report

minority rights group international

# Building Democracy in Iraq

By Yash Ghai, Mark Lattimer and Yahia Said

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# Building Democracy in Iraq

**By Yash Ghai, Mark Lattimer and Yahia Said**

**With interviews with Max van der Stoel, Gudmundur Alfredsson, Asma Jahangir and Donald Horowitz**

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Yahia Said is research officer at the Centre for the Study of Global Governance at the London School of Economics and Political Science. He has worked extensively on issues of political and economic transition in post-totalitarian societies with a focus on Central and Eastern Europe and the former Soviet Union. He is a Czech citizen of Iraqi origin. He had to flee Iraq in 1979.

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# Preface

On Tuesday 15 October 2002, the people of Iraq went to their polling stations to vote. It was not the first time that such an exercise in capturing the will of the Iraqi people had been conducted during the rule of Saddam Hussein. Indeed, within a year of his taking over as President in 1979, Iraq had seen its first elections since the military revolution of 1958. On this occasion, however, Saddam Hussein found the result more than usually satisfactory. The referendum on whether he should continue as President for another seven years recorded a 100 per cent 'Yes' vote.

This new report by Minority Rights Group International examines the conditions under which the next election that takes place in Iraq could claim to be more democratic. In so doing, it considers not just the formal absence of dictatorship, but also the need to establish those features which are essential to a genuinely democratic society, including fair representation, cooperation between communities, the rule of law, personal security and respect for human rights. International experts in conflict prevention, transitional administration, and international and comparative constitutional law were interviewed to help elaborate ground rules for building democracy in Iraq.

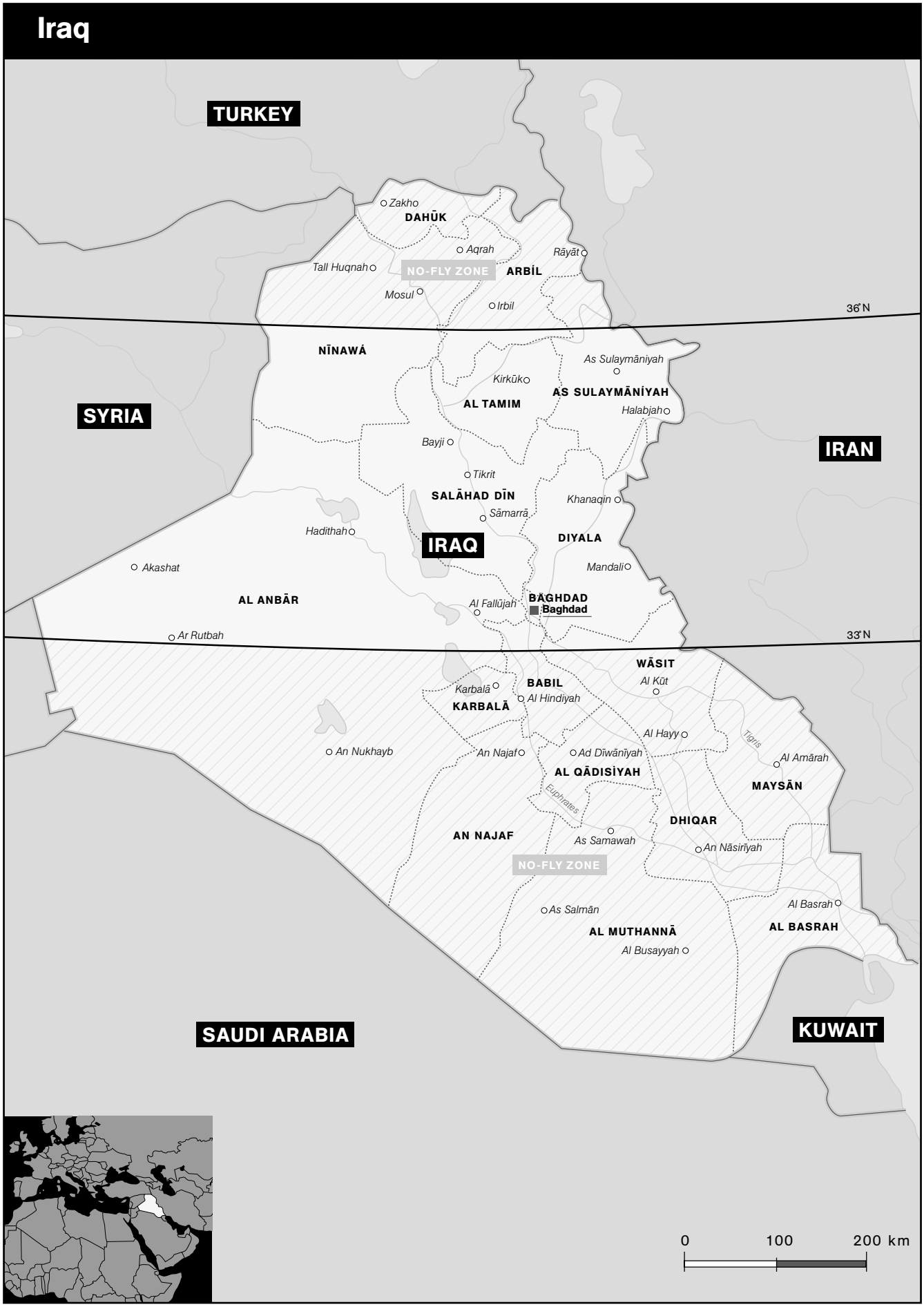
In particular, this report considers the potential risk posed by inter-ethnic and inter-confessional conflict and the action necessary to try and avoid it. On the one hand, Iraq has a recent history of systematic discrimination and violent repression targeted at particular ethnic and religious groups; on the other, it has traditionally been a relatively well-integrated society. Major political change and international intervention pursued in Iraq, if not properly informed, may together risk exacerbating the potential for division.

This report is being published at a time when the future of Iraq is uncertain. Intense international interest, in particular that of the United States, on the issue of weapons of mass destruction and the threat of war mean that there is a likelihood of major political change within Iraq in the near future. The modalities, or indeed ethics, of triggering such change are not the subject of this report, which instead focuses on the conditions required for establishing democracy, human rights and the rule of law in the longer term (although discussion of the latter is necessarily informed by the range of possible action mooted under the former). The report considers, in turn, the specific challenges for establishing a multi-ethnic, multi-confessional democracy in Iraq; the social and political aspects of managing post-totalitarian transition; and options for a constitution-building process, drawing on the experience of other states in transition.

Human rights are always a matter of universal concern, but the international community has a particular responsibility towards Iraq. Support for the belligerents in the terrible Iran-Iraq War, the failure to respond effectively to egregious human rights violations in Iraq in the late 1980s and since, and the maintenance of economic sanctions at a crippling human cost, all place an obligation on the international community of states to refocus its efforts in Iraq now towards the protection of human rights and the promotion of human development. Iraq's people deserve better from their government, and from the world.

**Mark Lattimer**
Director
January 2003

# Iraq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# Challenges for establishing inclusive democracy

*Mark Lattimer*

## Iraq's peoples

Carved out of the Ottoman Empire by the British at the end of the First World War, the frontiers of modern-day Iraq encompass a diverse range of ethnic, religious and linguistic groups. Appreciating the dynamics of that diversity is essential for an understanding of Iraq's polity and the conditions under which democracy can be fostered.

A brief guide to Iraq's different peoples is given in the box overleaf.[1] However, because ethnic and religious distinctions often do not coincide in the country, it is useful also to consider ethnicity and religion as separate axes, generating their own possibilities and tensions.

### Ethnic diversity

Up to 80 per cent of Iraq's people are Arabs. The remainder are mostly Kurds, although there is also a sizeable Turkoman minority. A long-standing dispute over the governance of Kurdish areas in the north of Iraq led to an autonomy law being imposed by the government in 1974, after talks broke down.[2] Although in theory the agreement still stands, it proved to be largely formal. Following the imposition of an air exclusion zone following the 1991 Gulf War (see below), most of the Kurdish region has enjoyed *de facto* autonomy, with relatively free elections. The receipt of a stipulated 13 per cent of the income from the 'oil-for-food' programme under the UN sanctions regime has also encouraged relative prosperity.[3]

Outside the autonomous area, the Iraqi government has however pursued a policy of 'Arabization', forcibly expelling ethnic Kurds or Turkomans from key areas, particularly in and around the oil centre of Kirkuk, or coercing people into registering themselves as Arab.

### Religious diversity

Although over 95 per cent of Iraq's population are Muslim, these are split between Sunni and Shi'a, with the latter in the majority. There are also a number of Christian communities, covering a range of different churches (see box). When modern Iraq was first formed, it was a condition of rule stipulated by King Faisal that the territory included southern Kurdistan, specifically in order that the Sunni Kurds would help prevent the Shi'a from predominating.

Southern Iraq is, however, the historical centre of Shi'a Islam, with many holy places and schools located there, particularly in Najaf and Karbala. Many of these were destroyed by Saddam Hussein in periodic campaigns of repression, and Shi'a leaders have been alternately persecuted, arrested or assassinated, or, occasionally, courted. From the 1970s, groups of Shi'a believed to be of 'Persian' origin were expelled to Shi'a Iran. The Iraqi Shi'a are mainly Arabs, however, and generally see themselves as distinct from the Farsi-speaking Iranians. There was no significant rebellion of Iraqi Shi'a during the Iran-Iraq War and only a minority of Shi'a appear to support the Iranian revolutionary concept of the *velayat i-faqih* ('guardianship of the jurist') or clerical rule.

The ruling Ba'ath Party is nationalist, pan-Arabist and secular in history and orientation. In practice, just as he has promoted Arab identity for political ends, Saddam Hussein has periodically chosen to emphasize the Islamic or the socialist nature of his government when it was expedient to do so. The Islamic inscription was only added to Iraq's national flag in 1991.

### Tribal and kin affiliations

To assert that present-day Iraq is ruled by Sunni Arabs is a somewhat misleading statement, both because it implies a level of confessional exclusivity in an administration in which many Shi'a and some non-Muslims hold prominent positions, and also because it suggests that Sunnis as a whole enjoy political dominance when in practice the power is held by very few. In reality, Iraq's leadership has traditionally been dominated by a small number of Sunni tribes from north-western Iraq, and Saddam Hussein's use of kin networks and patronage to entrench his personal power has made this factor even more marked.

Key figures in the government, the Revolutionary Command Council (RCC), the Ba'ath Party, the Republican Guard, Special Republican Guard and other elite security forces come from Saddam Hussein's home town of Tikrit and the surrounding regions, including Samarra and al-Dur. Many are related to his family, such as those of the al-Majid clan (including 'Ali Hassan al-Majid, sometime governor of Kuwait and commander of the genocidal *Anfal* campaign against the Kurds).

## Principal ethnic and religious groups in Iraq

*Note: The 1997 census recorded a population of just over 22 million, although the current population is more credibly estimated at around 26 million. Due to the lack of credible census information, the political sensitivity of population estimates and the tendency of particular communities to exaggerate their numbers, the figures quoted below are necessarily approximate.*

### Sunni Arabs
A dominant minority, the Sunni Arabs have constituted most of Iraq's ruling class from the time of the Hashemite monarchy onwards. Making up approximately 17 per cent of the population, the Sunni, particularly those from the north-west, dominate the government, the Ba'ath Party and the armed forces. They form the majority in many areas of central and western Iraq.

### Shi'i Arabs
The Shi'a form an overall majority in Iraq, constituting about 55 per cent of the population, but have historically been marginalized in terms of political and military influence and have long suffered from discrimination. The Shi'a are most concentrated in the south and south-east, but are now also a majority in Baghdad. The Shi'a include the Mada'in, the so-called 'Marsh Arabs', who, before the government campaign of repression following the 1991 Gulf War, inhabited the extensive marshlands at the confluence of the Euphrates and Tigris Rivers.

### Kurds
The Kurds form some 15–22 per cent of Iraq's population, concentrated overwhelmingly in the Kurdish autonomous region in the north and north-east of the country, bordering Turkey and Iran. They constitute a linguistic as well as ethnic minority, speaking Kurdish rather than Arabic, but are nearly all Sunni Muslims. The small remaining population of Feili Kurds are, however, Shi'a, and live in Baghdad and the south-east. The Yezidis speak Kurdish but observe their own religion.

### Turkomans
Making up about 3–4 per cent of Iraq's population, most of the Turkoman live in the north. They are split between Sunni and Shi'i Muslims, with only the former generally looking to Turkey for support.

### Assyrians and other Christian minorities
Christian confessions constitute another 3-4 per cent of Iraqis. Many Assyrians, members of the Nestorian Church, still live in the north, where they suffered in the Iraqi government's *Anfal* campaign (see main text). There is also an Assyrian community in Baghdad. The Chaldeans and smaller groups of Syrian Orthodox, Armenians and Catholics live mainly in Baghdad.

### Jews
Once numbering over 150,000, the Jews of Iraq have nearly all left or been forced out. Following a major exodus in the 1960s and 1970s, small communities numbering no more than a few hundred now remain in Baghdad and the north.

However, tribal identities and networks have also been used on a more widespread basis as a means of exerting political and social control in Iraq. Charles Tripp notes that under Saddam Hussein this has become 'an integral part of the state's organization of support':

> On a more general and widespread level across Iraq, this reflects the marked favouring by Saddam Husain [sic] of the hierarchies of tribal shaikhs, able and willing to cooperate with the regime and to 'deliver' the loyalty or at least the acquiescence of their fellow tribesmen to the head of state. Officially, this has taken the form of measures introduced in the 1990s recognising the authority of tribal shaikhs to settle disputes and regulate affairs among their tribesmen and with other tribes, bringing back a form of separate jurisdiction for the 'tribal areas' (now situated in many cases within the towns of Iraq) that recall the days of the monarchy. Unofficially, Saddam Husain has favoured the most co-operative of the tribal shaikhs, by granting them land rights, by promoting their tribesmen in various branches of the state and by allowing them to arm their followers. ...increasing numbers of individuals, far removed from any obvious 'traditional' tribal identity, have sought to affiliate themselves with the recognised shaikhs of certain tribal groups to benefit from the protection and security this is thought to bring.'4

## Civil conflict and minority rights violations

The ethnic and religious diversity of Iraq, envisaged as a series of divisions or fault lines, has led many commentators to predict a future of civil conflict for Iraq. The leading report in the *Wall Street Journal* on 11 December 2002 began, for example: 'If a US-led force succeeds in ousting Iraqi President Saddam Hussein, the victors would inherit a traumatized society full of festering conflicts that didn't start with him and wouldn't suddenly fade with his departure. ... How can the nation avoid being dismembered by its neighbors or breaking up in spasms of violence like the former Yugoslavia?'[5]

It is notable, however, that ethnically or religiously homogeneous states are rare, and those that are homogeneous are not markedly more stable than those that are not. In Iraq, while there is a long history of conflict, particularly over relations between the Kurdish region and the central government, there is also a long-standing practice of cross-community integration, with members of the Shi'a and of Christian minorities working in state institutions, including taking prominent positions in authority. In many important respects, ethnic and confessional distinctions do not

coincide (most Kurds are Sunni Muslims, for example, sharing a confessional identity with the Sunni Arabs predominant in Iraq's government). This works against ethnic or confessional identities operating as overriding factors in Iraqi politics. Similarly, the renewed importance of tribal networks, while making constitutional arrangements in Iraq yet more complex, also works against ethnic or religious groups being seen as monolithic blocks.

A post-totalitarian Iraq will nonetheless have to deal with the legacy of extreme repression and grave violations of the rights of minorities. The fact that such violations were in many cases targeted at specific ethnic or religious groups will have increased the chance of future division in the country.

Following the 1991 Gulf War, the UN Security Council approved Resolution 688 which *inter alia* expressed grave concern at 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region'.[6]

Resolution 688 was a reaction to the measures taken by Iraqi government forces to quash a Kurdish rebellion which had led to the mass flight of nearly two million people. However, relatively little international attention had been paid to a series of egregious violations of the rights of minorities that had taken place in Iraq over the previous decade. In February 1988 the Iraqi government launched a genocidal campaign against the Kurds in northern Iraq that was named *al-Anfal* (a Koranic reference to the spoils of war). Violations perpetrated as part of the campaign have been well documented[7] and will not be detailed again here, but resulted in approximately 100,000 deaths or forced disappearances of civilians and other non-combatants and the destruction of some three-quarters of Kurdish villages. The campaign included the repeated use of chemical weapons against civilian communities, most notoriously killing at least 3,200 inhabitants of the Kurdish town of Halabja in March 1988. During the Iran-Iraq War, mass arrests and forced disappearances were carried out against Iraqi Shi'a, forcing hundreds of thousands to become refugees in Iran. Repression intensified after a Shi'a rebellion broke out in some cities in the south following the 1991 Gulf War. After many Shi'a sought refuge in the remote marshlands of eastern Iraq, the Iraqi government launched a military campaign against them and the Mada'in, and initiated a project to drain the marshes. Some 200,000 Shi'a were killed and most of the marshlands destroyed.[8]

Resolution 688 had called for 'immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq' and it was used to justify, controversially, the imposition of a 'no-fly zone' north of latitude 36°N to create safe havens for Kurdish and other displaced populations in northern Iraq. A second 'no-fly zone', south of latitude 32°N and later enlarged to south of latitude 33°N, was established by the US and allied forces with the expressed aim of protecting populations in southern Iraq.

Human rights violations have continued on an appalling scale, however (see box). Periodic reports of the UN Special Rapporteur on the situation of human rights

## Continued and silent ethnic cleansing

The Fédération Internationale des Ligues de Droits de l'Homme and Alliance Internationale pour la Justice published the report *Irak: épuration ethnique continue et silencieuse* in December 2002, based on research carried out in July 2002 with displaced Iraqis in the Kurdish autonomous region in Iraq and with Iraqi Shi'a refugees in Iran. The report highlights the harassment and continual monitoring and torturing of ethnic and religious groups in Iraq, including the policy of 'Arabization', and calls for an end to ethnic cleansing, racial discrimination and the persecution of Iraqi Shi'a.

### Policy of 'Arabization'

- Since 1991 the policy of Arabization has been followed in total violation of UNSC Resolution 688 and of all international treaties for the protection of fundamental rights.
- Large numbers of Kurds, Turkomans and Assyrians have been forcibly displaced, particularly in the region around Kirkuk. The total number of Kurdish victims of enforced disappearance in Iraq is estimated at 182,000.
- In September 2001, the Revolutionary Command Council accorded by decree 199 the 'right' of every Iraqi to change his/her ethnic identity and choose an Arab one. Those designated on the list must make the choice between forced displacement and changing their ethnic identity.
- In 1977 and 1987 a national census obliged all Assyrians to choose between Kurdish or Arab nationality. Those who insisted on identifying as Assyrian were struck off the list or arbitrarily registered as Arabs or Kurds.
- At present, in Iraqi-controlled regions, Assyrians do not have the right to give their child an Assyrian name and must change their 'nationality' under threat of losing their employment and being expelled.

### Internally displaced persons

- In 2002 the US Committee for Refugees placed Iraq among the 10 countries with the highest number of internally displaced peoples, estimated at between 700,000 and 900,000.
- Sadun Faili, adviser to the Minister for Human Rights in Sulaymaniyah, asserts: 'Currently, there are numerous displaced people rejoining their parents in the Kurdish region, but they do not wish to be registered for fear of reprisals on their families left in the governmental zones.'
- Many people register and de-register themselves from Iraqi authorities' lists on a weekly basis for fear of monitoring and harassment by the authorities.
- Population movement is incessant and thousands have been uprooted several times during their lives, forcibly reinstalled in collective camps after months of enclosure in military camps, then displaced again, fleeing conflicts or repression.

in Iraq, first appointed in 1991, now comprise over a thousand pages of reporting revealing a pattern of systematic gross violations.[9] In April 2001 the Committee on the Elimination of Racial Discrimination, the UN body that monitors compliance under the International Convention for the Elimination of All Forms of Racial Discrimination, expressed further concern over allegations that 'the non-Arab population living in the Kirkuk and Khanaquin areas, especially the Kurds, Turkmen and Assyrians, have been subjected by local Iraqi authorities to measures such as forced relocation, denial of equal access to employment and educational opportunities and limitations in the exercise of their rights linked to the ownership of real estate'.[10]

## Democracy-building: the scale of the task

Although the situation of Iraq is unique, the UN, regional security organizations and other representatives of the international community have in recent years built up considerable experience in reconstruction and constitution-building in post-conflict countries or in countries in transition from authoritarian government (including Afghanistan, East Timor and countries of the former Yugoslavia). MRG conducted detailed interviews with four internationally renowned experts in conflict prevention, human rights and inter-ethnic issues to help establish some ground rules for building democracy in Iraq.[11]

Some of the complexities of this task were cogently summarized by **Max van der Stoel**, OSCE High Commissioner on National Minorities from 1992 to 2001, and former UN Special Rapporteur on Iraq (1991–9):

> The London conference [of Iraqi exile groups in December 2002] has shown how many controversies there are and how difficult it will be to create a stable post-Saddam government. This is particularly the case because there is not really a person who clearly would be able to lead a coalition and would have the prestige to find solutions if there were tensions within the coalition. I remember from when I was in Iraq that I thought that a fairly big majority of the population didn't like the regime, but they only have one interest, that is to keep their heads as low as possible. In other words, there hasn't been any chance of helping currents which could be of importance for a leadership group in a democratic society. Even just in matters of internal policy there, still it will be dangerous to deviate from the position of the government and it could lead to arrest or removal from a job, etc. So the whole element of public debate, which is so important for having people creating and taking responsible positions in society, has been absent for so many years.
>
> The big problem in Iraq is that the Kurds have their clear wishes for autonomy, substantial autonomy, and that there are religious divisions, so that even if the country had some democratic tradition, it would still be very difficult to come to an effective system of government which would ensure democratic values. Clearly in the Gulf War in 1991, the main reason for the Americans to stop was exactly the fear that the country might fall apart, and there are of course the Turks probably knocking on the door every day in Washington to emphasize the need to ensure that the Kurds will not create a sort of independent state which could be the nucleus of a wider Kurdistan, comprising parts of Iraq and of Turkey and Iran.
>
> If Iraq were a mono-ethnic state and a mono-religious state that would in a way simplify matters, but with these religious divisions and the Kurd issue, you would have to have a very intricate state structure. You cannot simply say, here we have a parliament and everybody who wants to can create his own party and then we will start a government. There have to be specific formulas to deal with the Kurdish problem – in what fields will they have autonomy, in what fields should they not have autonomy – and to secure the religious rights of all concerned, bearing in mind that the Shi'a have their specific issues. It is difficult to foresee how things will look after the collapse of the regime – and if half the country is really destroyed, things might be even more difficult.

Understanding the complexity of the task also must lead to a realistic appraisal of the length of time required for establishing democracy, a point made forcefully by **Gudmundur Alfredsson**, Professor and Director, Raoul Wallenberg Institute of Human Rights and Humanitarian Law at the University of Lund in Sweden, who accompanied the UN Special Rapporteur on his mission to Iraq in 1992:

> You are looking at a country which has no democracy, which has known exactly the opposite to democracy for the past several decades. We saw widespread evidence of violations, interviewing people not only in Iraq but also beyond its borders in refugee camps. For a country and a people to reverse this situation will take time. I think that regarding human rights education, which includes education in democracy, it may take a generation or two before you have a system firmly in place, depending on the country, on the surroundings, the amount of assistance coming in and the level of education already there. In Iraq, for example, women may be relatively better off than in some countries in the region, so there may be something

positive on that one score. But you cannot do it in short order. The experiences the international community is now having in Kosovo and in Bosnia, places in Europe where the surroundings are quite different, is that it is taking more time than people expected in the beginning. But that should not stop the effort or the expectation of democracy, because I don't think really there is an alternative.

The time element is going to be there: the formation of political parties, the opening of meaningful political debate, exchange of opinions and the establishment of a free press, information to the public, getting the public used to freedom of expression, being able to freely elect in a democratic process. It's not as simple as taking Saddam out, and putting the exiles in. It's more than one man: he has built around him a system of bureaucracy and a military which is a lot larger in numbers than the exile community. Coming from abroad, you also don't know how representative the exile community are.

It is not just political repression that has been preventing an active civil society in Iraq from forming. The Iran-Iraq and Gulf Wars, and a decade of economic sanctions have contributed to the impoverishment of Iraq's infrastructure and its people (see box) and left them almost totally reliant on the state. This, ironically, has served to strengthen the control of the government.

A leaked confidential report prepared by the UN Development Programme in December 2002 to look at likely humanitarian scenarios following a war in Iraq emphasized: 'the bulk of the population is now totally dependent on the Government of Iraq for a majority, if not all, of their basic needs and, unlike the situation in 1991, they have no way of coping if they cannot access them: the sanctions regime, if anything, has served to increase dependence on the Government as almost the sole provider'. The report also dismissed comparisons with the post-war situation in Afghanistan in this respect as being 'simply invalid', noting that in contrast to Afghanistan's predominantly rural population with a high level of self-reliance, Iraq is relatively urbanized with the state providing for the basic needs of the population as a matter of government policy.[12]

**Asma Jahangir**, UN Special Rapporteur on extra-judicial, arbitrary and summary executions and a founding member of the Human Rights Commission of Pakistan, agrees with the need to take care in making comparisons with the situation in other transitional or post-conflict societies:

## The humanitarian situation

In February 2002 the Iraq office of the United Nations Children's Fund (UNICEF) produced an 'Iraq Situation Analysis', detailing the effects of economic sanctions, the conditions under the current Iraqi regime, and the situation after two major wars. It highlighted that 'the cumulative effects have resulted, among other things, in the non-availability of sufficient financial resources to provide and support effective services; ad hoc, intermittent, and insufficient supplies; restrictions on purchase of local goods, and an increase in female headed households', and adverse effects on health and well-being.

### Health factors

- The infant mortality rate (per 1,000 live births) in 2002 was 107, more than double the rate in the 1980s. The under-5 mortality rate in 2002 was 131, up from 56 in 1992. Preventable diseases such as diarrhoea and malnutrition account for 70 per cent of infant mortality.
- Just over 22 per cent of children are suffering from moderate to severe stunting and chronic malnutrition.
- Women not receiving adequate obstetric care during pregnancy and childbirth is a contributory factor to a sharp increase in maternal mortality rates.
- Frequent power failures affect sewage treatment and clean water provision; between 1990 and 2000 the daily consumption of potable water in many areas more than halved. The report estimates 500,000 tons of raw sewage are dumped into fresh water bodies each day.

### Education

- A shortage in school buildings and teachers, books and materials often means three shifts in schooling, with 8,613 buildings needing renovation and a further 5,132 schools needed.
- The Multiple Indicator Cluster Survey (MICS) 2000 revealed that 23.7 per cent of children are not attending primary school (31.2 per cent of girls).

### Households and employment

- Many Iraqis are living on $3–$6 a month
- Women's labour force participation has increased in the past decade, both in paid and unpaid work, effectively doubling the amount of work women do.
- A survey by the General Federation of Iraqi Women (GFIW) in 1997 estimated there were 10,560 female-headed households in Baghdad; 48.9 per cent of women were economically active and of these, many were still having to send their children to work to guarantee sufficient income to support the household.
- There was an unreported increase in the number of children working in the street, of orphans needing state assistance, and a fall in available provisions for disabled children.

> I don't think that you can take good practices from what has happened, for example in East Timor, and use them in Afghanistan. The two models are very different, and so much of it depends on what the situation is. There is also a lot of difference between Afghanistan and Iraq. In Iraq there are certain infrastructures that are still in place, at least you can get a book of law there. In Afghanistan after the bombing, you could not even get hold of their legislation.

Asma Jahangir is particularly concerned about the situation of women in Iraq (see box), although critical of the tendency in the West to politicize the issue to justify foreign intervention:

> In Iraq, you have a country where everybody's rights are jeopardized, and it is but natural that those sections of society that are more vulnerable will suffer the most. There is no accountability. Despite the fact that they have women in the army and the police, there is still that very sexist male macho attitude. Violence against women is considered to be a matter of routine.

However, like Gudmundur Alfredsson, she does not think the situation of women in Iraq is the worst in the Middle East. Both of them further point to institutions which could be amenable to reform within a limited time frame: Jahangir to the judiciary, and Alfredsson to the security forces:

> You've seen secret services in countries where governments have fallen: they don't disappear immediately,

## The status of women

### Key indicators

| | female | male |
|---|---|---|
| Life expectancy (WHO: 2001) | 62.9 years | 58.7 years |
| Literacy rate, 15–24 year-olds (UNESCO: 2002) | 29.9% | 59.9% |
| Labour force participation (UNDP: 1997) | 10.3% | 43.3% |
| Share of parliamentary seats (2001) | 8% | 92% |

### Human rights obligations

Iraq acceded to the Convention on the Elimination of All Forms of Discrimination against Women in 1986, although it entered a reservation to state that it was not bound by articles 2(f) and (g) (concerning modification or abolition of discriminatory laws and practices; article 9 (concerning equal rights to nationality); article 16 (concerning elimination of discrimination in marriage and family relations); and article 29(1) (concerning international arbitration and jurisdiction of the International Court of Justice). The reservation to article 16 was 'without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them'.

### Violence against women

- The UN Division for the Advancement of Women noted in 'Sexual Violence and Armed Conflict: United Nations Response' (1998) that sexual violence during the Gulf War went largely unreported; however, the rape of women by Iraqi soldiers was fairly widespread, resulting in trauma, unwanted pregnancies and miscarriages.
- Kurdish women received barely any aid, care, or necessary financial compensation after the rape and violence suffered during the *Anfal* campaign. Many suffered from physical and psychological trauma; and were widowed in a society which can stigmatize lone women. (FIDH/AIJ, *op. cit.*)
- Many women report harassment by Iraqi security services, have witnessed the execution of their children, or have been submitted to degrading treatment which is believed to be the cause of some women committing suicide. (*Ibid.*)

### Healthcare, households and employment

- For two years following the Gulf War, there was an increase in miscarriages and pregnancy complications among women in the Gulf states, thought to be the result of chemicals that leaked from weapons into the food chain, smoke pollution from the oil fields, or conflict-related stress (UNIFEM: 2002).
- The maternal mortality rate is 310 per 100,000 live births. UNICEF reports that 28 per cent of births are not attended by trained health personnel and maternal mortality accounts for one-third of all deaths among women aged 15–49.
- Early marriage is prevalent with 40 per cent of women married before 18, 40 per cent of childbirths spaced less than two years apart, and 20 per cent less than 18 months, contributing to poor reproductive and child health and survival.
- Denis Halliday, former UN Humanitarian Coordinator for Iraq 1997–8, reported to a 1998 London Conference on Sanctions that the number of single parent families had risen, children were pushed into work and that young women had been forced into prostitution, due to the effects of sanctions imposed on Iraq.
- The 1991 Aga Khan report to the UN Secretary-General by the Executive Delegate of the Secretary-General for humanitarian assistance in Iraq found that one-third of pregnant women were in need of nutritional support. Contraception was scarce and therefore only given to women with medical need, and the poverty caused in part by economic sanctions and war gave rise to an increasing number of illegal abortions.
- Women's participation in the workforce has increased in the past decade. Female contribution to agricultural work is high, but largely unrecognized and unpaid.

Additional sources: Inter-Parliamentary Union; UNDP, *Arab Human Development Report 2002*; B. Bhatia, M. Kawar and M. Shahin, *Unheard Voices: Iraqi Women on War and Sanctions*, London, Change, 1992.

but they may not be the main obstacles – take Romania. They are still around but relatively quickly overtaken by other political developments, civilian control, new bosses. But even if they slowly fade away, that doesn't mean democracy has been introduced in the full meaning of the word. During this period where it is one generation or a little less or a little more, backlashes or reversals can be expected. Who is to say that these exiles and their organizations, and they're fighting each other quite actively, are going to be committed to democracy when they come home?

## Managing the transition: an international role?

As noted above, there are both positive and negative indicators for ethnic or religious conflict in Iraq. During the largely spontaneous Shi'i uprising in 1991, there were terrible revenge killings of those who were seen as representatives or agents of the government, but the reports indicate that the attacks were perpetrated regardless of confessional or ethnic affiliation. That is to say they appeared political, rather than sectarian, in character. Political parties representing both Kurds and Turkomans have resolved to reverse the forced displacement that in recent years has been carried out in the region of Kirkuk (a town to which both groups historically lay claim), but the record of relative ethnic and religious tolerance in the Kurdish autonomous region suggests that this could be achieved without violations of the rights of Arabs and bodes well for future ethnic relations. Recent history suggests that perhaps the greatest danger comes from in-fighting between Kurdish parties, although the two main parties committed themselves to power-sharing in the Washington agreement in September 1998.

Yahia Said also downplays the risk of a widespread sectarian conflict in Iraq (see following chapter), as does Asma Jahangir, who notes: 'Revenge killings will happen, but it need not turn into a civil war – not unless the international actors have their proxies there. There is a kind of fatigue that people have, with what they've seen happening and what they see is coming.' (Needless to say, international actors including the USA, Iran and Turkey have a long history of supporting armed groups operating in Iraq.)

For Gudmundur Alfredsson, understanding the severity of the conflict that has already taken place in Iraq leads him to call for a very different role for the international community working together in a transition phase:

> There has been a civil war: there has been fighting with and between the Kurds and severe armed repression of the Shi'a. Maybe it hasn't been a fully fledged civil war, but there have been many of the characteristics of civil war going on, and we don't know about the full scale of torture and killings taking place.
>
> In the short-term, I think there is a need for major international presence, like in the former Yugoslavia or in Afghanistan, partly to try to prevent backlashes and to support the democratization that needs to take place. The scale of international presence provides some of the guarantees the government will not be able to provide in the democratization process: guarantees of fairness, of participation, of equal distribution, but also guarantees of not being killed, not being the victims of discrimination like in the past – and it takes a while for a minority to overcome the constant fear they have lived in.

Max van der Stoel also emphasizes the role of the international community in democratization:

> No doubt a provisional government will be established and it could perhaps be something which we wouldn't admire: it might be led by a 'moderate' (in Iraqi terms) general. I think it would be important not to wait for what such a provisional government would produce in terms of ideas for a new government structure or for federal structures. It is important that specific proposals come from outside, from [the] international [community], to ensure a balance between the various interests and to ensure that the government remained representative, for instance making sure that the Shi'a or the Kurds were not excluded from the central government.

Van der Stoel suggests that, in any case, in the event of a military intervention in Iraq the assumption is that there would be *de facto* an international or mainly US protectorate for 'an interim period of a few years':

> It might meet opposition on the part of the newly created Iraqi government, but it could be that the situation would be so chaotic that it would be virtually inevitable to maintain American forces or an international force. From the frictions which already exist among the [exile] groups who met in London, you get a sort of preview of what can be expected once a new Iraq has to be set up. And one reason for justifying the decision not to withdraw immediately would be the argument that it is necessary to clean up the whole country and check that all weapons of mass destruction have really disappeared.

The interviewees all generally agreed that if there were an international peace-keeping or administrative presence in Iraq during a transition phase, it would be preferable if it was a neutral UN force. It is important to note that this

is a separate question from the identity of, or mandate for, international belligerents in any war with Iraq, although the two are obviously connected, as van der Stoel points out: 'The USA will be less inclined to share influence if only very few countries, perhaps only Britain, really contribute to the second war against Iraq.' This caution has also been voiced by Chris Patten, the EU Commissioner for External Relations, who has drawn attention to the fact that UN involvement will make it much easier to get reconstruction aid from the EU, the world's largest development donor. He said on 13 January: 'I would find it much more difficult to get the approval of member states and the European Parliament if the military intervention that had occasioned the need for development aid did not have a UN mandate.'[13]

When van der Stoel was UN Special Rapporteur on Iraq, he called for the deployment of human rights monitors in the country. It is important to note that the role of human rights monitors is essentially to observe and report on human rights violations – they are not peace-keeping forces – but the presence of monitors can itself function as a deterrent to the commission of violations and build confidence, as was demonstrated in El Salvador. A prominent group of Arab academics, lawyers and journalists from a number of Middle Eastern states also called in January 2003 for 'the stationing across Iraq of human rights monitors from the United Nations and the Arab League, to oversee the peaceful transition of power in the country'.[14]

The role of a UN peace-keeping force or transitional administration would also have to be carefully monitored, Gudmundur Alfredsson and Asma Jahangir both stress, not least because there is no current accountability mechanism to monitor the UN's own compliance with the international human rights standards. Jahangir says:

> External actors become very possessive about how they want to see things in a particular country. Then the objective becomes muddied. Is it democracy that you want, or is it stability, and then what takes precedence over which? You go in to build democracy in Iraq and you end up building vested interests.
>
> When external actors go in, their decision-making should also be shared, with the people and even within the UN itself. I find the UN system in such conditions becoming very undemocratic itself. So much is at stake, so much depends on these decisions, and yet they can be taken in very secluded circles.

## Transitional justice

In 1999 the UN Secretary-General issued guidelines to his envoys and representatives to 'assist in brokering agreements in conformity with the law', described by the Secretary-General as 'a significant step in the direction of mainstreaming human rights'. The contents of the Secretary-General's guidelines are confidential but, according to his announcement of 10 December 1999, they 'address the tensions between the urgency of stopping fighting, on the one hand, and the need to address punishable human rights violations on the other'. Since 1999 it has been the policy of the UN not to recognize amnesties from prosecution for those who commit war crimes or crimes against humanity.[15]

Although amnesties were discussed in the context of the 2001 UN peace talks for Afghanistan, the Bonn agreement of the 5 December contains no provision for amnesties. It requires the Afghan interim authorities to 'act in accordance with basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party' (including the Geneva Conventions) and to establish, with UN assistance, a judicial commission to rebuild the domestic justice system and a human rights commission whose responsibilities include investigation of violations. The agreement also accorded the UN 'the right to investigate human rights violations and, where necessary, recommend corrective action'.[16] Little action on transitional justice has been taken to date, however.

Although the international standard is, in the words of the preamble to the Rome Statute of the International Criminal Court (ICC), that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', in practice decisions on bringing to justice those responsible for past crimes have been largely left to transitional societies themselves. The Statute of the ICC, to which Iraq is not a party, itself did not come into force until 1 July 2002 and the court has no retrospective jurisdiction. In a number of situations, including in Sierra Leone, East Timor and in Kosovo/a, special tribunals or courts have been established with both domestic and international elements.

Asma Jahangir points out the particular sensitivities of imposing international justice:

> One of the first things that I was told when I went into Afghanistan was that transitional justice should not turn into victors' justice, and there is a great fear of that happening. That by itself brings resentment and the risk of further reprisals, which may be dormant for some time but will erupt at a future date.
>
> Now this is a strange thing. In Afghanistan people want international transitional justice, at least the involvement of international actors, because they feel that security, the justice system, the political world and

> the fragility of the process all do not allow them to do it alone. And there the international community is dragging its feet. The situation in Iraq will be compared with others. Would it not be questioned that in Afghanistan, after 23 years of crimes against humanity in every era, nothing has come up, and suddenly in Iraq, you have a tribunal, you jump into transitional justice immediately with an international presence? Why the disparity? It has to be well reasoned, that disparity.

Max van der Stoel, however, notes the practical difficulties of organizing credible national prosecutions in the near future:

> What is actually in place in Iraq is just a travesty of justice. There is no independent judiciary, not even something faintly resembling it, so to start off you would have to find some people who would be recognized as being of sufficient stature and quality to fill the role of an independent judiciary. An international tribunal would be, in theory at any rate, a better solution. The problem is that this would probably require UN blessing and if the Americans just start the war without waiting for sufficient support from the Security Council, then the chances of reaching agreement on the remit of an international judicial organ might also be affected.

Gudmundur Alfredsson estimates that because of the scale of the violations that took place in Iraq, potentially thousands of people could have been involved in commiting crimes against humanity:

> Should there be a truth or reconciliation commission? Should the prosecution be at the national level and left to national courts or should the Security Council go ahead with another criminal tribunal? I think all these options are possible – I would like to see what Iraqis think. If a country is able to achieve peace for itself and move on with democracy then a country should be given these choices. You've seen different models applied in different parts of the world, but I think that should be, to a significant degree, a local decision.

## Towards a constitution: representation, autonomy and electoral systems

'For democratization to be a lasting order and of lasting value the Iraqis themselves should be allowed to choose what kind of democratic order or state they live in', emphasizes Gudmundur Alfredsson. There has already been considerable debate about the basic elements of the constitutional order in a post-totalitarian Iraq, including the desirability of a federal or unitary structure for the state, possible elements of a federation, the extent of regional or ethnic autonomy, and priorities for institutional reform. The US State Department has sponsored conferences of Iraqi opposition groups in exile, and some of their proposals are analysed in the following chapter. But Alfredsson points to a fundamental pre-requisite:

> This is a process that needs to be discussed in Iraq, through a constitutional assembly type process. Of course the international community can come with good suggestions, of course there are international standards that address some of these issues, practices and experiences available from other states which have gone through a similar exercise, but it's for the Iraqis to choose, not the international community.
>
> No matter what constitutional system they choose, from federation to unitary, what the international community can expect is respect for human rights, and that would include minority rights. That would include peoples' rights, non-discrimination, the types of guarantee you have in the international instruments, but that can be achieved through many different constitutional systems. There are many different models, but for the success of the experiment, they have to choose themselves, because otherwise the chances are they will not be satisfied with the results.
>
> If you look at the world today, I'm not able to see one system that serves minorities better than others. You can have federations, even federations that are organized or aligned along minority ethnic lines, but there will always be minorities within the minorities, or minorities which are not large enough to have a federal province for themselves.

Systems of autonomy or federalism have the advantage of devolving power but they also entail the problem that, as Max van der Stoel puts it, 'on the one hand, the Kurds will not think it is enough and on the other hand, the central government will feel that what has been acquired by the Kurds will be the basis for further attempts to get more'.

**Donald Horowitz**, Professor of Law and Political Science at Duke University School of Law in the USA, agrees that there are drawbacks with federations organized on ethnic lines:

> There are always minorities in every region dominated by some ethnic group and ethnic federalism, that is one that is configured specifically to empower only a particular minority (either on a cultural basis or alternatively where the territory is so configured as to match perfectly the aspiration of a particular group),

always tramples on the rights of regional minorities, that is, minorities within that region.

Where there is ethnically defined federalism, ethnically defined regional units, minorities who have aspirations at the centre, are often told to go back to their own region, 'that's where you belong, you don't belong here, you have got your own little playground out there', and, for a country like Iraq, to have some sort of civic politics at the centre would seem to be very important. In order to resist the impulse to have people think of others as strangers because they belong in the region, it seems to me that territorial federalism is far preferable.

There is a danger that people will be rejected at the federal level on the grounds that they control their own region. That's a source of conflict and it also is the sort of thing that propels regions towards the very thing that people fear: namely secessionism. If you want to avoid secessionism then you define regions territorially; whoever is in a region has a part to play in the regional politics.

There is a cynical argument in favour of ethnically defined units, and it goes something like this: where there are ethnically defined federal units, units that embrace particular ethnic groups and more or less nobody else, what you do is to encourage sub-ethnic tensions, which then can compete with the ethnic tensions at the larger national level. Among the Kurds this would inevitably be productive of a lot of sub-ethnic tension, because you know the Barzanis and Talabanis have a long history of fighting each other and also of lining up one or the other with the central government. It would give plenty of opportunity for central government to manipulate their rival.

Iraq's recent history means that ethnic identities are strong, however, and not just among the Kurds. In the Kurdish region, for example, Tripp notes that political parties 'based on ideas of ethnic and sectarian identity' have emerged, such as the three Turkoman parties, as well as Assyrian and other Christian parties.[17] Gudmundur Alfredsson agrees that initially in any transitional phase, political parties are likely to be constituted along communal lines:

> That is a response to the discriminatory practices of the past. We have seen in other countries where we have ethnic parties, of course persons belonging to minorities have different political opinions, but they unite in ethnic parties when that concern becomes overwhelming as compared with other concerns they're likely to have.
>
> In the beginning you will have plenty of political parties, everyone will want to have a party for him or herself. It will take time – one or two or more elections – before the position becomes more clear, but I think that's the democratization process. You can't steer it too much. You can influence it, you can speed it up with assistance, you can avoid abuses or backlashes in the process or try to prevent them, but it is a process and it will take time.
>
> Once that process is under way and minorities feel they are participants, and that they are not being discriminated against, then you will see them slowly beginning to join parties along lines of political opinion, economic interest, just like you see in other countries.

Horowitz notes that, even under democratic conditions, it is not impossible for a minority the size of the Sunni Arabs to control the government depending on how the electoral system is designed and how constituencies are delimited:

> Actually the emphasis on the regional minorities and the periphery doesn't answer the question what kind of central government institutions you want. A lot of what you want to prevent is not merely separatism. The Shi'a and the Sunnis are both going to want to control the central government and institutions have to be put in place to prevent either of them from having exclusive control.

Horowitz has been critical of the concept of consociationalism, as developed by Lijphart, which suggests constitutional recognition of ethnic groups as corporate entities with proportional and often separate representation on public institutions, as well as ethnic autonomy. Consociationalism was the basis for the constitution of Bosnia-Herzegovina established under the Dayton Peace Agreement, where the emphasis on the rights of the three main ethnic groups (Bosniacs, Croats and Serbs) arguably works to the detriment of inter-community cooperation.[18] The current High Representative for Bosnia-Herzegovina also draws attention to an unfortunate side-effect: 'The red-tape culture spawned by the pre-war socialist regime has been compounded by the multi-layered system of decentralised government established by the Dayton Peace Agreement. ... There are 1,200 judges and prosecutors, 760 legislators, 180 ministers, four separate levels of government and three armies – for a country of fewer than four million people. There are 13 Prime Ministers – one for every 300,000 citizens. The cost of government is a staggering KM 1.8 billion (about £600 million) – and that's just for the government machine itself, it doesn't include the cost of services such as health, education and pensions. Just paying for politicians and bureaucrats costs every citizen of working age in Bosnia and Herzegovina

KM 900 (£300) each year – almost three months' wages for the average worker.'[19]

Horowitz outlines an alternative approach to power-sharing mechanisms, which might include constructing electoral constituencies that are multi-ethnic, and requiring political parties to appeal across ethnic lines:

> The mechanisms I like best have to do with electoral systems, because politicians in democratic countries respond to electoral incentives, but they don't necessarily all have to be electoral incentives. What you want to do is to get politicians to think it's in their interests not to be exclusive – and that's not easy – but if you can get it to happen it really is likely to be self-sustaining, because once they get rewards from that they will seek them again and they get those rewards by behaving moderately. In a country like Iraq, all of the incentives on politicians are mutually exclusive and that is what makes a consociational regime seem to me vulnerable to breakdown, because there is nothing to prevent politicians from going off on their own – that is, from catering to the interests of their own group.
>
> But the consociational formula is easier to comprehend and apply and is more likely to be accepted. It purports to guarantee something; the fact that the guarantees are likely to be illusory down the road doesn't occur to people. The idea of fair shares, for example – from your 40 per cent of the vote, you get 40 per cent of the cabinet – that's easy to understand. But it is not likely to be sustainable over the long haul because politicians don't really have any reason to stay with those deals if they think they can do something better for themselves, and they often can.
>
> In Iraq, where some groups are territorially demarcated and where you might have regional autonomy, you could require parties to get a certain amount of regional distribution in addition to votes in order to hold certain offices. The Nigerians pioneered this in respect to their presidential election, and the Indonesians have recently opted for the same thing. In Nigeria, in the first presidential election after the country returned to civil rule, it was decided that the president had to have a plurality plus 25 per cent of the vote in no fewer than two-thirds of the votes in 19 states. In Indonesia, too, the notion is to have a pan-ethnic president. If Iraq is going to have a presidential regime they need a pan-ethnic president and a very good way to get it where groups are regionally concentrated is to require regional distribution. If it is going to have a parliamentary regime then you think about how the constituencies can be delimited. You can't prescribe these things in the abstract: you have to look very carefully on the ground to see just what kind of device works. But the basic mechanism is to have the politicians respond to incentives to behave moderately towards groups other than their own.

The notion of a pan-ethnic president for Iraq, who secured a level of support from all the major communities, would be one mechanism which could help address the continuing and very justified fears that many of Iraq's communities hold of another period of autocratic, Sunni Arab-dominated rule. More broadly, systems of cross-voting, where candidates for federal office would have to gain a specified proportion of votes from across communities, or across territorial units, should be considered in the design of a new constitution for Iraq.

When foreign powers formed the territorial and constitutional structure of modern Iraq at the end of the First World War, they initiated a history of authoritarian government that privileged some communities over others. Given Iraq's recent history of discrimination, ethnic cleansing and other gross human rights violations, international actors in any transitional administration must avoid action which would exacerbate ethnic or confessional divisions. As a priority, the international community should provide technical support in constitutional design aimed at promoting cooperation between communities while allowing strongly-felt identities to be expressed and protected.

Donald Horowitz and Asma Jahangir both seriously question whether the feeling of 'liberation' experienced by many in Afghanistan after the fall of the Taliban regime would be replicated in Iraq after an international armed intervention. Gudmundur Alfredsson and Max van der Stoel both stress the difficulty that a fledging Iraqi government would have in accepting what was seen as a foreign imposition. And Yash Ghai, in the last section in this report, emphasizes that the constitution-making process is as integral a part of building democracy as the constitutional design itself. This would all suggest that the optimum role of the international community in the process of democratization should be supportive rather than directive.

Article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights establishes that 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Taking democracy seriously means respecting the right of the Iraqi people to determine their future.

# Post-totalitarian transition in Iraq

*Yahia Said*

Regardless of how the regime of Saddam Hussein meets its end, there is a need to prepare for the day after. Following are some of the tenets which should guide the transition process from that day on until the inauguration of a freely elected government and the adoption of a permanent Iraqi constitution.

- **Iraqi ownership** – For transition to succeed Iraqis should assume full ownership of the process at all its stages. The new leadership, institutions and laws should emerge organically from within Iraqi society. International assistance should thus be devoted to creating an enabling environment where Iraqis can build their own democratic state. Critical elements of such an environment are human rights and economic stability. Legitimacy, transparency and inclusiveness should guide the transition process at all times.
- **Long-term commitment** – The tasks at hand are daunting in any post-totalitarian society but especially in Iraq. Decades of brutal rule combined with the devastation of two wars and 11 years of sanctions have damaged the very fabric of Iraqi society. Democratic transition in Iraq will require a long-term commitment and significant resources. Any solutions which involve a quick turnaround may end up reproducing Saddam's regime, tearing the country apart, or both.
- **Political solutions** – The conflict in Iraq is political rather than ethnic in nature. It pits the totalitarian regime against the entire society. The solution should likewise be political. It should target Iraqi society as a whole while taking full consideration of the national and ethnic mosaic of the country, and the disproportionate suffering of the Kurds, Shi'a and other groups. Ethnically based solutions, derived from the experience of societies emerging from ethnic conflict such as in the Balkans or the former Soviet Union are not directly applicable and may achieve the opposite result by promoting identity as source of political legitimacy.

The translation of the above principles into a detailed programme raises a lot of dilemmas: How to balance Iraq's need for foreign assistance in everything from protecting its own borders to training judges with the imperative of establishing Iraqi ownership over the process of change? How to prevent a Somalia situation, where foreign assistance became a lightning rod for opportunists trying to build their political and material fortunes on the ruins of their own country? How to prevent a Bosnia situation where international assistance has at times smothered local initiative? How to prevent Iraq's oil wealth from tearing the country apart? How to address the legitimate grievances and long suffering of the Kurds and Shi'a without turning identity into the only means of establishing rights and privileges?

This section seeks to identify these and other dilemmas and suggest policies to address them. This is done by analysing existing proposals advanced by Iraqi opposition groups and US think tanks. The critical analysis of the proposed transition programmes is informed and preceded by a review of initial conditions, as the baseline of the transition process. Policy recommendations and preliminary conclusions are peppered throughout the section, with the most important summarized at the end.

## Initial conditions

The search for policies to guide the process of transition in a post-Saddam Hussein Iraq can be informed among others by the recent experiences of post-totalitarian societies in Eastern and Central Europe, the former Soviet Union and South-East Asia. Iraq shares many similarities with these countries. Of all authoritarian rulers of the Middle East, Saddam Hussein has arguably come closest to establishing a Stalinist totalitarian experience. Despite being technically a Third World country, Iraq was, until 1991, as developed as some of the former Soviet Republics and more so than, say, Vietnam. Even Iraq's dependence on oil justifies comparisons with some of these countries. These comparisons arguably provide more relevant insights into Iraq's future than those gleaned from recent 'state-building' endeavours in Bosnia, Kosovo/a and Afghanistan, which have just emerged from protracted and devastating ethnic and civil conflict.

Analysts of transformations in post-totalitarian societies identify two broad groups of factors which affect the success of the transition process: initial conditions and policies. The importance of policy was emphasized in early

research on transition. Later the emphasis shifted to initial conditions, not least due to their impact on policy.[20]

Initial conditions also provide a convenient framework for evaluating the various proposals being advanced today for post-totalitarian transition in Iraq. A significant part of the difference between these proposals can be attributed to differing assumptions about the conditions that would pertain immediately after the fall of Saddam Hussein.

Initial conditions cover a wide range of factors including the pervasiveness of the totalitarian regime, the state of the bureaucracy, forms of civil society, the size and quality of the opposition, the existence of a middle class, ethnic homogeneity, economic development and resource endowment. Below I address some of the factors most relevant for the early stages of transition in Iraq.

## Bureaucracy, middle class, civil society

A functioning state apparatus, a middle class and a civil society are among the most critical initial conditions for successful transition. Iraq had varying forms of all the above when Saddam Hussein reached the peak of his political power in 1979. In the wake of his demise, the regime will leave a legacy of devastation in all three areas.

The thrust in the regime's strategy in the 1970s and 1980s was the building a Stalinist totalitarian system which permeates every corner of society. This approach involved significant development and institution-building efforts aimed at creating not only institutions of repression but other essential state institutions. The regime in effect used the vast oil resources at its disposal to finance a totalitarian welfare state. As the war with Iran dragged on, and especially in the aftermath of the 1991 Gulf War, the regime had to abandon this strategy and withdrew to a hard core of vital institutions, diverting the country's dwindling resources to finance these institutions and letting poverty manage the rest of society.

Economic decline was a major factor behind the regime's change of strategy. GNP per capita, which stood at a respectable US$4,100 in 1979, plummeted to US$3,500 by the end of the war with Iran in 1988 and then down to US$500 in 2000.[21] Iraq, which for decades suffered from labour shortages, requiring at one point the import of two million foreign labourers, has a 50 per cent unemployment rate today. Illiteracy, all but eradicated in the 1970s, is back at 44 per cent,[22] and so are other symptoms of under-development such as malnutrition and infant mortality. Damage to power and water facilities caused by allied bombing in 1991 is yet to be repaired, resulting in continuing severe shortages in both areas.

Economic decline, which started during the war with Iran and intensified with the 1991 war and the comprehensive sanctions, was exacerbated by the regime's economic policies. Draconian taxes and fees were introduced on a regular basis affecting every aspect of daily life and economic activity. Compulsory 'donation campaigns' were organized to finance everything from road building to the military. Funds collected this way were often diverted to enrich the regime's cronies. It is widely alleged that the extensive gold donation campaign organized by one of Saddam's wives, Sajida, under the pretext of financing the war effort against Iran, ended up with the first lady keeping hundreds of kilograms of collected gold for herself. The new 'tax' system was so effective that the government's non-oil revenues increased by 200 per cent in 1998 alone.[23] Hyper-inflation precipitated by the regime's reckless money printing acted as an additional form of hidden taxation.

Higher taxes were accompanied by drastic austerity measures. The real value of public sector wages fell dramatically, since meagre raises were far too low to keep up with inflation (a senior civil servant's salary plummeted from the equivalent of US$350 in 1979 to US$32 in 2000),[24] and allocations for heath, education and other social needs were drastically reduced. Most healthcare institutions, for example, were made self-financing, thus eliminating universal healthcare coverage. Even the army, police and judiciary were starved of funds. Conscripts were regularly compelled to pay for their food and to finance repairs to barracks and living quarters. State-owned industries were transferred to the regime's supporters through privatization. Many were run down through theft and mismanagement. All these moves exacerbated the economic depression.

The result of all this is pervasive collapse of most state structures and institutions, and with them most achievements of decades of modernization in Iraq. The only functional parts of the Iraqi state today are those absolutely necessary for the regime's survival: the security and intelligence services and the oil-for-food programme distribution network.[25]

Civil police and the judiciary have all but disappeared. They have been squeezed out by the security and intelligence apparatus both in terms of access to resources and in terms of jurisdiction. Whatever remains of police resources is enlisted in the service of the security apparatus, conducting surveillance and oppression functions as opposed to law enforcement.[26] The special courts attached to the various security agencies and military intelligence have priority over the civilian courts. The judiciary has been virtually privatized, both through the reintroduction of tribal mechanisms for dispute settlement and through widespread corruption.[27]

Regular army units did not escape institutional collapse either. They are under-funded, under-equipped and under-staffed. Significant numbers of troops are either

absent without leave or on leave acquired by bribing the relevant officers.[28] Regular purges and constant rotation of senior military staff, driven by Saddam's paranoia coupled with low pay, has damaged morale in the officer corps and encouraged levels of corruption previously unknown in the military establishment.

With these policies, the regime is leveraging the sanctions and exacerbating their impact on ordinary Iraqis as a tool of repression. Iraq's once thriving, well-educated and politically active urban middle class often acted as a wellspring for political dissent. In the 1970s and 1980s, the regime ensured middle-class loyalty through a combination of repression, on the one hand, and an ambitious development and modernization programme and generous state hand-outs, on the other. In the 1990s, the regime seems to have decided to eliminate this group altogether. The middle class was hit severely by oppression, migration and economic decline. Salaried employees, more dependent on a functioning economy and state services than the rural population, were the primary victims of hyper-inflation, food shortages and the collapse of the bureaucracy. Iraqi society is now polarized into an impoverished majority and a small group of newly rich, including sanctions profiteers and tribal sheikhs associated with the regime.

The regime has been actively encouraging tribalism as a new mechanism of political control. Saddam has sought to buy off tribal leaders with economic concessions, such as the authority to manage water resources, and by granting them legal powers within their communities in exchange for political support and collaboration. This approach has mixed results for both sides. The sheikhs' growing authority is undermined when they are compelled to collaborate with the regime and hand in people seeking their protection. Their loyalty to the regime is transient and their power can only grow at the expense of state institutions including Saddam's security apparatus.[29]

Since the extension of the oil-for-food programme in 1999 and the increase in world oil prices, Iraqis have experienced a marginal improvement in their living conditions. This, combined with intensifying political pressure on the regime by the Bush administration, has injected a measure of optimism among Iraqis about the regime's imminent demise. Unfortunately, this may also lead the regime to intensify oppression.

## Ethnic coherence

Ethnic coherence is often cited as one of the initial conditions which has great impact on the success of post-totalitarian transition. Iraq is often portrayed by the media as a quilt of mutually hostile nationalities and sects. Pundits and politicians as senior as US Secretary of State Colin Powell predict that in the event of Saddam Hussein's demise the country could disintegrate into three or more regions. Yet, despite decades of discrimination and persecution on ethnic, religious and sectarian grounds, there have been no significant incidents of communal ethnic strife (as distinct from state-organized violence) in modern Iraqi history to justify such predictions.

Iraq is indeed a quilt of overlapping nationalities, religions and sects.[30] Some are concentrated geographically like the Sunni Kurds in the North. Some are spread throughout the country like the Sunni Arabs or the Shi'a Kurds (also known as Feili Kurds), many of whom live in Baghdad and in the east of the country all the way to the Gulf. Forced and voluntary migration has left its mark on Iraq's population map. Urbanization meant that, historically, Sunni Baghdad has a Shi'a majority today. Christians, who mostly live in the north-west of the country, also flocked to Baghdad and other big cities in search of a secular urban environment. Many of them have emigrated to the West. The individual major groups are also divided into smaller tribal and regional allegiances which often supersede their titular affiliation. There are two major Sunni Kurdish groups – Bahdinan and Soran. There are differences between urban Shi'a living in the holy cities of Najaf and Karbala, many of whom have Iranian roots, and those who live in the countryside along the Euphrates. Even the various neighbourhoods of Najaf had at one point distinct identities and their own constitutions.[31]

Most of Iraq's rulers since the Umayads have conducted discriminatory policies against the non-Sunni, non-Arab and non-Muslim minorities in Iraq. The extent of repression, discrimination and incitement varied from one ruler to another, reaching its peak with Saddam Hussein. This repression, however, has been as much motivated by politics as by racism, a fact not lost on most Iraqis regardless of their ethnic, religious and sectarian affiliation.

The Kurds were on the receiving end of the most severe repression culminating in the genocidal *Anfal* campaign (see preceding chapter). The regime continues to conduct ethnic cleansing in territories under its control, especially in the oil-rich province of Kirkuk where Saddam is trying to establish an Arab majority at the expense of both Kurds and Turkomans.

The Kurds were subject to repression not only because of the chauvinist nature of Saddam's regime, but also because of the threat the Kurdish areas posed to the totalitarian system as a whole. The mountainous region, with its large rural population and strong tribal tradition, did not submit to central government control like the rest of the country. The Kurdish areas, especially the remote villages, always presented an island of freedom beyond the reach of Iraq's various rulers. They often provided a safe

haven for dissidents from all over the country. This represented a breach in the totalitarian edifice which could one day bring the whole system down. Saddam, like Stalin, understood all too well that totalitarian systems can only function if they are total.

The Ba'ath Party did not always discriminate against the Shi'a, who accounted for a majority of the party's leadership in the 1950s and early 1960s. This situation changed almost overnight in November 1963 when a failed revolt against Saddam Hussein was supported by most Shia in the party.[32] Following that revolt, the Ba'ath Party came to be dominated by the military, which was a Sunni institution by design.[33]

Crimes against the Shi'i majority include the deportation of tens of thousands of Shi'a of Iranian descent on the eve of the war with Iran, the brutal suppression of the predominantly Shi'i 1991 uprising, including the murder of hundreds of thousands of people, the ransacking of the holy sites in Najaf and Karbala, and the subsequent destruction of the marshes. Since the 1991 uprising, the regime has been openly fomenting sectarianism in an attempt to consolidate Saddam's power base among Sunni Arabs. However, Saddam is too aware that it would be impossible to run the country without a modicum of cooperation from at least some of the country's Shi'i majority. He therefore continues to woo them rhetorically while reserving his most brutal repression for any form of organized political dissent among the Shi'a.[34]

After abandoning the bulk of the ideological facade of 'Arab Socialism' sometime during the war with Iran, Saddam's regime became more openly chauvinistic in its rhetoric and actions. The results of this were felt by all but a small number of tribes from Tikrit and the surrounding region which underpin the regime. Unlike other regimes built on ethnic nationalism, there is no significant ethnic group or sect which feels in any way indebted to the regime or dependent on it for its safety and prosperity. Instead of generating ethnic and sectarian hatred, the regime's pervasive brutality has created a common identity that crosses all community boundaries and unites all the victims of the regime. Likewise, the regime has implicated all Iraqi communities in its crimes. Taha Yassin Ramadan, one of Saddam's most brutal lieutenants, is a Shi'i Kurd. Tariq Aziz, his faithful international interlocutor is a Christian. For most of the 1980s the regime maintained thousands of Juhoosh–Kurdish paramilitary units who conducted day-to-day repressions in the Kurdish areas on his behalf. Most of the regime's rank and file forces in the Shi'i areas are Shi'a themselves.

## Oil revenues

Iraq's oil is often cited as a factor that will make the post-totalitarian transition smoother by at least paying for a significant portion of the costs. The experience of most oil rich, post-totalitarian societies, and that of Iraq itself, does not support this assumption. Oil wealth is more often than not associated with rampant rent-seeking, predatory government, state collapse and conflict.[35]

Governing Iraq means assuming control over around 110–200 billion barrels of oil reserves – second only to those of Saudi Arabia. It has been estimated that, given sufficient investment, Iraq's output could be ramped up to 6–7 million barrels per day – almost as much as Saudi Arabia's current output.[36] Oil has certainly helped the regime to maintain power. Oil revenues paid both for the repressive apparatus and for buying political consent.

Iraqi oil is already poisoning the post-Saddam atmosphere. International intervention, rightly or not, is dismissed by many as a grab for oil. Various old and new opposition groups are staking their claim to a portion of Iraq's oil revenues based on ethnic or territorial affiliation. Fantastic expectations are being stoked about the oil's capacity to pay for the costs of regime change, post-war reconstruction and compensation for the regime's victims both in and outside Iraq. The fact that these expectations will not be met does not bode well for the prospects of political and social stability in the country.

## The Iraqi opposition

The existence of an effective and legitimate opposition ready to assume power after the regime's demise would have a profound impact on the process of transition. This is the last of the initial conditions that I will address in this chapter. This will also set the stage for the next part, which will discuss the various transition scenarios, some of which are advanced by Iraqi dissident groups.

Political life has come to a virtual standstill under Saddam Hussein. Even the ruling Ba'ath Party ceased to exist as such when Saddam Hussein executed 400 senior party functionaries in 1979 and transformed it into one of the many security structures. The situation is captured succinctly by an Iraqi intellectual speaking to a researcher from International Crisis Group in Baghdad in Autumn 2002: 'We have become political dwarves.'[37]

There are isolated dissident cells operating deep underground in the parts of the country still under the regime's control. Some of these are affiliated with parties in exile or in the Kurdish areas such as the KDP, PUK, the Communist Party and Al-Daawa. Some are independent. Given the conditions of secrecy needed to operate and survive in the areas controlled by Saddam Hussein, it is quite difficult to ascertain the size and efficacy of these cells.

The four groups mentioned above are the oldest and most established of the Iraqi opposition groups. The **Kurdistan Democratic Party** (**KDP**) established in 1946 is the

oldest Kurdish party. It is built mainly around the Barzani tribe and the broader Bahdinan group. It has strong traditions and roots within Kurdish society. The KDP led most Kurdish insurgencies and suffered most from Saddam Hussein's repression, including the murder of most male Barzanis. The KDP was also active in seeking a political solution for the Kurds with rulers in Baghdad, including negotiations in 1970, 1973 and in the 1990s.[38]

The **Patriotic Union of Kurdistan** (**PUK**), established in 1975, is relatively new. It is simultaneously more political and less rooted than the KDP. Its area of activity is Soran on the border with Iran. Unlike the KDP, which seeks a real politik solution for the Kurds within Iraq regardless of the regime, the PUK seems more keen on regime change in Baghdad. Jalal Talabani, the PUK leader, probably harbours ambitions for political power in Baghdad.

The two Kurdish parties have been governing the three northern provinces of Dhok, Erbil and Sulaymaniyah since 1991, with a predominantly positive if mixed record. The negative points include internal strife claiming up to 30,000 lives, in which occasional side deals have been made with Saddam Hussein, the Turkish military, Iran, the US and the Kurdish opposition group in Turkey, the PKK. On the positive side, the parties managed to conduct relatively free and fair local and regional elections; they tolerate a reasonably free press and a plethora of groups, NGOs and associations. The Kurdish areas boast a relatively independent judiciary and a reasonably functioning bureaucracy. The result is that the Kurdish areas, with only 13 per cent of the oil-for-food programme revenues and much worse initial conditions in terms of development, are living in relative prosperity compared to the rest of Iraq.

The **Iraqi Communist Party** (**ICP**), established in 1934, is the oldest surviving political institution in Iraq. Subscribing to Soviet-style communism for most of its history, it was for a long time the only multi-ethnic, secular opposition party in Iraq. The ICP was brutally suppressed by most of Iraq's rulers except for short spells in 1958–63 and 1973–9. Since the departure of its leadership into exile in 1979 and the collapse of Soviet communism, the party's influence has diminished significantly. That said, the ICP maintains a small clandestine presence in areas controlled by the regime and a store of goodwill among the population, partly due to its nationalist position. The ICP and Al-Daawa are the only Iraqi opposition parties that currently appear to maintain a respectable distance from foreign powers.

**Al-Daawa** is the oldest Shi'i political party in Iraq. It was established by mid-level clerics from the holy cities in 1958 as a fundamentalist sectarian party aimed at protecting Shi'a from the secularism of the communists and later the Ba'athists. Its influence grew with the deprivations suffered by the Shi'a at the hands of the Ba'ath regime, as well as the drought following the opening of the Euphrates dam in Syria in the mid 1970s. Al-Daawa's tightly knit and highly secretive organization allowed it to maintain a small presence inside Iraq, despite the regime's best efforts. Its ability to stage symbolic protests and daring armed attacks to date has earned it both popular respect and the intense hatred of the regime.

The **Supreme Council of the Islamic Revolution in Iraq** (**SCIRI**) is the largest Iraqi dissident group in exile. It was established in 1982 in Iran, with the involvement of members of Al-Daawa, who were forced into exile together with tens of thousands of Shi'a of Iranian origin, deported to Iran in 1980. SCIRI maintains close ties with the Iranian establishment, which allows it to recruit in the Iraqi refugee camps. SCIRI commands a paramilitary force of 4,000–8,000 on the Iranian side of the border.

SCIRI is less ideological and more pragmatic than the Al-Daawa party. Its main concern is the protection of the rights of the Shi'a in Iraq. It enjoys some legitimacy among the Shi'a population if for nothing else than for the provenance of its leaders – descendants of respected religious scholars in the holy cities.

The **Iraqi National Congress** (**INC**) was first established as an umbrella organization for Iraqi opposition groups in 1992. It emerged out of a conference of these groups organized with significant but subtle US support in the resort town of Salah-u-Din outside the Kurdish regional capital, Irbil. The INC, however, was unable to combine the liberal, pro-Western slant of many of its activists with the role of an umbrella organization encompassing mainly Kurdish and Arab nationalists, Islamic fundamentalists and communists. Moreover, the INC activists were more welcoming of both monarchists and late defectors from Saddam's regime than the main body of the Iraqi opposition. As a result, the INC has gradually become a distinct group consisting mainly of pro-Western, wealthy and well-educated professionals in exile. With such resources at its disposal, and with consistent support from at least part of the US establishment, the INC maintains a high profile among Iraqi opposition groups, despite having no history or presence inside Iraq to speak of.

There are dozens more Iraqi opposition groups, many consisting of a handful of people and rarely present inside the country.

## Existing proposals

Most plans for post-totalitarian transition in Iraq, whether they are advanced by Iraqi opposition groups or US-based think tanks, agree on the general principles: Iraqis, benefiting from full support by the international community,

should be the ones determining the fate of their country. Iraq should become a democracy, which respects the human rights of its own citizens and lives in peace with its neighbours. The aspirations of Iraq's long-suffering Kurdish and Sh'ia communities should be addressed while maintaining the country's territorial integrity. Despite differences over the exact nature of future territorial organizational arrangements, most agree on federation as a title.

There are some dissenting voices, largely among US pundits who doubt the viability of attempting to introduce democracy as a political system in Iraq.[39] They argue that the best one can hope for, if one is to maintain the country's territorial integrity and with it stability in the Middle East, is for Iraq to be ruled by a despot, albeit one who is friendly to the West. This view, however, is in the minority, at least for the moment.

The main proposals, despite agreeing on the general principles for post-totalitarian transition, diverge on identifying the main agents of change, at least for the initial period, and on the details of the transition process. Indeed, there is surprisingly little detailed planning and analysis of the transition process by the Iraqi dissidents. This is unfortunate since even plans for post-Saddam Iraq can affect both the process of regime change and the ensuing transition. A good example in this context are plans for transitional justice. On one hand, it has been argued that offers of amnesty for all but a handful of the regime's most senior leaders may compel some to defect, or at least refrain from fighting to protect the regime.[40] They would also help society to 'move on' expeditiously to the next stage. On the other hand, such an amnesty would leave hundreds of murderers, torturers and rapists without punishment, and may compel some victims to take the law into their own hands. Moreover, the amnesty may be viewed as discriminatory by the Kurds and Shi'a, the communities which suffered most from the regime's brutality. Proposals for an amnesty did indeed spark heated debates along ethnic lines at the meeting of Iraqi opposition groups in London, 14–16 December 2002.

The most detailed contribution on the subject is the paper prepared by the Democratic Principles Working Group (DPWG), which is part of the US State Department's 'Future of Iraq' project. The project involves dozens of Iraqi-born experts, mostly associated with the INC.[41] Even this document, which was discussed but not adopted by the meeting of the Iraqi opposition in London, is a work in progress offering, on many issues, a menu of options which the London meeting was supposed to decide on. It is not quite clear whether that actually happened.[42]

One issue which is seldom discussed in this context is the process of regime change itself. The assumption behind most documents, including the DPWG report and the *Guiding Principles for US Post-Conflict Policy in Iraq* developed by an independent working group co-sponsored by the Council on Foreign Relations and the James Baker Institute (CFR/JBI),[43] is that it will be precipitated by US military action. Other plans envision an internally driven regime change via a combination of a military and civilian rebellion. One could envisage other scenarios, such as a palace coup or a gradual implosion of the regime, all of which would have profound repercussions on the groups and individuals who will end up in charge of the process of transition and on the content of that process. An internally-driven democratic regime change supported by the majority of the population will bode better for the future of Iraq than regime implosion or a foreign invasion.

In the following sections, I will discuss the various proposals for post-totalitarian transition focusing on stabilization, interim administration, oil and constitutional arrangements. The proposals usually follow a chronological approach, envisioning an initial stabilization period followed by an interim administration period which would prepare and manage elections and a referendum on a new constitution.

## Stabilization

Almost all proposals agree on the immediate tasks for the initial days and weeks following the regime's demise. These are the same tasks which lie at the core of any government: maintaining the country's territorial integrity, providing safety and security for the country's citizens and securing essential services including food and shelter.

Following are some of the risks mentioned by the various proposals in the immediate aftermath of regime change: random score-settling and vigilantism, ethnic cleansing and/or spontaneous resettlement by internally displaced people, opportunist crime and looting, random or planned acts of violence by marauding remnants of the regime's security structures and elite military units, warlordism and attempts to 'establish facts on the ground' by armed tribal leaders and armed units of the Kurdish or Shi'i opposition; transgressions on Iraq's territorial integrity by Turkey or Iran; breakdown of basic services, especially food distribution.

The assessment of the extent and possible timing of all the above risks varies from one group to the other and with it the proposed remedies. The probability of these risks depends to a large extent on the assessment of the initial conditions discussed above as well as the conditions of regime change. At one extreme there are those who expect all of the above as highly likely (including the CFR/JBI, and James Fallows).[44] On the other, there are those who believe that Iraqis elated by their liberation from the hated regime will do everything to earn their newly acquired freedom (including the communists and nationalists).

The record of the 1991 uprising and the situation in the Kurdish territories provides a mixed insight into this issue: the security structures dissolved overnight, with their agents preoccupied with escaping retribution. Kurdish paramilitary units that had supported the regime joined the uprising. There was widespread but targeted score-settling and vigilantism. The ransacking of the regime's symbols involved some vandalism but there were no reports of ethnic reprisals or looting.[45] In the Kurdish areas where the freedom gained through the uprising and the imposition of the no-fly zone continues to date, there was some warlordism, including the in-fighting mentioned elsewhere in this report, but the situation seems to have stabilized now. There was a humanitarian crisis immediately following the uprising in the north, which required massive intervention involving both humanitarian agencies and (for a brief period) foreign troops. Since 1991, and even on occasion before then, Turkey has been continuously violating Iraqi borders in the areas outside the regime's control.

The experience from other post-totalitarian countries is more benign. There was some vigilantism in Romania but not much else in terms of security chaos even in the most under-developed and remote Soviet Republics. Indeed, the onset of state collapse, anarchy and ethnic conflict in those places where it did take place, such as Chechnya, Azerbaijan or Yugoslavia, was gradual, taking several years.

Apart from the differing assessment of the risks in the immediate aftermath of regime change, the proposals diverge on who should take those risks on. The CFR/JBI working group and the DPWG suggest a massive deployment of foreign troops will be needed. The SCIRI and the PUK suggest that thousands of their own armed troops could do the job. The nationalists and communists seem to suggest that the Iraqi regular army units and police could carry out these tasks assuming the removal of a relatively thin top layer of officers compromised by their affiliation to the regime.

The first option is the most likely one, unless regime change was carried out by forces from within the country. Foreign troops would be best equipped to deal with most serious challenges such as disarming the regime's elite units and security services, or safeguarding stockpiles of weapons of mass destruction against misuse or misappropriation. Experience from Bosnia and Afghanistan, however, shows that international forces are not very good at conducting policing functions and often fail to protect civilians. Moreover, the problem with a massive foreign security presence is that it may be seen as an occupation by the Iraqis, especially if the invasion is coupled with high civilian casualties. Reports from territories controlled by the regime suggest that people have a benign attitude towards this prospect if it entails salvation from the regime and sanctions.[46] This attitude, however, is liable to change the day after Saddam is deposed. Moreover, such presence would undermine one of the main tenets of the transition process – Iraqi ownership. Even joint patrols by Iraqi opposition forces and foreign troops would emphasize the former's lack of legitimacy.

The second possibility carries its own risks, especially in terms of legitimacy and implications for ethnic cohesion. Some Iraqis interviewed in territories controlled by the regime seem to prefer foreign occupation over the possibility of rule by opposition groups of dubious legitimacy.[47] The bulk of the opposition troops are Kurdish Peshmerga and Shi'a SCIRI troops. Troops from other communities, even if they are being trained at the moment, will lag behind both in terms of skills and numbers. The prospect of these troops patrolling the streets of cities like Baghdad is fraught with risks, the most serious among them being that the sectarian nature of these troops may start the process of institutionalizing ethnic and sectarian divisions. These troops, like the foreign ones in the previous option, may constitute a convenient target for opportunists aiming to build political capital by stoking ethnic, sectarian or patriotic violence.

The last option is perhaps the most preferable of the three and is more likely if regime change is precipitated by internal forces. The army and police without the top-tier officers mirror the structure of Iraqi society without specific ethnic or regional quotas. These institutions can provide a sense of continuity with the country's national identity. An added benefit is that this approach would jump start the process of reforming the most critical state institutions instead of leaving it for a later stage in the transition process, as suggested by DPWG or CFR/JBI. Significant risks and uncertainties surround this option, however. Could law enforcement structures and the army be de-Saddamified at short notice? Is there or will there be enough institutional capacity left at the end the reform process to carry out these challenging tasks? Could these structures become a Trojan horse through which the regime can reproduce itself? Will liberated Iraqis respect the old compromised policemen, soldiers and judges?[48]

One solution may be a mix of all three options. Reformed Iraqi police and regular army troops would be in charge of maintaining law and order and protecting the borders, led by opposition figures from inside the country and abroad. International troops would be on stand-by, preferably outside the country, ready to intervene should internal forces fail in the face of any of the above listed risks.

The main dilemma of the stabilization period is that, during those crucial first weeks, Iraq and its citizens are likely to be in most need of international support and protection. The more high profile foreign protection and

involvement is, however, the more it would undermine Iraqi ownership of the transition process, and with it the Iraqis' ability to take charge of their own destiny in the future.

## Interim administration

Simultaneously with stabilization, an interim administration will need to be put in place to run the country until a proper government is chosen through free elections. The CFR/JBI working group seems to suggest a direct occupation or an Iraqi government with a US or UN 'Supervisor' for a period of up to two years. DPWG seems to suggest an Iraqi government with a significant contingent of exiles which will operate under formal arrangements with occupying forces and governments. The nationalists and the communists seem to prefer a government with a predominance of leaders from inside the country and with no formal foreign ties. All agree, however, that the main task of the interim administration is the preparation of free elections and a permanent constitution to be approved thorough public discussion and a subsequent referendum.

This is a daunting task given the abysmal state of political life in Iraq, the damage caused by the regime, its wars and sanctions to civil society and the middle class, and the lack of a meaningful political programme among most Iraqi dissident groups. In this context, and given the uncertainty which would prevail in the aftermath of Saddam's demise, hastily arranged elections may have disastrous consequences. Elections organized in similar circumstances in the Balkans and the former Soviet Union after the fall of communism brought people to power who were closely associated with the previous regime, exclusivist nationalists, or both. Indeed, the first free elections brought such leaders to power in almost all former totalitarian countries except for those where change was brought about by domestic dissidents such as in Czechoslovakia, Poland and Hungary.

The implication of the above is that the interim administration is likely to reign for an extended period of time – probably more than the two years envisioned by most proposals. Its tasks will likely extend beyond the technical organization of the elections and the management of the process of drafting, debating and adopting the constitution. The interim administration will need to create the conditions for jump-starting political life and civil society in Iraq, which encompasses a wide range of tasks including work towards:

- Establishing and maintaining a human rights regime including the adoption of an interim constitution and a bill of rights. This will also involve suspending discriminatory and oppressive laws and establishing institutional underpinnings for the human rights regime, e.g. a commission and ombudsperson.
- Economic stabilization and reconstruction, including stabilization of the currency, restructuring of sovereign debt, negotiations over the lifting of sanctions and stabilization of the oil industry.
- Institution-building and reform, starting with the police, army and judiciary.
- Transitional justice, including the possible coordination of an international war crimes tribunal, establishment of local tribunals and a truth and reconciliation commission, as well as starting the process of resettlement, restitution and compensation for the regime's victims.[49]

The interim administration faces the same challenge of finding the right balance between foreign assistance and domestic ownership as well as the balance between the number of Iraqis from exile and at home involved. There is also an inherent contradiction between the administration's limited legitimacy and its comprehensive agenda which would have long-term implications for the future of the country and society. These contradictions would be sharper the larger the role of foreign powers in the process of regime change.

In order to address this dilemma, the DPWG proposes an interim system of checks and balances, including precursors of the legislature and the judiciary as well as local administrations. They also propose strict term limits and a possible temporary ban on the administration's main protagonists from seeking political office. This approach has its limitations, since all the organizations involved in the system will share the administration's hobbled legitimacy. Moreover, the DPWG is proposing to staff at least half of all these positions with exiles of even more limited legitimacy.

The CFR/JBI proposes to address the legitimacy and capacity issues by establishing a UN- or US-controlled interim administration where Iraqis fulfil consultative but not decision-making functions. Needless to say, this approach raises serious concerns for the principle of Iraqi ownership of the transition process. CFR/JBI rightly note that the timeline should be subordinated to the achievement of the interim administration's goals.

The lack of legitimacy can be compensated for by a combination of a checks and balances system and the following:

- Adhering to a robust national programme for the entire period of the interim administration.
- Conducting all activities of the interim administration, including the selection and appointment of its members and development of a national programme,

in an open, inclusive and transparent fashion with maximum practicable levels of public debate and engagement.
- Establishing the right balance between international norms and best practice, on the one hand, and local traditions, on the other, in drafting legislation, conducting reforms and building institutions.
- Drawing broad and legitimate international support without discrimination and undue influence.

Unfortunately, current efforts aimed at setting the stage for the establishment of an interim administration, including the London meeting of Iraqi opposition groups in December 2002, violate almost all the above parameters. Apart from the Kurds, who have governed a self-contained region since 1991, all other participants in that meeting were exiles with little or no influence inside Iraq. The meeting was essentially a project of the US State Department, which played a visible and often heavy-handed role. The USA vetted the participants and lobbied those who were reluctant to participate. The DPWG proposals developed under the State Department's Future of Iraq project were the only ones discussed at the meeting. US special envoy Zalmai Khalizade pushed through the meeting's final documents and the list of participants in the follow-up coordinating committee. US dominance of the meeting and the manipulations by the Iraqi groups involved in organizing it prompted a significant part of the Iraqi opposition to stay away, including the communists, Al-Daawa and the nationalists. These shortcomings are a function of the implicit assumption underlying all these efforts of a significant foreign role in the process of regime change.

## Oil

In a development typical for oil-rich countries, claims and expectations from Iraq's oil wealth by domestic and international agents alike are climbing in tandem with the prospect of regime change. They are liable to reach new heights once Saddam is removed from power. Various narratives are likely to be employed to justify access to oil rents on ethnic, regional and social grounds: repaying old debts, compensating for past grievances, restoring social justice and so on. At the meeting of the Iraqi opposition in London there were half a dozen parties claiming to represent the relatively small Turkoman minority which inhabits the oil-rich governorate of Kirkuk.

The CFR/JBI suggest using the oil-for-food formula to distribute oil revenues on a proportionate population basis. There are several problems with this approach: by translating oil revenues into hand-outs it stokes rent-seeking or competition for a larger share of these hand-outs; it prevents any national strategy for managing oil revenues; and it assumes the continuation of the oil-for-food programme which should be phased out after Saddam's fall, making sure that alternative mechanisms of food supply are available to all.[50]

In order to prevent oil from turning into a trigger for ethnic conflict, it is necessary to manage expectations from oil wealth, especially in the initial reconstruction period, and to develop a national strategy for managing oil wealth most effectively for the benefit of all Iraqis, while taking into account the disproportionate impact of oil development on the regions where it is extracted, processed and transported. Such a strategy should seek to combat the negative economic consequences of oil dependence in the short term, and aim for economic diversification in the long term.

## Constitutional arrangements

There is remarkable agreement on the general contours of the future Iraqi constitution: democracy and human rights; political pluralism; separation of executive, legislative and judicial powers; non-discrimination on ethnic, religious or gender grounds; the rule of law and respect for private property. There is also agreement on recognizing the long suffering of the Kurds, Shi'a and other communities under the regime and the need to redress the injustices visited upon these communities. Furthermore, all Iraqi opposition groups recognize the need to address the national aspirations of the country's largest minority, the Kurds, including the right to self-determination within the framework of a federal Iraq. Citizenship and cultural and administrative rights of other minorities, such as the Turkomans and Assyrians, are also recognized along with their right to equality. The above could be found almost verbatim in the documents of most Iraqi opposition groups, including the final declaration of the Iraqi opposition meeting in London. The language about the rights and aspirations of the individual communities is usually balanced by language stating a commitment to Iraq's unity and territorial integrity.[51]

There appear few disagreements among the various Iraqi opposition groups on constitutional matters, although one of them centres around the role of religion. DPWG and other secular forces call for a separation of state and religion. The Iraqi opposition meeting, under the influence of SCIRI, states in its final declaration that 'Islam is one of the pillars of the Iraqi state. Sharia is a source of legislation.' This discourse, along with the ethnic or sectarian nature of many Iraqi opposition groups, may intensify centrifugal tendencies within society. Identity would become a surrogate for politics for claiming legitimacy. It could be used as a tool to claim a larger share

of oil revenues or a way of dismissing responsibility for the regime's crimes. To counter these tendencies, both DPWG and the CFR/JBI call for a federation based on territorial rather than ethnic principles: 'The future all-Iraqi federation should not be one of competing nationalities but one of different geographically defined territories within which different national groups may form a majority. The point is not to diminish or dilute the Kurdishnes of the Kurds or the Arabness of the Arab; it is to put a premium on the equality of citizenship for all.' [52]

DPWG recommends a combination of a bottom-up and top-down approach. It suggests a federation of 18 units following Iraq's current administrative divisions, and the promotion of local governments, including elected councils and administrations. This would provide an institutional framework for addressing community needs without emphasizing identity issues. It would also provide a check on the central government. The top-down approach would then be based on rallying Iraqis on a common national agenda which would offer an alternative to exclusivist nationalism: 'a future democratic Iraq, has to be an Iraq that elevates the Iraqi character of the state above all considerations of race, ethnicity and religion'.[53]

The main dilemma of the federal arrangement, especially if it was applied to areas other than the Kurdish-dominated north, is how to address community aspirations without dividing the country into ethnic or religious cantons or, worse, triggering conflict? Territorially determined arrangements could become a vehicle for ethnic divisions. Local and regional administrations, as the Russian experience warns, can be hijacked by local overlords who can be as abusive and exclusivist as the central government. Moreover, once in place these overlords are very hard to dislodge. Even advanced democracies are still grappling with these issues, let alone other post-totalitarian states.

The DPWG approach is probably the best but questions remain over the notion of an 18-part federation. An alternative approach would be to establish a federation of two constituent parts, with one part based on the three provinces currently under Kurdish control.[54] All remaining communities, including Kurds living in other areas and minorities living in the Kurdish area, would enjoy administrative, cultural and all other rights.

## Conclusions

Iraq will probably lack the institutional wherewithal to maintain law and order, safeguard the country's territorial integrity or provide basic services in the immediate aftermath of Saddam's demise. This would be especially the case if regime change is precipitated by foreign armed intervention. The collapse of state institutions, however, is relatively recent. Society should still maintain the 'institutional knowledge' necessary to rebuild these capabilities in relatively short order. Two main criteria will affect this process: (1) foreign assistance should be respectful of maintaining Iraqi ownership of the process and (2) regime change and subsequent de-Saddamization should be mindful of possible collateral damage to both individual and institutional capabilities necessary for state-building.

Social tensions are likely to emerge as a major challenge to state-building in post-totalitarian Iraq. Tensions between impoverished populations, especially in the cities, and the new rich, be they sanctions-profiteers or tribal leaders, will come to the fore and may take violent forms. The new elites are bound to seek to perpetuate their privileges by a range of means, including attempts to stoke up ethnic tensions. Without the middle class, the transition process will be missing its most important constituency and talent-pool. The implications for policy are: (1) legal and economic privileges granted to tribal leaders should be brought back under the control of national law; (2) sanctions profiteers should be brought to justice or expropriated in cases where there was clear infringement of the law or the rights of other citizens; and (3) economic reconstruction efforts should aim at reviving the middle class across Iraq's communities, as well as of course addressing the needs of Iraq's poor.

Fears of ethnic strife immediately after the regime's collapse are not substantiated. Grievances accumulated by the Kurds, Shi'a and other communities, however, do provide a reserve of tension which could burst into conflict if the legitimate concerns and aspirations of these communities are not addressed properly. People responsible for war crimes and crimes against humanity should be brought to justice. Rights should entail restitution wherever possible, especially as regards the resettlement of refugees and internally displaced people. The communities should be given full access to self-government mechanisms consistent with maintaining national cohesion. Most importantly, however, Iraq's communities should feel that their rights and interests, both as individuals and communities, are best encapsulated in their common Iraqi identity as opposed to their ethnic, religious or sectarian identities.

The state of the Iraqi opposition and political culture in particular does not inspire confidence for the period immediately after the fall of Saddam's regime. Barring a surprise appearance of political leaders from territories under the regime's control, there does not seem to be anyone out there who could quickly assume the responsibility of running the country. Moreover, many Iraqi politicians in exile, or those who may emerge after the regime's collapse, may seek to stoke ethnic, sectarian or social tensions as a way to gain power and with it a share of oil revenues.

This does not bode well for the prospect of conducting elections anytime soon after the fall of the regime.

The prospect of quickly concluding an informed and meaningful discussion around a permanent constitution is even less likely in these circumstances. This is probably one of the hardest challenges of the transition period. It is unrealistic to attempt to create an artificial leadership abroad and inject it into the country. The only correct approach in this context is to create the conditions where politicians can emerge who compete on the basis of political programmes rather than ethnic, sectarian or religious identities. The most important elements of this environment are human rights and economic stability.

# Constitution-making in a new Iraq

*Yash Ghai*

## Constitutions and constitution-making: some general considerations

The process of constitution-making has to be closely tied to the role and objectives of the constitution. Constitutions do not play the same role in all societies. Their role depends on various factors, including national traditions of the 'rule of law', the sources of authority/legitimacy in the society, literacy and communications which enable the people to understand the objects and contents of the constitution, the vitality and organization of civil society, etc. In some states the constitution does, and is seen to, provide the overarching source of all public power and is superior to other norms, while in others it is one of many sources of authority, and not always the most important. Institutions for the enforcement of constitutions vary in nature and effectiveness. Constitutional processes are less autonomous in some states than others – in many states that are heavily indebted to external creditors, foreign states, international financial institutions, and even private corporations may play a key role in governance, sometimes in a way at variance with prescribed constitutional values and rules. In countries with a weak tradition of the rule of law, constitutions may be important in determining access to power, but ineffective in regulating the exercise of power. Traditionally, constitutions consolidated an existing, even if newly born, socio-economic reality, but many recent constitutions, at independence, after conflict or economic crises are by definition largely aspirational and change-oriented.

Iraq's constitutional experience places it among countries without reliable traditions of constitutionalism – a concept encompassing limitations on powers of state, rules and practices of the separation of powers, mutual checks and balances composed among the organs of state, and an independent judiciary. There are few mechanisms for the enforcement of the constitution. In terms of the substance, the earlier constitutions tried to recognize the diversity of the Iraqi people, albeit under the hegemony of Sunni royalty and nobility. But the more recent ones are marked by centralization of powers and their domination by small cliques. In other words, control rather than inclusiveness or participation has been their principal theme.

Constitutions have traditionally played a key role in defining a people or establishing or redesigning a state. The latter has particularly been the case when the international community has been involved in the resolution of internal conflicts, as in Namibia, Cambodia, Bosnia and Herzegovina, Kosovo, East Timor, and now Afghanistan. Very often, the end of international obligations or administration or supervision is contingent on the conclusion of a satisfactory constitution. What is a 'satisfactory' constitution is seldom spelled out, apart from customary and slender references to democracy and human rights. Constitution-making is pre-eminently a national or domestic prerogative, although in this day and age, every constitution-maker is to some extent bound by universally accepted or internationally mandated norms. While the international community might see the constitution as a badge of state sovereignty and a passport into the international system, for the citizens of the state the primary functions of the constitution are manifold: depending on the situation, the constitution is seen variously as an instrument to consolidate newly developing class and social relations, entrench revolutionary change, define a nation or an identity, heal conflicts and wounds of the past, develop norms and institutions for the coexistence of different religious or cultural communities, etc. The aims of international intervenors and local communities may not always coincide. Equally, the methods for the making of the constitution may vary depending on the aims. When the timetable for the process is imposed by or under the influence of the UN or regional institutions, the aim is to get it out as soon as possible – mindful of the ever present danger of international 'fatigue' – and so a simple procedure involving a comparatively small number of stake-holders and a narrow agenda is preferred over procedures which seek to engage a large number of individuals, organizations and communities, and to work on the basis of a wide-ranging agenda.

### What is the constitutional process all about?

The process of constitution-making can be used to change the role or orientation of the constitutional order. It can introduce ideas which determine the constitutional order: principles, values, institutions and procedure. It can

enhance the capacity of the people to cope with the resulting constitutional order. The process of constitution-making is crucial, although not decisive, for its success. A fundamental question which should govern the approach to constitution-making is the conceptualization of what the constitution and the process are about. A constitutional review can achieve different purposes (which are not exclusive), including the following:

- most obviously, to make and adopt a constitution;
- to identify the underlying societal issues and define the agenda for reform (noting that sometimes the agenda for reform is pre-determined);
- to develop a national consensus on the goals of the constitution and, occasionally, on how to achieve them;
- to settle outstanding national or regional issues and difficulties, and provide the basis for future governance (a key question is how broad/extensive the agenda should be – there is a danger of overloading the process, just as there is apprehension that by exclusion of a key, controversial topic, an opportunity will have been missed);
- to consolidate new power relationships and goals, frequently after a coup (a process with this aim is seldom genuinely participatory; in fact it is usually highly controlled, if the constitution is not actually imposed);
- to promote national identity (a particular problem in multi-ethnic states);
- to legitimize the constitution – central to which is the participation of the people;
- to educate the people in principles of democratic theory and to develop democratic practice;
- through the participation of the people, to ensure wide public knowledge of the constitution, and to facilitate its implementation and protection.

Constitutions for post-conflict situations are often made by a small group of people, in secrecy. The real support they enjoy is not self-evident. The alternative, as mentioned above, is to throw the process open to wide consultation, with an open agenda. The approach to the process may be determined by whether those responsible for constitution-making see it as a necessity or an opportunity. If it is seen merely as a necessity, the tendency would be to adopt short-term objectives – to conclude it speedily, minimize public participation, opt for a minimalist constitution, and to exert tight executive control over the process and the outcome. If it is seen as an opportunity, the tendency would be to have a relatively open-ended process, encourage wide public participation, drawing in all key stake-holders including even children, broaden the agenda, and work towards a consensus. In the latter case the process would be used to develop or intensify a sense of national identity, to highlight and then resolve differences among the people, and aim for a consensual document broadly acceptable to all communities.

One reason given for restricting the scope of the process is the fear that it could open a Pandora's box, where issues long considered settled, as well as new controversies, are raised, and there is no easy way to resolve them. This is a special problem in states with fragile national unity or consensus. Wide public participation tends to broaden the agenda for reform, especially in relation to social polices. On the other hand it avoids the dominance of political parties which generally pursue narrow and selfish interests.

It cannot of course be denied that there may be risks in an open and participatory process. In conflict or post-conflict situations, it may be necessary to focus on issues that have divided parties so that peace can be restored. This may mean both that the issues are narrow and possibly short term. In these circumstances it may be that there should be two stages in the constitutional transition – one on transition to peace and the other on the transition to democracy. Sometimes the first object can be achieved through 'sunset' provisions, valid for a limited period (say four years), providing for example power-sharing arrangements – after which the more democratic features come into operation. Whether this exercise should be done in one go or in two bites would depend on circumstances and opportunities. However, constitution-making is an expensive and time-consuming activity, not easy to organize frequently, and the circumstances in which it can engage attention and mobilize resources are infrequent. So it is necessary to be strategic about the questions of when, how and how much.

To illustrate, as Afghanistan gets ready to begin its constitution-making process, there has been considerable debate on how open and open-ended the process should be. On the one hand, society has been divided for many years along ethnic and religious lines, and there are strong fundamentalist forces. There are dangers that an open process could allow its hijacking by fundamentalists or warlords, which would prevent progress towards democracy and stability. But a process which is tightly controlled may merely sweep difficult issues under the carpet rather than solving them. Eliciting the views of the general public, which tend to be more moderate than those of ethnic or religious 'entrepreneurs', can be a strategy for moderation and tolerance – and thus dealing with the fundamentalists. It could also help to deal with conflicts of the past and to develop a new kind of national identity.

If it is desired to adopt a wide participatory process, it is necessary to plan carefully the different stages so that

the process achieves its objectives. Some of the following steps would be found to be useful:

- The process and procedure for the debate on and the adoption of the constitution should be inclusive, bringing together political, religious, professional and gender interests – this will put a limit to self-interested behaviour. Attempts should be made to facilitate the participation of all sectors of society, including even primary school children, so that it becomes a truly national enterprise. Provision should be made for the use of local languages wherever necessary.
- The constitution-making process has to be preceded by or accompanied by civic education, to increase people's familiarity with constitutional issues and to enable them to engage actively in the process. A large proportion of the burden of providing civic education should be the responsibility of civic organizations.
- The views of the public – individuals as well as organizations – on the current constitutional arrangements and recommendations for reform have to be sought. In some countries, as historically in Afghanistan, public opinion is sought on the basis of a draft constitution prepared by a team of experts. The advantage of this is that public attention is clearly focused on a set of constitutional propositions. The danger is that it may foreclose issues on which the public should be engaged, and which should be considered for inclusion in the constitution. Increasingly, public opinion is sought before a draft is prepared, as was done in Uganda, Ethiopia, Thailand, Eritrea and Kenya, so that even if the agenda for reform has been identified in advance, it can be broadened by reference to the needs and aspirations expressed by the people. In any event, some guidance should be provided to the public on the issues on which public opinion would be welcome, possibly through a simple questionnaire. Moreover, civic education and consultation should not be a one-off process. The public should be given an opportunity to comment on the draft constitution before its adoption, even if it was prepared after the initial consultations, just as civic education on the draft as well as the final constitution should be encouraged and facilitated.
- It is usual now to adopt a two-stage process for the making of the constitution. The first consists in the preparation of the draft, often by a body called the constitution commission, in one of the ways mentioned above. The second stage is debate on the draft, first by the general public for a specified period, and then more formally by a constituent assembly-type body which adopts the constitution. The commission is normally a technical body (although sometimes its composition is intended to reflect a degree of societal diversity), whereas the assembly is democratic and representative, generally elected, but with scope for nomination by special interests. In the current review of the constitution in Kenya, for example, the ultimate decisions on the new constitution will be made by the National Constitutional Conference of around 630 persons, representing the National Assembly, local authorities, and professional, religious and gender organizations, as well as groups speaking for youth and disabled people, and a wide range of NGOs and civic society organizations active in human rights and social welfare work.
- Some countries have provided for a referendum after the constituent assembly or its equivalent has approved the constitution. The referendum serves well as a legitimizing device, but also the consideration that, at the end of the process, the product of consultations and negotiations will be subject to the scrutiny of the people, acts to keep the interests and aspirations of the people in front of the constitution-makers. But a referendum is not always provided for, if the constituent assembly is believed to be fully representative.
- Almost no arrangements for making constitutions find a place for civic education after the constitution is approved. This is a critical task, so that people become familiar with the principles and details of the constitution, and learn not only of their rights but also how they can invoke and mobilize them. A knowledge among the people of their constitutional rights is an essential element in the observance of the constitution by authorities who might be tempted to take short cuts.
- Connected with the above point is the establishment of effective methods to implement and uphold the constitution. There is a clear division of responsibility between the state and civil society in these endeavours. A state organ should be established with the authority to oversee the implementation of the constitution. Civil society has to gear itself to the protection of the constitution, through civic education, lobbying, dissemination of analysis and information, research and litigation. Only through these myriad ways will the constitution become a reality in the life and governance of a nation.

## Constitution-making in Iraq

### Problems of constitution-making

If, as I argue in this section, constitution-making is a deliberate process requiring wide participation of the people, an obvious difficulty now is that free discussions

within Iraq are difficult, almost impossible. These are easier in Kurdistan than elsewhere, but the parties there have a specific agenda and broader issues may be hard to canvass. Consequently, so far, much of the discussion on constitutional reform has taken place outside the country among the Iraqi diaspora. Some of them may be out of touch with developments and thinking within Iraq. Diasporas tend to have special perspectives on internal developments and reforms – not necessarily faulty, but partial. Also, experience elsewhere shows that diasporas tend to be particularly fractious and divided, although it is unclear the extent to which this is the case with the Iraqi diaspora. The fact that there is no specific consensus among them is not in itself a problem[55] – after all it is the task of the review process to promote debate and lay the basis for a consensus. Not surprisingly, the ideas for constitutional reform that are emerging are heavily influenced by Western constitutionalism. This again is not a problem in itself – the modern state is itself a product of Westernization and the devices for regulating it clearly have a relevance wherever that state is now the norm. But some recognition of local realities, values and expectations is also a necessary component of reform. On the other hand, Western constitutionalism may be a good antidote to the excessive concern with confessional issues that is likely to be dominant among local leaders and communities.

## Issues and prospects

The possibilities of constitution-making in Iraq would depend on the conjuncture which leads to the review of the constitution. What role will the USA or the UN play? What role will Iraq's neighbours, particularly Turkey, Iran and Syria play? Will the exiles, who seem hitherto to have been the only groups to have debated constitutional change, dominate the process? Who will be charged with the task of preparing and adopting the constitution – perhaps an interim administration? In short, will there be a genuine possibility of self-determination in which people freely participate in the process and decide? At present these are merely matters of speculation, but it is obvious that they are going to have a fundamental effect on the process and its outcome. In conflict situations, when the international community or segments of it become involved in designing the future, relatively little attention is paid to the purposes of constitution-making or the procedure to be followed. Iraqis will do well to begin to think about these issues and engage their interlocutors on options.

A critical question will be the purposes of constitution-making. As the previous section has tried to demonstrate, both the process and the outcome can be envisaged to serve specific priorities. If it is felt that there is no enduring sense of Iraqi nationalism or identity, the aims of the process would be different than if the aim were seen to be to develop a culture of constitutionalism, or to deal with problems of the immediate past. Is state-building a higher value at this time than nation-building? Is the role of the constitution to make a fundamental break with the past or to fine tune present instruments? What role will the constitution play in mediating Iraq's relationship with its neighbours – in particular can it be an instrument promoting regional peace and cooperation? These priorities are in part a function of the conjuncture in which the process takes place. But Iraqis can no doubt influence the conjuncture, and therefore need to develop a vision of the constitution now. Iraqis should require that the modalities and aims of the process which recognize the people's right of self-determination should be defined in any agreement for the post-Saddam period.

## Democratization

Certain tasks of constitution-making seem obvious. The constitution must lay the basis of a democratic polity. Yet this is no easy task given the lack of a tradition of constitutionalism or the rule of law. Power has been highly personalized, even though it has been based on and deployed through the military. Some commentators have described the present Iraqi system of power as patrimonialism, in which personalized power is exercised through small circles of kinsmen. Certainly the system is characterized by a lack of participation or accountability. The ideology is the sacredness or even the power of an individual, and coercion is the principal instrument of rule. The system does not aim at inclusiveness, but operates through opportunistic alliances which shift with the expediency of the moment. The enormous concentration of power, personal as well as geographical, rests on an extensive use of informers and swift reprisals.

Assuming that democracy will be an aim of the new constitutional dispensation, Iraq has to balance the tensions between democratization and democracy, by which I mean that sometimes the way to achieve the transition from a non-democratic regime to a democratic regime may be incompatible with the long-term structures and procedures for democracy. There is considerable difficulty in generalizing about the path to, and the role of, constitutions in democratization. In recent and contemporary times, the transition to democracy has its starting point in (a) colonialism; (b) military rule; (c) one-party regimes; (d) mono-ethnic rule in divided societies; (e) a long period of rule by one dominant and authoritarian person; (f) some or all of the above, compounded by civil strife or war. The central issues that the constitution has to resolve vary greatly in these situations, and limit the

transferability of experience and knowledge from one case to another.

It is obvious that, in the case of Iraq, one critical factor is how to deal with the military. The present Constitution (1990)[56] has little to say on the military, except to prescribe conscription in article 31, which curiously appears in the chapter on fundamental rights. The armed forces are given a broad mandate, without any corresponding safeguards. The article reads as follows:

**Article 31 [Armed Forces]**

(a) The defense of the homeland is a sacred duty and honor for the citizens; conscription is compulsory and regulated by the law.
(b) Armed Forces belong to the People and are entrusted with ensuring his security, defending his independence, protecting the safety and the integrity of the people and territory, and realizing his national and regional objectives and aspirations.
(c) The State alone establishes the Armed Forces. No other organization or group, is entitled to establish military or para-military formations.

The organization of defence and security matters is left to the Revolutionary Command Council (art. 44). In another article (art. 41), the proceedings of the Revolutionary Command Council are declared to be secret. No principles for the organization, civilian control or accountability of the armed forces are prescribed. The Constitution says nothing about the role and organization of the police.

Iraqis would therefore do well to reflect on how to define the role of the armed forces and their distinction from the police force and its role (armed forces should focus on the defence of territory against foreign threats, while the police should protect citizens against internal threats to their security and rights), bring both under civilian control and oversight, and involve the public in the maintenance of law and order. At an international conference in Madrid in October 2001 on democratization, the following principles for the organization of the armed forces were agreed:

- Enforcing a democratic civilian decision-making process on defence policies, defining military missions, involving the executive, the legislature and civil society bodies.
- Creating a civilian-controlled ministry of defence, truly empowered to formulate and manage defence policies, staffing policies for the armed forces, procurement, logistics and military education as well as long-term strategic planning.
- Preventing armed forces from raising their own finance or having recourse to special autonomous resources not allocated and controlled through parliamentary debate, e.g. funds derived from military pension funds or private enterprise.
- Establishing a system of military promotion with clear and well-defined procedure based on professional merit. The highest ranks will be defined with approval from democratic authorities.
- Preventing military forces from being involved in non-military missions. Military involvement in issues of public order heightens the social and political profile of the armed forces. For this reason, there should be a clear-cut separation of the functions of foreign and domestic security, supported by legal provisions.
- Eliminating privileges, limiting military justice exclusively to specifically military crimes, such as insubordination, and not just any type of crime perpetrated by the military.
- Fostering the development of centres of strategic studies; specialist qualifications for experts in the public administration of defence; the training of journalists; the creation of defence-related academic institutions so as to trigger off public debate and provide democratic perspectives on strategic thinking that used to be lacking.[57]

Another important step towards democratization is the rehabilitation of civil society after its destruction by infiltrators and informers. Here there may be tension between a secular civil society and the dominance of confessional and cultural traditions and demands. Both are important and some way must be found to balance the different sets of values which alone will enable non-state institutions to play a constructive role. Some thought might also be given to mechanisms and regulations to encourage political parties which are committed to national goals and democracy, exemplified by their own internal values, composition and openness. Years of repression and violation of human rights may suggest a weak sense of the worth of human rights; on the other hand, these very violations can be used to create a consciousness of the importance, indeed the priority of human rights. Institutions for promoting and protecting rights should find a central place in the new constitutional order.

Not surprisingly, in view of the above, there is a weak sense of citizenship. The concept of citizenship is also compounded by the uneasy relationship between the state, community and the individual. The problem seems to arise from the failure to develop a national identity on a principled basis. This has given disproportionate salience to 'tribal' and ethnic identities. As elsewhere, identities have been politically defined and manipulated. The emergence of Iraq without an organic basis out of the disintegration of the Ottoman Empire, the absence of

national values, and the failure to create a vision of Iraq which commands broad acceptance, have facilitated this manipulation. On the one hand there is a tendency towards 'monolithizing' groups into highly aggregated categories, ignoring their fragmentation into various communities, often in deep antagonism. Tripp notes the changing idea of the 'tribe' and 'tribal shaikh' in Iraqi history. He states that they have 'played various roles under different regimes, many of which have tried to fit them into their schemes for social control as key institutions to extend the power and reach of the centre'.[58] Particular regimes have had an interest in undermining or bolstering these categories. Tripp says: 'However, in all cases the very attention paid to the questions of lineage and status associated with tribal identity in Iraq has helped to transform the categories themselves. It has also inscribed into the notion of "tribal identity" a variety of meanings for individual Iraqis at different moments of their history. Similarly, ethnic and sectarian categories such as "Kurd" or "Shi'a" have not only meant different things politically over time, but have also been used in a variety of ways, by government and the opposition alike.'[59]

Under the circumstances, the constitutional proclamation that 'Iraq is part of the Arab nation' and that 'the Iraqi People are composed of two principal nationalisms: the Arab Nationalism and the Kurdish Nationalism' (article 5) scarcely succeeds in capturing the complexity of the population or helps to define the nature of Iraqi identity, juxtaposing nation with people, and obscuring other identities. Undoubtedly the new constitution has to confront the issue of the identity and vision of the Iraqi people, avoiding the twin dangers of totalization or fragmentation of the people. Both in ideology and practice, the concept of citizenship, abstracting a person from his or her community and sectarian affiliations, has been marginal to the key issues of political organization, the relationship of individuals to the state and as among individuals. Greater emphasis on citizenship is desirable to balance the competing claims of the state, community and individuals – a balance which can be struck guided by national aspirations and international norms of minority protection and public participation.[60]

Closely connected to the lack of national identity is the absence of a vision of the country. There have been too many competing conceptualizations of the country, constantly manipulated. Iraqi nationalism has been played against Arab identity. Islam has provided a unifying force, but its effect has been dissipated due to sectarian divisions and sub-divisions. Attempts at entrenching Sunni dominance of the state threatens both Islamic and national foundations and inclusiveness of the state. The geographical position of Iraq which gives its neighbours, particularly Iran and Turkey but also Syria, a special interest in the fortunes of specific communities in Iraq, has complicated questions of identity and loyalty (or is often represented as doing so), and intertwines domestic issues with regional politics. The search for dominance of the state by one group has resulted in two, somewhat contradictory, characteristics of the state which will have to be confronted in the design of the new constitution: the centralization and militarization of the state, and the organization of society and state policy along ethnic and sectarian lines.

From its birth, Iraq's key state institutions became, as Tripp states, 'instruments in the hands of powerful individuals and their followings, encouraging factionalism among officials and throwing in question the nature of their loyalties. … Army officers emerged as significant political players, attracting patrons and clients and helping to shape the rules of the political world.' He says that this was possible 'in part because of a shared centralising, authoritarian vision of political order among much of the political elite, notables and senior state servants alike, which assigned to the armed forces a leading role in the disciplining and definition of Iraqi society. Rebellions in the provinces rejecting this vision provided their ideas of social order and national discipline, as well as the means of imposing it through strategies of co-option and coercion.'[61] A strong, centralized state was regarded as essential also because of the absence of social and communal bonds that held the various communities and geographical areas together. The state was seen as the principal instrument of national unity and integration. The salience accorded to the state marginalized other strategies of nation-building, the cultivation of civil society and the development of national values and goals. The state had little of the human and social character about it. Nor did it provide space for political and economic activities outside the narrow confines determined periodically, unpredictably and opportunistically by the state. This has clearly hindered national integration and often the only possible form of protest has been migration and exile. Such a regime affords little protection of human or collective rights and even less tolerance of human and political rights discourse.

Yet the centralization and militarization of state did not provide order or predictability. Nor did it establish any degree of professionalism or an effective regime of rules. At best it produced rule by small circles of persons, bound by kinship, clan or tribal connections (for example the armed forces are dominated by the Sunnis, the Revolutionary Command Council is under the control of the Tikriti group, and the inner sanctum of the administration is staffed largely by Saddam Hussein's family). But more generally, it produced the personalization of power, held on to essentially by coercion, supplemented by patronage and co-optation as well as the politics of ethnicity and division.

## The ethnic/religious issue

The ethnic dimensions of Iraqi politics dictated a quite different design of the state from that espoused by its military and political leaders. Instead of the state being run by a small group, exploiting rather than celebrating ethnic and sectarian diversity, excluding large sections of the people from any role in state power or public affairs, the logic of the ethnic composition of Iraq required the recognition of this diversity through the diffusion and sharing of power, and its decentralization to local communities. Successive constitutions have acknowledged the existence of Arab and Kurdish nationalities, but have made no provisions to accommodate them. In any event, this sparse recognition of diversity overlooks other communities. Those who have canvassed constitutional reform in recent debates have focused largely on ethnic issues. It seems obvious that the settlement of the ethnic issue will be central to the constitution – even if only by acknowledging the need to subsume it under broader national objectives and structures. The only corporate groups at present seem to be ethnic or religious communities, and so claims based on these identities are likely to dominate the negotiating process. As always, the ethnic situation is differently understood by different groups and subgroups. Yet this understanding is critical to claims that are advanced and structures that are recommended.

The bare 'facts' are given in the first section of this report (I place facts within quote marks because, like other contributors to this report, I note that Iraqi population figures are notoriously unreliable). The cross-cutting cleavages in ethnic and religious identities – Kurds are not Arabs but are mainly Sunnis, Shi'a are mainly Arabs but a different sect from other Muslims – can diffuse ethnic tensions and prevent polarities. These cleavages need to be used creatively in the constitution-making process.

The smaller communities in Iraq have made claims to full cultural rights and equal treatment but two large communities have made distinct political claims and these are discussed in turn below.

### Shi'a

Shi'i Arabs, although the majority community, have long suffered from discrimination, sometimes amounting to oppression, and have long resented their inferior political status. Their religious affiliation with the dominant sect in Iran has made them a target of suspicion. A report by the International Crisis Group provides the following background to the resentment felt by the Shi'a: 'Historically, present day Iraq is the heartland of the Shiite community. In Iraqi soil are buried eight of the twelve revered holy Imams of the Twelver Shia, the second largest branch of Islam. ... The Shrines of the Imams, destinations of millions of Shiite pilgrims from all over the world, are in the Iraqi cities of Najaf, Karbala, Samara and Kazimayn. Theological schools and centres of Shiite learning have been established around the shrines. For most of 1000 years, until the 1920s when the Iranian city of Qom rose to preeminence, Najaf was the most important Shiite centre of learning and theology, attracting students and scholars from all over the Shiite world, in particular from Iran.'[62]

Now Shi'a feel disenfranchised and marginalized politically and economically. But religious tensions are more potent. 'Religiously-inspired Shiite activism took root in intellectual centres led by religious clerics and theology students in the holy cities of Najaf, Karbala and, to a lesser degree, Kazimayn, though it had to contend with a strong apolitical tradition among the traditional clergy. Initially these intellectual centres aimed chiefly to counter the rising tide of communist ideology and to express the Islamic identity and culture of Iraqi society. ... Later, as the Baath regime attempted to interfere with Shiite practices and targeted religious Shiite figures in the 1970s, the Shiite Islamist current became a more potent and politicised force, both inside Iraq and in exile. A series of factors accelerated this trend and further gave the Iraqi religious Shiite movement an identity and aspirations all of its own.'[63]

Despite the political marginalization and relative socio-economic deprivation of the Shi'a by the Sunni-dominated regime, and despite some Iraqi Shi'i support for the Iranian government, the Shi'a have remained loyal to Iraq and its Sunni President (in spite of the desecration of Shi'i holy cities and mass executions). Shi'a have not claimed any special protection or recognition, other than the application of their brand of Islamic law, and they are represented in the various layers of government and bureaucracy. But now relations between Sunnis and Shi'a have deteriorated to a point where no lasting solution is possible unless there is an end to discrimination against the Shi'a and the development of the Shi'i south.

The position as perceived by the Shi'a themselves can be gleaned from a Declaration that the exiles made in 2002: the 'Declaration of the Shia of Iraq'.[64] They state that the 'Shia in Iraq are not an ethnic group nor a race nor nation, but rather, can comprise any social combination that believes that its Shia fealty has led it to suffer from persistent sectarian disadvantage over the centuries'. However, they also state that 'There is the unavoidable reality that there are two sects in Iraq, a fact which it would be foolish to deny or ignore. The imposition of an enforced and artificial homogeneity on this reality only serves to compound the problem and pushes it to the point where an explosion becomes inevitable. The recognition and even celebration of Iraq's sectarian diversity is an important platform in reconstructing the terms of dia-

logue between the state and the people, and by confirming the civil and religious rights of all the sects and groups in Iraq, the ground is strengthened for enhancing the sense of unity and patriotism in the country.' They blame the sectarian policies of the state for the difficulties faced by them and the country. 'The continuing isolation of the Shia from any meaningful exercise of power has contributed, in the modern period, to the transformation of the Iraqi Shia into a recognisable social entity with its own peculiarities, far from any specific ideological and religious considerations. In other words the crystallisation of the Shia as a distinct group owes far more to the policies of discrimination and retribution than to any specifically sectarian or religious considerations. This condition now defines the status of the Shia in Iraq irrespective of the individual Shia's doctrinal, religious or political orientations.'

In other words, these Shi'a see the problem as political, not sectarian. They claim that a 'relatively high degree of harmony has prevailed between the Sunnis and the Shia, in many ways superior to the conditions prevailing in most multi-ethnic and multi-sectarian countries. The struggle for national sovereignty and independence was joined equally by both the Sunnis and the Shia, at the level of their respective leaderships and right down to the community rank and file. Most of the national parties had a broad base of sectarian representation, and sectarian considerations did not dominate the response to key issues and moments that affected the destiny of the country.' Indeed the Shi'a have proved their loyalty to Iraq on many occasions, not least during the Iran-Iraq War when they provided the majority of soldiers in that long and bloody war.[65]

Based on the above analysis, the 'Declaration of the Shia of Iraq' makes a number of recommendations – not without some internal inconsistencies – in which they emphasize parliamentary democracy (i.e. a more inclusive and collective form of government than the presidential), dispersal of power geographically and ethnically, the importance of civil society and human rights (with particular sensitivity to respect for religious beliefs and practices), and combining common citizenship (reinforced by Iraq's Islamic identity) with Iraq's diverse 'national, ethnic, religious and sectarian' identities through the principle of non-discrimination. These principles, which are set out below, can indeed be accommodated in a constitution, but would require a complex set of arrangements and habits of tolerance and inter-ethnic accommodation.

1. Abolition of ethnic and sectarian discrimination, and the elimination of the effects of these erroneous policies.
2. The establishment of a democratic parliamentary constitutional order, that carefully avoids the hegemony of one sect or ethnic group over the others.
3. The consolidation of the principles of a single citizenship for all Iraqis, a common citizenship being the basic guarantor of national unity.
4. Full respect for the national, ethnic, religious and sectarian identities of all Iraqis, and the inculcation of the ideals of true citizenship amongst all of Iraq's communities.
5. Confirmation of the unitary nature of the Iraqi state and people, within the parameters of diversity and pluralism in Iraq's ethnic, religious and sectarian identities.
6. Reconstruction of, and support for, the main elements of a civil society and its community bases.
7. Adoption of the structures of a federal state that would include a high degree of decentralization and devolution of powers to elected provincial authorities and assemblies.
8. Full respect for the principles of universal human rights.
9. Protection of the Islamic identity of Iraqi society.

### Kurds

Kurds, less committed to a unitary state than the Shi'a, have made federalism and autonomy central planks of their claims. Also, unlike the Shi'a, they have consistently backed up their demands by armed insurrection as well as collaboration with Iranian forces. Kurdish people have suffered greatly from oppression by the Iraqi government (as well as by neighbouring states) since the very beginning of the Iraqi state, when the Kurds failed to secure a state of their own in the post-Ottoman settlement for the simple reason that King Faisal would not accept the Iraqi throne unless southern Kurdistan was included in his domains, to dilute the numeral dominance of the Shi'a.[66] Politically, the Kurds have been well organized, if internally divided. The internal divisions have limited the usefulness of foreign assistance for the cause of Kurdish independence or autonomy. As previous sections have described, the imposition of a no-fly zone in the north of Iraq after the 1991 Gulf War enabled the Kurds to set up their own form of self-government. This did not bring to an end periodic conflicts between the two main Kurdish parties, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK), but in recent years cooperation between them has increased, resulting in an agreement to work on constitutional reforms after the end of the Saddam Hussein regime. A draft constitution based on federal principles has been prepared and is being discussed by Kurds and other opposition groups.

Conditions in Iraqi Kurdistan seem quite favourable for debates on constitutional reform. Commenting on political changes there, the ICG report says: 'The region boasts a relatively free press and an independent judiciary. The numerous strands of the Iraqi opposition have opened offices there, and the region also serves as a refuge for Turkish Kurdish parties ... and Iranian Kurdish parties. Various ethnic and religious minority groups (the Turkomans, Chaldeans, Assyrians, and Yazidis) enjoy greater rights than in the rest of Iraq, and there are no religious restrictions. The outlook and mindsets of Kurds appear to have changed as they have been freed from the Baath regime's repression and have grown accustomed to self-government, as evidenced by the proliferation of parties and news channels of various political hues.' [67] Nevertheless, given their experience of the unreliability of support from foreign powers, they are afraid of betrayal by the USA and other states that may feel more secure with a Sunni-dominated government.

Kurdish claims are closely tied to autonomy. Politically, Kurds have occupied themselves either agitating for and negotiating autonomy or effecting *de facto* self-government in Kurdistan when circumstances have allowed this. Such is their passion for autonomy that the territorial integrity of Iraq depends on a satisfactory solution of the Kurdish claims.

A major step towards the acknowledgement of autonomy was an agreement drawn up in 1970 between the Iraqi government and the Kurds. It contained 15 points designed to recognize the Kurdish nation as a distinct nation within Iraq, Kurdish autonomy in areas where they were a majority, assistance with cultural and economic development, and participation in national legislative and executive authorities. The principal points were as follows:

- Kurdish language recognized as an official language, along with Arabic, in the region with a majority of Kurds. Kurdish would be the language of schooling; Kurdish to be taught as a second language in the rest of the country;
- Kurds to participate in government as equals, without any distinction between Kurds and non-Kurds regarding nominations for public office, including ministerial office and military command;
- Kurds to be helped to make up for past neglect in education and culture;
- Senior public offices in the Kurdish areas to be held by Kurds as far as possible;
- Kurds' right to set up their own organizations for students, teachers, young people and women;
- Rehabilitation of employees who fought on the Kurdish side during the war;
- Special commission to be set up in the Ministry of Northern Affairs to promote 'every aspect' of economic development to compensate for past neglect;
- Return of Arab and Kurdish refugees to their place of origin [which would have removed Arabs who had settled in Kurdish areas];
- Land reforms in Kurdistan, including land distribution to peasants;
- The Constitution to be amended to
  – acknowledge that the Arab nation and Kurdish nation make up the Iraqi people; and to recognize the national rights of Kurds and other minorities 'within the overall context of Iraqi unity'; and
  – provide Kurdish and Arabic as official languages;
- Return of heavy weapons of war to the government;
- One of the Republic's vice-presidents to be a Kurd;
- Change in administrative boundaries to reflect the agreement;
- Government to promote growing degree of Kurdish self-government and internal autonomy; but 'since internal autonomy will be exercised within the framework of the Iraqi Republic, the exploitation of the region's natural resources will proceed under the authority of the Republic'; and
- Kurdish people to participate in legislative authority in a measure 'proportionate to their number within the Iraqi population as a whole'.

Although it covers several key issues, the agreement would not have entrenched the arrangements for autonomy against its repeal, nor did it deal with the critical question of boundaries, including the status of Kirkuk, or the ownership and exploitation of oil and mineral resources. It is not surprising that the agreement foundered on the last two of these issues. However, the constitution was amended to declare that Iraq 'is part of the Arab nation' and that 'The Iraqi people consists of two main ethnic groups: Arabs and Kurds. The Constitution recognises the ethnic rights of the Kurdish people, as well as the legitimate rights of all minorities, within the framework of Iraqi unity' (art. 5) and subsequently the Iraqi government unilaterally passed an Act in 1974 which has for certain periods provided the framework for administration of Kurdish areas.

Further negotiations took place in 1984 but were also unsuccessful. When in 1991 Kurdish forces, now under a broad united front, overran Kurdish areas, they claimed to be implementing the 1970 15-point agreement. Subsequent negotiations with the government again broke down over the inclusion of Kirkuk in the autonomous area.

Under *de facto* self-government after 1991, elections were held to a 105-seat National Assembly and for a leader. The two main parties, the KDP and the PUK,

obtained a roughly equal number of seats. Elections for a leader produced 47.5 per cent support for Masoud Barzani and 44.9 per cent for Jalal Talabani. However, peace between the two parties did not last long, and in May 1994 the region was divided into two zones, each under the control of one party. Fighting between the two groups continued. Iran and Turkey intervened massively (Turkey on the side of the KDP and Iran on the side of the PUK), and both committed troops to fighting in the area. In 1998 the USA sponsored an agreement for a unified administration, the sharing of local resources, an end to hostilities and cooperation in implementing the 'oil for food' programme.

The 1974 Act, as amended, provides a possible framework for perhaps a more elaborate and legally secure arrangement for the future.[68] The Act makes the region of Kurdistan a separate administrative unit 'endowed with distinct personality within the framework of the legal, political and economic unity of the Republic of Iraq'. Its capital is declared to be Irbil. The official language is Kurdish in addition to Arabic. Both are languages of educational instruction, and members of the 'Arab ethnic group' will have their own special educational facilities. Constitutional rights and freedoms of Arabs and other minorities are safeguarded. They are also to be represented in the institutions of the autonomous region in proportion to their population. The key institutions are the Legislative and Executive Councils. The former consists of 50 members chosen by secret ballot. Its functions are law-making, approval of the budget and development plans of the executive, and ensuring the accountability of the executive. The Executive Council is responsible for administration, headed by a President who is appointed by the national President and approved by the Legislative Council. Other members of the Executive Council are appointed by the regional President. The executive is responsible to the legislature and can be removed by it. The powers of the regions cover education, culture, and social and economic development (these are not very precisely stated, which is an omission as outside these areas, national laws and policies apply). Its sources of finance are a combination of regional taxing powers and subventions from the centre. The regional President is also a member of the Council of State of the Republic. Disputes between regional and national governments as to jurisdiction are to be decided by a special court. This skeletal framework contains the critical issues on which agreement would be necessary for any future arrangement: the nature of the autonomy, the rights of minorities within the autonomous area, the powers and finances of the region, institutions of the region and their relationship with the centre, and dispute settlement. What would also be critical is the degree of the entrenchment of autonomy, and the extent to which the asymmetrical powers of the region are acceptable without replication for the entire state – a question which is closely connected to the more general provisions for federalism which are discussed later. It is interesting to note here that the 1990 Constitution does not have any explicit recognition of Kurdish autonomy, the key provision saying merely that the Iraqi republic is divided into administrative units and is organized on the basis of decentralization (art. 8(b)).

However, the current Kurdish thinking seems to go well beyond autonomy and to embrace the idea of Iraq as a federal state of two equal 'peoples'. This idea is elaborated in a draft constitution prepared by the KDP that was presented to the Kurdish legislature, which also gives an insight into Kurdish views on other aspects of the Constitution (reprinted at http://www.krg.org/docs/Federal_Const.asp). The Preamble attributes the failure of previous constitution to the centralized nature of the state and the failure to recognize the plural nature of the nation, particularly the special characteristics of the Kurdish people. Its principal remedy is a 'federal system based on federalism and the division of powers among the federal government and the regional ones in a manner that would be more consistent with the pluralistic nature of the Iraqi community made of the two primary nationalities, Arabs and Kurds, in addition to other national minorities present among the population.' Another plank of the Kurdish proposals is democracy, which itself is 'urgent and indispensable for a federal Iraq'. Democracy, the Preamble says, is not possible without democratic freedoms, including equal rights for women. 'The various civil institutions of the community must be allowed to practice their necessary role in development and progress.' Furthermore, democracy recognizes 'the principle of a multi-party system and the concept of an opposition' and the peaceful transfer of power through elections. It is based on the separation of powers, and 'protects the independence of the judiciary by giving it the last word in settlement of constitutional disagreements that may occur between the federal government and the regional government or between the institutions of the federal government itself'. Thus the Kurds are committing themselves to a fairly standard form of constitutionalism – far removed from the current constitutional arrangements and practice, but not out of line with the thinking of other communities.

It is in their federal proposals, however, that the Kurds are likely to differ from the other major communities. The Shi'a have a more integrative view of federalism than the Kurds, who constantly emphasize the separateness of the Arabs and Kurds, and their federal proposals are based on just these two separate entities, rather than on geographical regions. The country is to be divided into two regions, each with its own constitution and institutions

(including the judiciary), and the common federal institutions have fewer powers than the regional. The somewhat limited powers of the federal authorities are prescribed; the residue of powers and functions are with the regions. The principal sources of finance are to be with the regional authorities. Each region would be able to draft and adopt its own constitution. The constitutional settlement would be guaranteed by the UN. In other words, the Kurds are inspired more by considerations of self-government than other communities. The final article of the draft in fact says that if the constitution is changed unilaterally, 'this shall afford the people of Kurdistan Region the right of self-determination' (art. 82).

Although there is widespread support for federalism/autonomy, the complexity – both political and technical – of these arrangements should not be underestimated. There will undoubtedly be people who will resist it. Autonomy seen as privileging one community may provoke resentment among other communities. It may be interpreted as a first step towards Kurdish secession. To structure arrangements for division of powers and the relationship between the centre and federal units will not be easy, but their implementation may be even harder. Equally problematic may be agreeing on the criteria for internal boundaries and for the sharing of resources, especially given inequalities in regional development. The record of federalism or autonomy as a technique for resolving ethnic differences is mixed.[69] None of this is to suggest that Iraqis should give up on the federal principle, but it is to alert them to the complexity of the issues implicit in it, and to indicate that it may raise as many controversies as it seeks to solve.

### Sunni Arabs and other communities

Sunni Arabs for their part fear the loss of power and influence should Iraq move to a more democratic and representative regime. But as the International Crisis Group reminds us, 'Ultimately that the regime has a narrow Sunni base misses the point: both Sunnis and Shiites are disenfranchised by a far smaller group, whose core originates from the Tikrit area.' It is therefore likely that there would be considerable support among the Sunni for constitutional and political reform.

The problem posed by other minorities is of a different dimension. Their concern is less with political power than with fairness and justice, and the preservation of their religious belief and practices. In one sense, the Ottoman solution to ethnic and cultural diversity – the millet system – might well be the answer. The system, based on the recognition of personal laws of each community, and cultural and religious councils with autonomous powers over the community in these matters, was adopted by the League of Nations when Iraq was granted its independence in 1932 on the termination of the mandatory regime. At that time the Iraqi government agreed, among other minority provisions, that non-Muslim minorities would be allowed, 'in so far as concerns their family law and personal status, measures permitting the settlement of these questions in accordance with the customs and usages of the communities to which those minorities belong' (art. 6 of the Declaration made by Iraq on 30 May 1932). In addition they would have the right to establish and fund religious, educational and charitable organizations, and to provide education in their own languages. These provisions had in fact been already included in the 1925 Constitution.

By way of concluding this discussion, it should be stated that the approach to the ethnic question does not lie simply in dealing with specific claims of individual communities. What Iraq has lacked, and now needs urgently, is a vision of the country and its people. To build on ethnic distinctions that now dominate public consciousness, or which are the product of past manipulations by successive regimes, is to perpetuate divisions that would deny Iraq a proper destiny. Attempts to resolve ethnic differences can be made, to simplify, either by privileging the distinctiveness of communities or by transcending them through broader identities, commonalities, and interests, without totally ignoring the specificity and richness of diversity. Iraq certainly should consider the alternatives to the generalization of the Ottoman millet system to cover the entire political, social and economic structure. There is now a bulky literature on the problems of multi-ethnic societies and the different approaches to solutions, from which Iraqi policy-makers and constitution-makers can benefit.

## Guaranteeing the constitution

It is one thing to agree on a constitution, and quite another to protect and implement it. Even if the constitution is seen as representing a fair settlement of key issues, there may be little confidence that it would last. Given Iraq's political and constitutional history, this would be a reasonable assessment. It is because of the lack of mutual trust internally that the Kurds want international guarantees for the new constitution. The Kurdish draft constitution says that Iraq 'shall be accountable to the United Nations organisation for guaranteeing the rights, the boundaries, and powers of the two regions designated in this Constitution and the Regional Constitutions' (art. 81). However, the way in which the League of Nations' guarantees for minorities were violated gives little ground for optimism over international guarantees, any more than over the consistency of major powers. While there may be value in engaging the UN and regional powers in

the constitutional settlement, it is more important to lay national foundations for the security of the constitution.

There are at least two components of a domestic strategy. One is to include in the constitution mechanisms for its own defence: a strong judiciary with powers of constitutional review, an effective human rights institution, civilian control of the police and armed forces, parliamentary control over state revenue and expenditure, anti-graft codes and enforcement, dispersal of power, and an emphatic enunciation of national values of tolerance, fairness and social justice. In the old days the political process, underpinned by periodic elections, was often deemed a sufficient guarantee for constitutional protection. Today a constitution writer would be well advised to be a bit sceptical of that faith, and to rely on investigative, disciplinary and adjudicative mechanisms within the constitution itself. Second, external agencies, in addition to state organs, must be mobilized to protect the constitution. This requires that people are involved in determining national values and the making of the constitution, designing a constitution that is fair and equitable to all, inculcating the values of the constitution, empowering civil society in a variety of ways, instituting democracy at all levels of society, and so on. This may all sound utopian, but the effort is worth it. In any event, the destiny of Iraq will be influenced by the way it goes about making its constitution and the product of that process.

# Ground rules for building democracy in Iraq

**Minority Rights Group International recommends:**

1. The people of Iraq must be central to the determination of the form and process for constructing democracy in Iraq, including decisions over the structure of any transitional administration, the choice of representatives, the design of a constitutional process, and the form and content of a new constitution. The self-determination of the Iraqi people is the overriding criterion for creating democracy in Iraq.
2. A constitution-making process should be designed, based on a wide-ranging consultation with the people of Iraq, in which all Iraq's ethnic and religious communities are represented. The process should consider constitutional options which facilitate cooperation between communities, including:

   • electoral laws which encourage political parties to appeal across ethnic or sectarian lines, for example requiring them to nominate a proportion of candidates from minority communities;
   • an electoral system which requires parties or candidates for federal office to secure a minimum; distribution of votes in addition to number of votes;
   • the devolution of power to enable regional self-governance where it is desired by the local population, with regional autonomy based on territorial rather than ethnic or confessional lines;
   • the establishment of a federal structure for Iraq, taking into account particularly the long-held aspirations of the Kurds for self-government, while ensuring the protection of the rights of regional minorities within each of the constituent parts of the federation.

   In addition to drafting a constitution, the constitutional process should have as explicit aims the development of education in democracy and the promotion of public knowledge about the constitution to facilitate its implementation and protection.
3. A new constitution should conform to international standards on human rights, including minority rights. It should establish equality for all before the law, incorporate specific protection for the identity of ethnic, religious and linguistic minorities, and establish mechanisms for the protection of the constitution, including an independent judiciary with powers of constitutional review, a national human rights institution, civilian control of the police and armed forces, and dispersal of power.
4. Authorities in Iraq should undertake special measures to counteract long-standing discrimination against the Shi'a and against the Kurds and other members of ethnic and religious minorities, and promote their participation in government and other public institutions. A major programme should be implemented to facilitate the return of internally displaced persons or refugees to their homes, or to resettle them, as determined by the expressed wishes of the persons themselves.
5. In the interim period following a conflict, any transitional administration should be sufficiently mandated and equipped to ensure personal security (including food security), human rights and the rule of law. Human rights monitors should be deployed across Iraq to monitor compliance with international human rights and humanitarian law standards and build confidence. Any external forces should have a clear UN mandate and be international in composition to ensure credibility and neutrality in the eyes of the Iraqi people.
6. All authorities in Iraq should comply with the international standards to which Iraq is a party, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. UN and international forces that may be present in Iraq should also comply with the full range of international human rights and humanitarian law standards and institute mechanisms for monitoring compliance and dealing with violations.
7. Individuals responsible for the commission of war crimes, genocide and other crimes against humanity in Iraq, irrespective of their nationality, should be brought to justice according to international standards for fair trial. The Iraqi people should determine a system of transitional justice to ensure reparation for past crimes and end impunity, including the consideration of mechanisms such as truth commissions, statutory reparation programmes, administrative measures and criminal prosecutions. The constitution of a criminal tribunal with international involvement should also be considered as part of a transitional justice programme, in consultation with the UN.

# Relevant international instruments

## United Nations International Covenant on Civil and Political Rights, 1966

**Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

**Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

**Article 25**

Every citizen shall have the right and the opportunity, without [distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property , birth or other status] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

**Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

**Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

**Article 1**

1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.

**Article 2**

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

**Article 3**

1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
2. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.

**Article 4**

1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.
2. States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.
3. States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
4. States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.
5. States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.

## Universal Islamic Declaration of Human Rights

*[Prepared under the auspices of the Islamic Council and presented to the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1981]*

**III Right to Equality and Prohibition Against Impermissible Discrimination**

(a) All persons are equal before the Law and are entitled to equal

opportunities and protection of the Law.
(b) All persons shall be entitled to equal wage for equal work.
(c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language.

**X Rights of Minorities**

(a) The Qur'anic principle 'There is no compulsion in religion' shall govern the religious rights of non-Muslim minorities.
(b) In a Muslim country religious minorities shall have the choice to be governed in respect of their civil and personal matters by Islamic Law, or by their own laws.

**XI Right and Obligation to Participate in the Conduct and Management of Public Affairs**

(a) Subject to the Law, every individual in the community (Ummah) is entitled to assume public office.
(b) Process of free consultation (Shura) is the basis of the administrative relationship between the government and the people. People also have the right to choose and remove their rulers in accordance with this principle.

# Notes

1 For a more detailed review of ethnic and religious groups see McDowall, D., 'The Middle East: Iraq', in Minority Rights Group International, *World Directory of Minorities*, London, MRG, 1997.
2 Iraqi Kurdistan Regional Autonomy Act 1974. See the section in this report by Yash Ghai.
3 Under UN Security Council Resolution 986 (1995) and subsequent resolutions, Iraq was authorized to sell oil up to an agreed limit in order to provide for the humanitarian needs of the Iraqi people, with the UN managing the funds and supervising the distribution of supplies.
4 Tripp, C., *A History of Iraq*, 2nd edn., Cambridge, Cambridge University Press, 2000, pp. 265 and 295–6.
5 'Ethnic, Religious, Political Rifts Test U.S. Hopes for a Stable Iraq', *Wall Street Journal*, 11 December 2002.
6 UN Security Council Resolution 688, adopted 5 April 1991, S/RES/0688 (1991).
7 See for example Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds*, New Haven, Yale University Press, 1995.
8 See Fédération Internationale des Ligues de Droits de l'Homme / Alliance Internationale pour la Justice, *Irak: épuration ethnique continue et silencieuse*, Paris, December 2002; Human Rights Watch, *Endless Torment: The 1991 Uprising in Iraq and its Aftermath*, New York, 1992. See also Foreign and Commonwealth Office, *Saddam Hussein: Crimes and human rights abuses*, London, November 2002.
9 For a useful summary, see the statement of UN Special Rapporteur Max van der Stoel to the 55th session of the UN Commission on Human Rights, 31 March 1999. The Special Rapporteur's latest report was dated 20 August 2002, UN General Assembly A/57/325. Andreas Mavrommatis took over as Special Rapporteur from Max van der Stoel in late 1999.
10 Committee on the Elimination of Racial Discrimination, Concluding observations: Iraq, 12 April 2001, CERD/C/304/Add.80.
11 Interviews were carried out in December 2002.
12 The UNDP report was reported in Bone, J., 'UN chief issues secret orders for war in Iraq', London *Times*, 23 December 2002. A copy of the draft report, dated 10 December 2002, can be viewed at http://www.casi.org.uk/info/undocs/war021210.html
13 'Patten warns US over aid for Iraq', *Guardian*, 14 January 2003.
14 Reuters, 2 January 2003; Associated Press, January 2003. The 'Arab intellectuals' initiative was principally aimed at avoiding an international armed conflict by calling for the resignation of Saddam Hussein.
15 See Lattimer, M., 'Enforcing human rights through international criminal law', in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity*, Oxford, Hart Publishing, forthcoming 2003.
16 'Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions', 5 December 2001.
17 Tripp, *A History of Iraq, op. cit*., p. 275.
18 For an analysis, see Pajic, Z., 'A critical appraisal of the Dayton Accord Constitution of Bosnia and Herzegovina', in W. Bendek (ed.), *Human Rights in Bosnia and Herzegovina after Dayton: From Theory to Practice*, The Hague, Kluwer Law International, 1996.
19 Ashdown, P., 'Blueprint for Change', *Developments*, DFID, Fourth Quarter 2002.
20 Neo-liberal approaches which guided transition thinking in the late 1980s and early 1990s postulated that there is only one set of correct policies which should more or less work in any environment.
21 International Labour Organization estimates.
22 Iraqi National Human Development Report 2000, UNDP 2000.
23 ICP report to the 7th Party Congress, November 2001.
24 *Al-Saadi*, Sabri Iraq File 107, November 2000.
25 One of the perverse outcomes of the sanctions is that they increased the dependence of Iraqis, especially in urban areas, on the state through the oil-for-food programme. This is not lost on the regime which manipulates the programme for its own political ends.
26 Democratic Principles Working Group Report, 14 December 2002, posted on the INC website at www.inc.org.uk
27 The dual legal system where tribal chiefs had the authority to dispense justice and settle disputes in the countryside while the judiciary dealt with the urban populations had been abolished in 1958.
28 *Tariq Al-Shaab* No. 5, Vol 68, December 2002.
29 McFarquhar, N., 'Iraqi Tribes, US Forces, A Wild Card', *New York Times*, 5 January 2003.
30 Details on population groups with approximate figures are given in the preceding section. It should be noted that such figures are highly contested. The choice of census sets is subject to heated political debates. Indeed many proposals for post-totalitarian transition call for the organization of an 'objective' census at the earliest possible date. That said, the vast majority of Iraqis are Arab, Muslim and Shi'a.
31 Batatu, H., 'Shia Politics in Iraq', in B. Freyer Strawwasser (ed.), *Islamic Impulse,* London, Croom Helm, 1987.
32 *Ibid.*
33 One of the most lasting features of institutional sectarianism in Iraq is the predominance of Sunni Arabs among the senior officer corps of the Iraqi army – a feature originally introduced by the British founders of the army in the 1920s.
34 According to survivors of Iraqi security services jails, the most brutal treatment is always reserved for members of Shi'i dissident groups such as the Al-Daawa party.
35 For more on the so called 'Oil Curse' see Terry Lyn Karl, Jeffry Sachs and Andrew Warner, Paul Collier and others.
36 Council on Foreign Relations and James Baker III Institute for Public Policy of Rice University, *Guiding Principles for US Post-Conflict Policy in Iraq*, New York, 2002.
37 International Crisis Group, *Voices from the Iraqi Street*, Amman/Brussels, 4 December 2002.
38 Some of the data for this section is gleaned from International Crisis Group, *Iraq Backgrounder: What Lies Beneath*, Amman/Brussels, 1 October 2002.
39 Kaplan, R., 'A Post Saddam Scenario', *Atlantic Monthly*, November 2002.
40 Sanger, D. and Dao, J., 'US is Completing Plan to Promote a Democratic Iraq', *New York Times*, 6 January 2002.
41 Democratic Principles Working Group Report, 14 December 2002, posted on the INC website at www.inc.org.uk
42 The London meeting ended up adopting a transition plan which was shorter even than its political declaration. For full coverage of the meeting see *Al-Mutamar*, 331, 22 December 2002–2 January 2003.

43 CFR/JBI, *Guiding Principles, op. cit.*
44 Fallows, J., 'The Fifty-First State', *Atlantic Monthly*, November 2002.
45 Reports from Iraq indicate that people shocked by the level of violence unleashed by the 1991 uprising will be inclined to restrain the impulse for reprisals the next time around.
46 *Tariq Alshaabe*, No. 6, January 2003.
47 ICG, *Voices from the Iraqi Street, op. cit.*
48 In the Czech republic this problem was addressed by changing police uniforms.
49 Please refer to the DPWG report for an in-depth discussion of the various proposals under these and other tasks of the interim administration.
50 It is quite remarkable that most proposals for post-Saddam Iraq seem to assume that the sanctions will continue beyond the regime's demise.
51 *Al-Mutamar*, 331, 22 December 2002–2 January 2003.
52 DPWG report, *op. cit.*
53 *Ibid.*
54 The draft constitution proposed by the Kurdish parties envisioned an area extending far beyond the three provinces including the governorate of Kirkuk.
55 See ICG, *Iraq Backgrounder, op. cit.,* pp. 22–3: 'As a consequence of both the internal/external structure and the often incompatible ideological programmes of an opposition that includes Arabs and Kurdish nationalists, Islamists, communists, dissident Baath elements, liberals, royalists and representatives of regional or minority interests, consensus so far has been achieved only on the broadest level of generality. The groups share the goal of overthrowing Saddam Hussein and his inner circle; at the rhetorical level at least they endorse the territorial integrity of Iraq, democracy, free elections and a federal solution to the Kurdish issue. Beyond this they have not agreed on any substantive vision of a future regime. Differences over the most fundamental issues, such as the role of religion and the structure of the state, have precluded a more unified and effective stance. Some of the most significant of these groups predate the current regime and therefore have grievances directed as much against the overall structure of contemporary Iraq – its treatment of Kurds or of Shiites, for example – as against the regime itself.'
56 This constitution, replacing the provisional constitution of 1970, was approved by the National Assembly in July 1990. It was never confirmed by constitutional referendum on account of the state of war, but is presented by the government as a ruling constitution. See the version at http://www.oefre.unibe.ch/law/icl/iz_indx.html
57 Fundacion para las Relaciones Internacionales y el Dialogo Exterior (FRIDE), *Conference on Democratic Transition and Consolidation*, Madrid, Siddharth Mehta Ediciones, 2002, pp. 83–4.
58 Tripp, *A History of Iraq, op. cit*., pp. 2–3.
59 *Ibid.,* p. 3.
60 See Ghai, Y., *Public Participation and Minorities*, London, Minority Rights Group International, 2001. This point is recognized by communities of Iraqi Shi'a in exile, when they say, 'It is not possible for Iraq to emerge out of this cul-de-sac without the complete banishment of official sectarianism from any future political construct, and its replacement by a contract premised on a broad and patriotic definition of citizenship that is far removed from sectarian calculations and divisions' (from the 'Declaration of the Shia of Iraq', 2002, available at http://www.iraqishia.com/Docs/Declaration.htm).
61 Tripp, *A History of Iraq, op. cit.,* p. 78.
62 ICG, *Iraq Backgrounder, op. cit.,* p. 14.
63 *Ibid.,* p. 15.
64 'Declaration of the Shia of Iraq', *op. cit.*
65 MRG, *World Directory of Minorities, op. cit.,* p. 345.
66 *Ibid.,* 344.
67 ICG, *Iraq Backgrounder, op. cit.,* p. 18.
68 This summary is based on the 1974 Act as reprinted in Hannum, H., *Documents on Autonomy and Minority Rights*, Dordrecht, Martinus Nihoff Publishers, 1993, pp. 316–22.
69 Ghai, Y., 'Ethnicity and Autonomy: A Framework for Analysis' in Y. Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, Cambridge, Cambridge University Press, 2000. See also Ghai, Y., 'Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy', in A. Reynolds (ed.), *The Architecture of Democracy*, Oxford, Oxford University Press, 2002.

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**Building Democracy in Iraq**

**For decades, the people of Iraq have lived with the very opposite to democracy. Gross violations of human rights have been targeted at specific ethnic and religious groups, and the combined effects of economic sanctions and two wars have left the population impoverished and highly dependent on the state for their basic needs.**

**As the possibility of a transition increases, this report presents the first detailed analysis of the options for a constitutional process and the establishment of inclusive democracy in a post-totalitarian Iraq. It considers the need to entrench those features that are essential to a genuinely democratic society, including fair representation, cooperation between communities, the rule of law and respect for human rights. In particular it analyses the risk posed by inter-ethnic and inter-confessional conflict and the action necessary to try and avoid it.**

**Minority Rights Group International takes no position on the legitimacy of the use of force against Iraq. However, as the possibility of political change increases, it is essential to consider the requirements for protecting minority rights and promoting human development. Drawing on the detailed views of internationally renowned experts in conflict prevention, human rights, inter-ethnic issues and constitutional law, this report presents a set of ground rules for building inclusive democracy in Iraq, based on the self-determination of Iraq's people.**

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