armed society.

Currently we have some 1,400,000 policemen, army soldiers, national security forces members and intelligence agents. We cannot add 70,000 *sahwat* fighters. The normal average is one policeman for every 300 persons. In Iraq, we have one policeman for every 27 persons. We want to improve this ratio (to one policeman for every 100 hundred persons) by improving security, not the opposite. So we will allow some of these fighters to join the military and security forces according to actual need and employ the others in various ministries and directorates – but only after they have had the required training.¹⁴¹

This is a reasonable proposal. It does not solve the unemployment problem, however, and in the longer term, the government will need to revive the economy to absorb the brunt of former fighters and the unemployed youth more broadly.¹⁴² But time remains a precious commodity in a situation in which other critical planks of the reconciliation/accommodation effort are still missing. Underscoring the gulf separating various groups, parties and communities, a reconciliation conference organised by the government in Baghdad in March 2008 was marred by absenteeism, acrimony and walk-outs.¹⁴³

¹⁴¹ Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008.

¹⁴² Alexandra Zavis of the *Los Angeles Times* reported: “U.S. and Iraqi officials are now hammering out details of a plan to revive local economies and create new opportunities for the fighters through vocational training, public works schemes, farm revitalisation programs, micro-grants and business start-up loans. The two governments have committed \$155 million apiece to the projects. But these are long-term strategies, and the fighters need jobs now. If not, many openly declare they will have no choice but to work for the insurgency, which has tried to lure some of them back with offers of more money”, *Los Angeles Times*, 21 March 2008.

¹⁴³ Absentees included key Sunni Arab and secular blocs, including the Iraqi Consensus Front, the National Iraqi List and the Iraqi National Dialogue Front. *The New York Times*, 19 March 2008.

VI. REVISING THE CONSTITUTION

As part of the deal brokered in October 2005, Sunni Arab parties were granted an early review of the constitution. Although the UIA and Kurdistan Alliance were loath to amend a document that reflected their core interests, they were persuaded by their U.S. allies that a constitution lacking national consensus might harm them over time.¹⁴⁴ The review process, therefore, was intended to redress the severe imbalance created by Sunni Arabs’ absence in drafting it and thereby endow the document with a semblance of national consensus to maximise its acceptance and longevity.¹⁴⁵

However, the process has been hobbled by numerous delays and, in the final analysis, the parties’ inability to overcome deep divisions during the limited allotted timeframe, even after the initial four-month period was twice extended.¹⁴⁶ While members of the constitution review committee have indicated they have completed all technical aspects of the work (refining language, filling gaps on issues over which there was agreement), in addition to resolving some important substantive issues,¹⁴⁷ they have stated that the remaining core issues can only be addressed through political negotiations.¹⁴⁸

¹⁴⁴ The constitutional articles dealing with federalism, Kirkuk and oil reflected a backroom deal between ISCI and the Kurdistan Alliance, whose internal discipline and clarity of vision allowed them to take the initiative and prevail over the other parties, both friend and foe. See Crisis Group Briefing, *Unmaking Iraq*, op. cit.

¹⁴⁵ “The Constitution Review Committee was established to create the largest possible national consensus on the constitution”, Crisis Group interview, Nadim al-Jaberi, head of the Islamic Virtue Party and council of representatives member, Baghdad, 23 February 2008.

¹⁴⁶ Art. 142 of the constitution provides for the creation of a review committee that was to propose recommendations on necessary amendments within four months of the new council of representatives’ first working session, which took place in early 2006. The Bush administration reported that the committee was established in November 2006 (it was formed on 25 September 2006 but held its first meeting on 15 November) and credited it with “satisfactory progress”, despite the fact that deliberations have been completely stuck since well before the committee presented an interim report in May 2007. “Benchmark Assessment Report”, The White House, op. cit.

¹⁴⁷ Issues that were resolved include the federation council, the federal supreme court and independent commissions. Crisis Group interviews, members of the constitution review committee, Baghdad, January-February 2008; and “Report of Constitution Review Committee”, Presidency of Constitution Review Committee, 21 May 2007.

¹⁴⁸ One review committee member stated: “We made about 55 amendments but all of these were minor – deleting a word,

As a review committee member put it, “these issues require meetings by the leaderships of the political powers and communities. The review committee cannot deal with them, because most of the disputes are political in nature”.¹⁴⁹

As the brief synopsis of core issues below shows, Sunni Arab politicians have sought to use the constitution’s review to recoup some of the ground lost as a result of their election boycott, pressing for greater powers, better access to resources and laws favourable to their community’s interests, while curbing the ambitions, territorial and otherwise, of parties that took advantage of the boycott, ie, the Kurdish and Shiite Islamist parties. These issues include:

- **Art. 41.** This article, a vaguely phrased endorsement of religious freedom,¹⁵⁰ requires legislation determining the law – secular or religious; if religious, the Sunni or Shiite interpretation – by which to adjudicate personal status issues, including marriage, divorce and inheritance, all of which have a bearing on women’s rights in particular. It has triggered a conflict between Shiite Islamist parties that want a law imposing a Shiite interpretation of religious law (Sharia), and both Sunni Islamist parties, which want their own interpretation,

rewriting, etc. We also managed to reach agreement about some of the controversial issues, including with the Kurdistan Alliance, but when they submitted these amendments to the Kurdish leadership, they rejected them and we had to go back to square one”, Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008. See also “Report of Constitution Review Committee”, Presidency of Constitution Review Committee, 21 May 2007.

¹⁴⁹ Crisis Group interview, Abd-al-Khaleq Zangana, council of representatives member for the Kurdistan Alliance and a member of the KDP, Baghdad, 8 January 2008. Similarly, a Tawafuq member on the review committee said, “I don’t think the review committee will be able to make the necessary amendments in the little time that is left, by the middle of the year. We in al-Tawafuq think that the leaders of the political blocs and members of the presidency council should meet and discuss these articles seriously in order to solve the main problems. The committee cannot solve these problems without the support of the main leaders”, Crisis Group interview, Salim al-Jubouri, council of representatives member for the ICF, an official of the Iraqi Islamic Party and a member of the constitution review committee, Baghdad, 8 January 2008.

¹⁵⁰ Article 41 reads: “Iraqis are free in determining their personal status according to their religion, denomination, belief or choice. This shall be regulated by law”.

and secular parties (including the main Kurdish ones),¹⁵¹ which oppose any application of religious law. As a secular politician put it:

This article enables Shiite religious rules to be applied in the courts. The Shiite parties, who were in the majority, pushed it through. To us the article is doing wrong to women, who are the true majority in Iraqi society. The laws of previous Iraqi governments [the Civil Affairs Law of 1959] should be used to give women their complete rights, perhaps with some amendments. State courts should have the final word in marriage and divorce cases, not courts that belong to this or that sect. Additionally, the dispute is over the fact that Shiite religious laws are applied in the courts and Sunni laws are being ignored. But Iraq consists of many religions and sects and so one sect’s laws should not be imposed on the other religions and sects.¹⁵²

- **Arts. 67-75.** These articles delineate the powers of the president and (in the first – current – electoral cycle only) those of the presidency council. In their quest to restore strong central government and dilute the power of Shiite parties, Sunni Arab parties seek to bolster presidential powers to the extent that they at least equal the prime minister’s; they also wish the president to be commander-in-chief. Shiite parties, which expect to hold on to the prime ministerial post given their greater electoral strength, prefer the current parliamentary system in which the prime minister is strong and the president holds symbolic power only.¹⁵³
- **Arts. 111-112.** Concerning oil and gas (discussed above).

¹⁵¹ The struggle is replicating itself in discussions over the KRG’s draft constitution between Kurdish secularists and Islamists.

¹⁵² Crisis Group interview, Hussam al-Aazawi, council of representatives member for the National Iraqi List, Baghdad, 11 January 2008. A (Shiite) UIA member concurred that the problem could be resolved by declaring the 1959 Civil Affairs Law to be the law in effect under Art. 41. Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008.

¹⁵³ Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008.

- **Art. 115.** The balance of power between the federal government and regions/governorates (discussed above).
- **Art. 140.** This article relates to resolution of the status of so-called disputed areas, including oil-rich Kirkuk, many of which have heavily mixed populations of Kurds, Arabs, Turkomans and smaller minorities.¹⁵⁴ Art. 140 provides for various steps: normalisation, census and a referendum in disputed areas to be held by 31 December 2007.¹⁵⁵ In a controversial decision in that month, when it became evident that the deadline would not be met, the prime minister, presidency council and prime minister of the Kurdistan region jointly decided to extend it until 30 June 2008, without consulting the council of representatives.¹⁵⁶

Parties that oppose the Kurds' bid to incorporate these territories into the Kurdistan region claimed that the constitutional provision had become null and void; they have taken the dispute to the

federal supreme court and are currently awaiting its ruling. Kurdish parties take a very different view.¹⁵⁷ More generally, having failed to make any significant progress in implementing any of the Art. 140 provisions, the parties must decide whether to speed up the process and impose a referendum that few besides the Kurds desire or chart an alternative process that could lead to a peaceful resolution of these areas' status.

Iraqi negotiators have been unable to amend the constitution for a straightforward reason: the principal contested issues – in particular, federalism, oil management and revenue sharing as well as the status of disputed territories – go to the heart of the debate over the shape of post-Saddam Iraq. They also are thoroughly intertwined. Some parties want the constitution subject to serious revision while others oppose anything but cosmetic changes.¹⁵⁸ Sunni Arab parties, for example, but also Shiite parties such as Al-Fadhila, favour a constitutional overhaul; the Kurds, fearing they will lose everything they gained in 2005, adamantly oppose any changes

¹⁵⁴ See Crisis Group Report, *Iraq and the Kurds: The Brewing Battle over Kirkuk*, op. cit., and Crisis Group Report, *Iraq and the Kurds: Resolving the Kirkuk Crisis*, op. cit.

¹⁵⁵ Art. 140 reads: "First: The executive authority shall undertake the necessary steps to complete implementation of the requirements of all subparagraphs of Article 58 of the Law of Administration for the State of Iraq for the Transitional Period. Secondly: The responsibility placed upon the executive branch of the Transitional Government stipulated in Article 58 of the Law of Administration for the State of Iraq for the Transitional Period shall be extended and conferred upon the executive authority elected in accordance with this constitution, provided that it completes normalisation, a census and a referendum in Kirkuk and other disputed territories to determine the will of their citizens before 31 December 2007".

¹⁵⁶ In a press release on 15 December 2007, UNAMI announced it was "pleased to note that there is general agreement among the Presidency Council, with the concurrence of the Prime Minister of Iraq and the Prime Minister of the Kurdistan Regional Government (KRG), on the urgent need to initiate a process in order to accelerate the implementation of Article 140 of the Iraqi Constitution. This process will place particular emphasis on, but not be limited to, issues relating to the Northern provinces of Iraq. In view of the technical and logistical difficulty of holding a referendum prior to 31 December 2007, as mandated in the Constitution, and given the corresponding need for a technical delay, it has been indicated to UNAMI that the next best step would be to initiate, in January 2008, and within six months, a process of facilitating the implementation of the Article with technical assistance of the United Nations (UNAMI/Baghdad) to the authorities involved, including the High Committee for Implementation of Article 140. This would enable all parties involved to contribute constructively to such a process". See also wire reports on 17 December 2007.

¹⁵⁷ A UIA official held: "The extension of the deadline in Article 140 is not legal; it was effected for political reasons. The article expired on 31 December 2007; extending it till 30 June 2008 is tantamount to changing the constitution. Any amendment to any article in the constitution should be made according to Article 142 [ie, via the constitution review committee]. The amended articles should be approved by the council of representatives and subsequently by the Iraqi people in a referendum. Deleting a date and inserting a new date is amending the constitution", Crisis Group interview, Abbas al-Bayati, a council of representatives member for the UIA, leader of the Turkoman Islamic Union and member of the constitution review committee, Baghdad, 13 January 2008. The Kurdish view, by contrast, was: "The constitution review committee is the only authority that can decide whether the expiry of the period in Art. 140 means that the article has become null and void. Look at Article 142: It had a time limit of four months from the council of representatives' first session. The council of representatives subsequently decided to extend the Article 142 deadline. In that case, the Article 140 deadline should be treated the same", Crisis Group interview, Friad Rawanduzi, a council of representatives member for the Kurdish Alliance, a PUK official and member of the constitution review committee, Baghdad, 10 January 2008.

¹⁵⁸ One parliamentarian stated: "Generally speaking, all the blocs agreed that the constitution should be revised, but their will to do so differs from one bloc to another. The Tawafuq bloc really wants to amend the constitution; the others don't", Crisis Group interview, Alaa Makki, council of representatives member for the Iraqi Consensus Front and a member of the Iraqi Islamic Party, Baghdad, 25 June 2006. Wael Abd-al-Latif, an independent council of representatives member, noted: "Tawafuq is insisting on amending the constitution, but the Kurds refuse to make any change", Crisis Group interview, Baghdad, 7 January 2008.

affecting Iraq's federal structure and have put a red line before the Kirkuk issue, insisting on Art. 140 implementation as a condition for concessions on other matters.¹⁵⁹ As Hamid Majid Mousa, a constitution review committee member, put it:

The committee reached some shared perspectives on primary issues but these could not be turned into final agreements, because each side is insisting on certain matters and will accept adjustments only when the other sides agree to compromise on their own issues as well. For example, the Kurds won't agree to change their position concerning provincial powers or oil revenues unless the others agree on Article 140. We are currently trying to forge a comprehensive deal to which all fronts can agree and that preserves everyone's rights.¹⁶⁰

The issue of disputed territories, and in particular the Kurds' insistence on implementation of Art. 140, have contaminated debate over other issues such as oil. Oil legislation cannot be finalised as long as parties fail to resolve the dispute over the classification of oil and gas fields located in disputed territories; they may agree to classify these fields only once the status of these territories has been settled, lest they lose control over how oil production there is managed. Likewise, agreement over the architecture of federalism could have significant bearing on both the oil law and the issue of disputed territories. If parties agree to temper the extreme decentralisation contained in the current constitution, the debate over ownership, management and revenue sharing of the country's oil wealth (Arts. 111-112) is likely to be less incendiary.

These conflicts are playing themselves out through procedural tangles. One involves the legality of extending

a constitutional deadline by parliamentary decision. A council of representatives member contended:

The review committee was given a specific time period to complete its work – four months – but failed to reach agreement about points of dispute and exceeded the time the constitution gave it. This time infringement is a violation of the constitution, and the council of representatives cannot resolve this by a vote that itself is unconstitutional.¹⁶¹

Others see no problem in extending the deadline, citing the "greater good": "Some people say that these extensions are not constitutional, but overall they are accepted because these constitutional amendments are vital for national reconciliation".¹⁶² For the moment, while the review formally continues, in effect it has halted.

A second tangle concerns veto power over revisions. The bottom line is that progress in negotiations depends on support from both the Kurdistan Alliance and the remnants of the Shiite coalition, as each could mobilise the necessary two-thirds majority in at least three governorates to torpedo the package of amendments in a nationwide referendum.¹⁶³ Kurdish parties could marshal such a majority in the three governorates they dominate – Erbil, Suleimaniya and Dohuk – and the UIA could possibly accomplish the same in at least three southern governorates. This gives both coalitions, which wrote the current constitution, virtual veto power over any amendment. As an independent, secular Iraqi political analyst put it:

Any amendment contrary to the Kurds' interest will be rejected by a two-thirds majority vote in three Kurdish governorates. The same goes for the Shiites. At the time of the constitutional referendum [in October 2005], the Sunnis showed that they lacked the power to defeat the constitution.¹⁶⁴ This means that amendments

¹⁵⁹ "There are no differences inside the Kurdistan Alliance about Kirkuk, and I don't think there will be any compromise from the Kurds about Kirkuk", Crisis Group interview, Friad Rawanduzi, a council of representatives member for the Kurdish Alliance, a PUK official and member of the constitution review committee, Baghdad, 17 February 2008.

¹⁶⁰ Crisis Group interview, Hamid Majid Mousa, a council of representatives member for the National Iraqi List, leader of the Iraqi Communist Party and member of the constitution review committee, Baghdad, 18 February 2008. He cited the precedent of passage of the budget, amnesty law and provincial powers law as a package deal in February 2008: "We tried something like that in the last vote when we put three laws up for a voting at the same time. Despite all the difficulties and manoeuvring, we succeeded and every side got what it wanted. We hope that this 'achievement' will set a useful precedent".

¹⁶¹ Crisis Group interview, Nadim al-Jaberi, head of the Islamic Virtue Party and council of representatives member, Baghdad, 23 February 2008.

¹⁶² Crisis Group interview, Hunain al-Qaddu, council of representatives member for the United Iraqi Alliance, head of the Iraqi Minorities Council and member of the constitution review committee, Baghdad, 16 February 2008.

¹⁶³ Art. 142(4) states: "The referendum on the amended articles shall be successful if a majority of voters approves it and two-thirds of voters in three or more governorates does not reject it".

¹⁶⁴ In fact, the Sunnis came close to defeating the constitution in the 15 October 2005 referendum, when Sunni Arab parties called on their supporters to vote against it. They managed to

have a minimal chance of being accepted. The constitution is untouchable, unfortunately, and trying to amend it a waste of time.¹⁶⁵

Holding the main cards in their hands, the Kurds have been blamed for blocking progress in negotiations on a range of issues, including the oil law and constitutional amendments. This explains repeated visits by high-level U.S. officials to Masoud Barzani's redoubt in Sari Rash in the mountains above Erbil. In March 2008, U.S. Vice President Dick Cheney asked Barzani, the KRG president, for help to "conclude a new strategic relationship between the United States and Iraq, as well as to pass crucial pieces of national legislation in the months ahead".¹⁶⁶

In 2007, as it became clear that the Art. 140 deadline would not be met, the U.S. put its support behind a new initiative by the UN Assistance Mission in Iraq (UNAMI) to involve itself directly in the thorny debate over Kirkuk and implementation of Art. 140.¹⁶⁷ The immediate result was the deadline's six-month postponement. Beyond, that, however, according to participants in the deliberations, the U.S. has not weighed in on the content of any disputed issue. Instead, its role has been limited to a gentle nudging along of negotiations. But without serious U.S. pressure on the Kurds and related quid pro quos to make a deal palatable to them, a breakthrough in the various sets

gain a two-thirds-majority "no" vote in Anbar and Salah al-Din, and fell just 85,000 votes short in a third governorate, Ninewa.

¹⁶⁵ Crisis Group interview, Tareq Harb, analyst, Baghdad, 23 June 2006. Kurdish politicians have justified their blocking power as expressing the will of the people: "The parties cannot oppose the voice of the Iraqi people. 80 per cent of the people voted for the constitution. To change it, the review committee should present to the council of representatives the articles that should be amended, but as a package, not one by one. If the council accepts the amendments by a 50-plus-one vote, then the presidency council should confirm them. After the latter's approval, the new constitution should be offered to a vote by the people in a referendum. This is why I think there is no chance the articles on federalism or other primary issues will be changed", Crisis Group interview, Abd-al-Khaleq Zangana, council of representatives member for the Kurdistan Alliance and a member of the KDP, Baghdad, 8 January 2008.

¹⁶⁶ *The New York Times*, 19 March 2008.

¹⁶⁷ In Resolution 1770 of 10 August 2007, the UN Security Council decided that UNAMI, "at the request of the Government of Iraq, shall (a) advise, support, and assist: ... (iii) The Government of Iraq and the Council of Representatives on Constitutional review and the implementation of constitutional provisions, as well as on the development of processes acceptable to the Government of Iraq to resolve disputed internal boundaries".

of talks is unlikely. What will be required in particular is a concerted effort to unlock the matter of disputed territories, which is holding up progress on the other issues. While this is not one of the Iraqi government's or Bush administration's, benchmarks, it should be. The more risky alternative is to wait for the late 2009 parliamentary elections, which could change the political equation enough to break the deadlock.¹⁶⁸

¹⁶⁸ At least one Kurdish official has suggested that the only other way progress could be achieved would be via new parliamentary elections, but these are not scheduled until late 2009: "I think things are heading toward delaying the controversial issues until after the next elections", Crisis Group interview, Friad Rawanduzi, a council of representatives member for the Kurdistan Alliance, a PUK official and member of the constitution review committee, Baghdad, 17 February 2008.

VII. CONCLUSION

Despite the breathing space provided by the surge, no meaningful progress toward reconciliation/accommodation has yet occurred. Instead, politicians with varying degrees of representativeness and a ruling alliance whose power and agendas have stood in the way of compromise have rendered a breakthrough unlikely. While some legislation has made it past the council of representatives, negotiations on key deals are stalled or sputtering, little has been carried out, and disputes over the content of laws are being reconfigured as disputes over their implementation.

A principal reason for this disappointing lack of progress is that the process itself has not enjoyed broad support. The U.S. was the driving force in late 2005 after it realised that its state-building project was becoming unhinged because of a constitution-drafting process that lacked national consensus. Recognising in particular the need to appease Sunni Arabs, it concluded a compromise agreement to recalibrate power, which it imposed on a reluctant ruling alliance. This agreement's subsequent non-implementation fed growing sectarian violence, which soon overtook politics.

The surge brought relative and welcome calm. But there is reason to fear this is only a temporary salve and that underlying issues will again come to the fore. Security gains could well be imperilled by a plethora of residual threats (from remnants of al-Qaeda in Iraq; intensifying intra-Shiite conflict; the proliferation of militias and armed gangs; a government push-back against, or deepening frustration by, the Sons of Iraq; territorial disputes; and, more broadly, the inability to establish legitimate, functional state institutions). Whatever political space the surge tore open thus is likely to narrow once again.

Several scenarios loom:

- Re-escalating conflict as the surge comes to a close, growing and intersecting civil wars, a failing state and regional intervention. This scenario is plausible but probably will not occur in all its severity, as regional states have too much at stake to allow conditions to deteriorate to this extent.
- Gradual stabilisation via provincial council elections. If genuinely free and fair and carried out in a secure environment, these hold the potential of beginning to alter the political landscape by bringing a new generation and class of political leaders to the fore. Perhaps they could be a stepping stone toward a new national consensus.

In case of election boycotts, major violence or fraud, however, the elections may have the opposite result of further polarising an already deeply divided country.

- A muddle-through. This may be the most likely scenario, in which elections are sub-standard, U.S. forces pursue a divide-and-rule approach with mixed results and Iraq remains deeply fragmented, without legitimate, functional institutions and plagued by a constant, fluctuating level of violence. The intensity of the violence will be a function of local and regional circumstances, but in which neighbouring states' shared interest in maintaining Iraq's territorial integrity prevents disintegration and limits direct foreign intervention.

There is a fourth, more ambitious option which Crisis Group has advocated in the past and that ultimately may be necessary, however unlikely in the foreseeable future. It is to reach domestic reconciliation and regional/international consensus through a broad gathering bypassing the existing parliament. Both the domestic and regional components are critical, for without regional buy-in, local actors would have the option of turning to foreign allies as an alternative to compromise, and without domestic agreement, there is little positive – besides containment of the conflict – outside actors can do. Several of Iraq's neighbours, convinced the current approach cannot work and that the current government is unredeemable, have pressed this case.¹⁶⁹

This scenario would entail:

- An inclusive conference under UN sponsorship bringing together a broad range of Iraqi actors (parties both inside and outside the government, important insurgent groups with the exception of al-Qaeda in Iraq, significant militias and tribal entities), regional states and other key members of the international community, aimed at achieving a political compact that would guarantee all major constituencies a fair share of power and resources. This could be preceded by more limited talks between the U.S. and major insurgent groups mediated by a UN envoy, as described

¹⁶⁹ In discussions with Saudi officials and analysts, there was broad consensus on the need for such an approach in order to promote a more nationalistic, "patriotic", non-sectarian leadership. Crisis Group interviews, Riyadh, April 2008. Syrian officials also argued for an inclusive conference to forge a new compact, Crisis Group interviews, Damascus, March-April 2008.

in the companion report as a means of making the process more manageable;¹⁷⁰

- regional agreement concerning neighbouring states' respective red lines, a broad common vision for Iraq and minimum requirements for its re-stabilisation, involving all of Iraq's neighbours, as well as the Arab League and the Organisation of Islamic States. Key to success would be serious U.S./Iran and U.S./Syria engagement, as discussed in a prior Crisis Group report¹⁷¹ and efforts to encourage dialogue between Saudi Arabia and Iran; and
- a multilateral effort to bring about both the Iraqi conference and regional framework, headed by the UN and supported by the U.S.

Any overall political compromise would need to address the principal questions of territory, power and resources. It should start with a solution to the status of Kirkuk (as well as other disputed territories). As proposed in a previous Crisis Group report, the best outcome would be one in which all sides achieve their minimum demands, while no one's red lines are crossed. It would involve designating Kirkuk governorate as a stand-alone federal region, much like Baghdad, with a power-sharing arrangement and protection of minority rights.¹⁷²

In exchange for not gaining Kirkuk as part of the Kurdistan region, the Kurds would obtain the right – in the hydrocarbons law – to develop their own oil and gas wealth, including the right to determine and sign contracts, and obtain federal government support to enable them to do so. Moreover, the UN would assist in determining the Kurdistan region's boundary inside Iraq, which would receive international recognition.

In this package deal, the Kurdistan region would be Iraq's only federal region; in the rest of the country, power would be devolved along governorate lines, as proposed in a previous Crisis Group report.¹⁷³ The law on the creation of regions should be amended to reflect this asymmetric federalism. Finally, the constitution should be revised to reflect all the above agreements and submitted to popular referendum. The Kirkuk agreement should likewise be subject to popular referendum in the Kirkuk governorate.

Because prospects for such a deal seem unlikely for now, the more immediate, realistic task is to encourage provincial council elections to take place on time. The U.S., its allies and the UN have a major role in persuading all Iraqi actors to participate and ensure that the elections take place in a safe environment and are not riddled with fraud.

**Baghdad/Istanbul/Damascus/Brussels,
30 April 2008**

¹⁷⁰ See Crisis Group Middle East Report N° 74, *Iraq after the Surge I: The New Sunni Landscape*, 30 April 2008.

¹⁷¹ See Crisis Group Report, *After Baker-Hamilton*, op. cit.

¹⁷² Crisis Group Report, *Iraq and the Kurds: The Brewing Battle over Kirkuk*, op. cit.

¹⁷³ See Crisis Group Report, *After Baker-Hamilton*, op. cit.

APPENDIX A

MAP OF IRAQ

