

Seminar Proceedings

**Towards a new Iraq:  
Making the Transition work**

**The Role of the international community**

The Hague, 6 February 2004, The Clingendael Institute

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Desk top publishing: *Birgit Leiteritz*  
Netherlands Institute of  
International Relations  
'Clingendael'  
Clingendael 7  
2597 VH The Hague  
Telephone: xx-31-70-3245384  
Telefax: xx-31-70-3746667  
P.O. Box 93080  
2509 AB The Hague  
E-mail: [research@clingendael.nl](mailto:research@clingendael.nl)  
Website: <http://www.clingendael.nl>

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## Summary

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The seminar “Towards a new Iraq: Making the Transition work. The role of the international community” organized by the Netherlands Institute of International Relations ‘Clingendael’ with the support of the Netherlands Ministry of Foreign Affairs (Policy Planning Staff), was held on 6 February 2004 at the Clingendael Institute, The Hague. The aim of the seminar was to address the question of obstacles and opportunities regarding the transition of Iraq. The seminar consisted of four sessions, each of which was introduced by experts on the specific subject with either an academic or policy background, the latter participating in a private and not an official capacity under a modified version of the Chatham House rules.

# Towards a new Iraq: Making the Transition work

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## Opening

Alfred van Staden, director of the Netherlands Institute of International Relations 'Clingendael', welcomed the participants and introduced the programme of the seminar. Mr. van Staden chaired the morning sessions that focused on the power play between and within the various ethnic and religious groups and the sequencing and timing of the transition process. Maarten Lak, head of the Policy Planning Staff of the Netherlands Ministry of Foreign Affairs and co-organiser of the seminar, described the seminar as a mental preparation for the Netherlands EU presidency in view of the fact that the return of full Iraqi sovereignty and the start of the Dutch presidency would coincide in time (July 1<sup>st</sup>). Another reason for the Netherlands to take a keen interest in developments in Iraq was the fact that there are over 1000 Dutch troops in the south western part of the country (al-Muthanna province). Mr. Lak chaired the afternoon sessions on the situation on the ground and the question of how to give room to religion, federalism, democracy and power-sharing during the transition period and in permanent constitutions.

## Key elements of the debate

The debate during the seminar generated the following ideas and recommendations:

*Internal factors: the power play between and within the various ethnic and religious groups*

After the victory over regular Iraqi forces and the fall of the regime of Saddam Hussein, the American forces and their allies were confronted with insurgents of at least three different kinds. The first category are the 'Saddamists'. They operate in the Sunni areas and constitute the hard core of armed opposition. The individual actors range from uneducated youngsters to formerly high ranking officials who – as an individual or as member of a clan – lost their

privileges, their status, etc.. Criminals that were released by Saddam Hussein also play a role in the attacks. They are paid to eliminate political figures and also destabilize the country by non-political criminal acts. With regard to suicide attacks, the criminals and ‘Saddamists’ are not the ones who blow themselves up. The suicide attacks are executed by Islamists from other Arab countries, the second category of insurgents. They are driven by the idea that Islam demands their activities. The Islamists mainly operate in the Euphrates region, north-west of Baghdad. The third category of insurgents are tribal rural people. Their attacks must be regarded as avenging the death of relatives as part of the tradition of blood revenge. They feel honour bound to kill an American or other nationals of the coalition forces. Some of these attacks are co-ordinated by ‘Saddamists’. Mosques play a role as centres for the distribution of weapons and training. Suggested answers to these threats ranged from arresting leaders, especially ‘Saddamists’, to initiating talks and negotiations with Sheikhs and the Ulama (religious scholars). However, it was believed that it is likely that the insurrection will continue. Moreover, it was feared that in case the coalition forces will leave certain towns or regions, the insurgents will take over and clean these places of ‘pro-US’ persons.

With regard to the Kurdish question, the future status of the city of Kirkuk was regarded as a particular issue of potential conflict between Kurds, Arabs and Turkmen. The problem of who will be in control over what territory and how is also an issue in the city of Mosul and the Syrian border area. The demarcation line (green line) between the territories under Kurdish control and the Arab areas is subject to change and leads to frictions, especially in the above mentioned cities and regions. A recent development with regard to the future status of the areas under Kurdish control is the gathering of about one million signatures to support a request for a referendum on this issue.

*Sequencing and Timing of the Transition: when should elections enter into the equation*

The military campaign by the United States and its allies caused considerable infrastructural damage and destroyed Iraq’s system of public administration. Many of the civil servants were either killed, ran away or are in jail. The latter particularly holds for upper level and medium level officials. To be able to fulfil their military tasks in al-Muthanna province, Dutchbat took part in the rebuilding of an administrative system in the al-Muthanna province in cooperation with the Coalition Provisional Authority (CPA). In order to prevent people seeking for help at the gates of their camp, it assisted in establishing village and city councils that would be responsible for concrete assistance to the local population. These councils were also needed as additional eyes and ears of Dutchbat. The creation of local councils was based on a system of caucuses of a hundred people representing different parts of the local communities. These hundred persons constituted the electorate that elected a chairman or city manager and a council of ten persons that were responsible for concrete issues such as the supply of water and electricity or fuel distribution. This model worked rather well and has become known as the ‘al-

Muthanna model'. The provincial council was established in a similar way. A caucus of forty consisted of two women, twelve tribal leaders, two clergymen, twelve technocrats and twelve representatives of political parties. Finding a balance between the different groups proved difficult and required a thorough understanding of the different players in the province.

With regard to the planning of the elections for selecting delegates to the transitional National Assembly it was expected that these elections will come sooner than March 2005. This moving towards early elections was considered by some as a potentially hazardous development. In post conflict areas, too often elections come too soon as this favours radical groups that are the first ones to organize. It also favours organisations that existed before the conflict (in some cases reorganised after the conflict under a different name). Moreover, in non-democratic states, elections constitute an element of conflict themselves as they determine the allocation of power and resources.

On the feasibility of the organisation of elections, some believed the registration of voters could be solved in time, others considered this a major obstacle. The question who is Iraqi and who not is a difficult one. There are an estimated three million Iraqi's living abroad. A census might be needed to make fair registration possible.

The creation of electoral districts was regarded by many as very problematical. A proportional system would 'solve' this problem and would lead to a wider representation in Iraq's future democratic bodies. It was also argued that a proportional system would better serve an ethnically and religiously heterogeneous country such as Iraq.

Whatever system will be agreed upon, it was argued that elections not only hold the risk of conflict but also of leading to extremists dominating the political scene. In addition, experience with elections in neighbouring states tell there is a danger in elections, think of the recent case of Iran and the case of Algeria in the early 1990s. However, despite all difficulties and risks, holding general elections was preferred above extending the local and regional al-Muthanna model to the national level. According to some, a caucus system would give low credibility to 'elected' bodies and institutions and would institutionalize ethnic, tribal, religious and other divisions that will be difficult to erode in time. The credibility of the elections may also be jeopardized by certain activities of American governmental and non-governmental organisations. At the same time, supporting the development of civil organisations, the promotion of inter-ethnic and non-religious political groups, and the training of political parties was believed to be both legitimate and necessary.

Irrefutably, it was clear to the participants that the first elections will not be perfect and that security will be a real problem. The elections are, however, inevitable.

*The Mission in the Field: matching theory and practice*

The situation in Iraq was described as messy. This situation may last for a while and the outcome of the transition process may not be pretty. But the situation is new. Today, especially after the arrest of Saddam Hussein, many Iraqi are convinced that his regime is not coming back. As it remains unclear in what direction the new situation will develop, people bet on different horses. This holds for tribal leaders, representatives of political parties and movements, technocrats and officials. They may work for, co-operate with or be engaged in talks with the Coalition Provisional Authority and at the same time be in contact with or co-operate with the insurgents. Moreover, in this period of uncertainty, everybody is armed and organised to protect property and interests.

The role of the United States in a future Iraq is not clear. The fear for 'colonization' among Iraqi is largely gone according to some participants. Nonetheless, it is clear that the United States is going to stay in Iraq for a long time to assist the country economically and militarily. An obstacle to fruitful and well-balanced cooperation is the lack of detailed knowledge of Iraqi society among American policy-makers. Isolation of CPA officers in Baghdad (staying within the so-called green zone) and cultural insensitivity among Americans lead to resentment among Iraqi. The CPA officers in the province tend to be better informed. It must, however, be stressed that Iraqi society is a highly complex society and that there are few Iraqi and foreign experts in this field. There are very few Iraqi sociologists and most of them that were allowed to conduct studies in the last decades were close to the regime.

It was also argued that not all is bad. The socio-economic situation in Iraq has improved in recent months. New ministries have restarted their work. Local daily life issues are gradually resolved. Salaries do come in and the police is back on the street. The economy is reviving, partly as a result of money sent by Iraqis living abroad. For instance, real estate prices have soared and construction is up. The job situation is also improving.

Nonetheless, new Iraqi institutions are not ready for the hand-over of power on June 30<sup>th</sup>, 2004 as laid down in the *Agreement on Political Process* as agreed upon on November 15<sup>th</sup> 2003 (see appendix). Before June the 30<sup>th</sup> still a lot of work needs to be done and one can question what the restoration of full Iraqi sovereignty will mean in practice. Many tasks of the CPA will be transferred to the US embassy, which means a hand-over of tasks and responsibilities from the US Ministry of Defense to the Department of State. Through their 'embassy', the Americans will remain in control over many issues in the country. Their influence will remain large as they will pay most of the bills and will remain in charge of security (together with other coalition members). Therefore, in practice, there will still be limitations to Iraqi sovereignty. These observations raised questions about the legitimacy of the new government. It was also argued that the idea of an 'embassy' running the country might infuriate the Iraqi as the situation looks rather neo-colonial. Also the legal consequences of dissolving the 'international' CPA and handing over tasks to the 'national' embassy were subject of debate; how would it affect the



position of the many non-American ‘coalition’ partners who now work with the CPA and under CPA-agreements?

On the question whether Iraq will return to a state governed by a strong central government opinions differed. Some argued that it was wise to invest in a bottom-up system based on strong local government. Others believed that such a system may be an obstacle to the creation of a sense of national solidarity and even may jeopardize territorial integrity. The expectation that the central government will be in charge of the oil industry and will have a say in what will happen to the oil revenues may be an important factor in the transformation process leading to a strong central government.

*The Transitional and Permanent Constitutions: how to combine religion, federalism, democracy and power-sharing?*

With regard to the Iraqi Constitution, six issues were regarded as key issues that in one way or the other should be dealt with in this document. These are: the role of Islam, ethnicity, federalism, electoral, systems, the status of the President and the status of the National Assembly.

On the role of Islam, the Constitution has to speak out on the Sharia as a source of legislation. Bringing in Islam in the new Constitution may prove to be extremely difficult as Islamic Law and Arab Constitutional Law are hard to combine. It may also lead to opposing reactions both domestically and internationally.

On Ethnicity it was pointed out that the current Constitution speaks of Arabs and Kurds, but does not mention other groups such as Turkmen, Assyrians, Armenians, etc.. It neither speaks of Sunni and Shiites. The Constitution also describes Iraq as part of the Arab nation; a description that may be objected by the Kurds and other non-Arab communities.

On federalism the advantages and disadvantages of such a political/administrative system were discussed. Federalism may, according to some participants, satisfy groups with separatist ideas, but it also may imperil national solidarity and even the territorial integrity of a country. The latter holds in particular for federalism based on ethnic identity and less so for federalism based on regional identity of previously separate units bound together. Unfortunately, there exists no regional model that can be easily applied to Iraq. The United Arab Emirates constitute a federation, but can not be regarded as an example for Iraq as it is a very asymmetrical ‘federation’ dominated by two of the seven Trucial States, i.e. Abu Dhabi and Dubai. The Lebanese model of non-territorial autonomy, the Spanish system of autonomous regions and the case of Switzerland and Belgium were also discussed.

All models and examples have their pros and cons and it could be concluded that Iraq has to find its own model that fits the country’s specific needs and issues. The most controversial of these ‘federal issues’ is the status of the areas under Kurdish control. The Kurds want nothing less than to maintain their current level of autonomy and aspire to a strong single autonomous Kurdish unit within a federal Iraq, if not *de facto* independence. Compared to

other groups in Iraqi society, they have had much longer time to develop clear ideas on federalism. Moreover, they have experienced *de facto* independence for more than twelve years. Neighbouring countries are wary about federalisation as it might lead to the creation of a Kurdish state that sets an example to ‘their’ Kurdish communities.

On electoral systems, legal experts face many options and many potential different outcomes. As mentioned earlier, the discussion revolved around the pros and cons of a single member district versus a proportional system. The possibility of multi member districts was also mentioned as an in-between solution. Furthermore, the discussion focused on the likelihood and the advantages and disadvantages of a parliamentarian and a presidential system.

On the status of the President of Iraq, the German system or the Turkish model were discussed. It was pointed out that within the Arab world there are very few examples of strong prime ministers. Strong presidents (or kings), that are not much hindered by parliaments, constitutional courts etc., are the norm. Whatever model or system Iraq may choose, the problem of democratic accountability will be a serious one. The current draft of the Interim Iraqi Constitution (see appendix), however, is very vague about the division of powers. In order to diminish the possibility of an authoritarian president or the rise of a new dictator, Iraq needs a strong constitutional court or lots of detailed regulations to check and balance powers. A three-person presidency may decrease the Presidency’s room for manoeuvre, but it might lead to a very ineffective presidency and continued political conflict.

On the status of the National Assembly the question was raised whether or not parliament may have much influence in the future Iraqi political arena. The country does not have a strong record with regard on this issue as Iraqi parliaments of the past were all very weak. Experiences in the region also suggest its influence is very likely to be little.

With regard to all of the six key issues the new Constitution has to deal with, it was noted that Iraq does not have a rich constitutional experience. In addition, examples from the region are not very helpful with regard to the issues described above. Given the fact that most constitutions in the Arab world are written by regimes with the aim to stay in power, this potential risk should be taken serious. Against this background it was argued that rewriting the current constitution should be an open, highly politicized process in which many groups participate. It is highly likely that this process will not to be concluded before electing the National Assembly.

## Closure

The chairmen of the seminar, Alfred van Staden of the *Clingendael* Institute and Maarten Lak of the Ministry of Foreign Affairs, closed the event stressing the importance of the different suggestions for providing solutions to the issues discussed, in particular the issues of elections and sovereignty. In addition to emphasizing ‘problems’ and challenges, the seminar was also closed with a “suspicion of optimism” with regard to the new Iraq.



**Programme of the Seminar  
Towards a new Iraq:  
Making the Transition Work  
the role of the international community**

Round table organised by the Clingendael Institute at the request of  
the Policy Planning Staff of the Netherlands Ministry for Foreign Affairs

February 6<sup>th</sup>, at the Clingendael Institute, The Hague

*Chairperson*

Alfred van Staden, Director of the Clingendael Institute, The Hague (morning)  
Maarten Lak, Head Policy Planning Staff, Netherlands MFA, The Hague  
(afternoon)

9.00-9.30 arrival of participants, coffee

9.30 brief welcoming words by Prof Alfred van Staden, Director of  
the Clingendael Institute and by Maarten Lak, Head Policy  
Planning Staff, MFA

**Session 1: Internal factors: the power play between and within the  
various ethnic and religious groups**

9.40-10.00 Amatzia Baram, professor at Haifa University and senior fellow  
at the United States Institute for Peace

Who are the insurgents? Are we facing former regime elements, a Jihad or a  
Sunni problem? Are there political solutions or only military ones? Will the  
insurgents still be a force to be reckoned with once foreign troops withdraw?  
What are the major forces within the Shia community? Are their leaders by  
definition always religious authorities? How hard will the Kurds push for a  
more or less autonomous state? What role will the many militias (Kurdish,  
Shiite etc) play in the emerging power contest? What kind of results could we  
expect if free election were held in Iraq in the near future? Who would be the  
winners, who would be the losers?

10.00-10.30 discussion

10.30-11.00 coffee

**Session 2: Sequencing and timing of the transition: when should  
elections enter into the equation?**

A lot has to be done between now and the restoration of full Iraqi sovereignty  
on June 30<sup>th</sup>, 2004. Can it all be done in time? Where can things go wrong? Will  
the 15 November road map have to be adapted? Is the caucus system for  
selecting delegates to the transitional assembly workable? What are our  
expectations with regard to the rest of the transition, i.e. the period between 1

July 2004 and 31 December 2005? To what extent will the role of coalition countries and of the international community as a whole change after the restoration of full Iraqi sovereignty on June 30<sup>th</sup> 2004? The assumption seems to be that the US will continue to be a major influence behind the scenes: is that a realistic assumption? What should be the role of the UN in the various stages? Which groups in Iraq want early elections, which don't? To what extent is lack of security an obstacle to holding direct elections? Are there workarounds?

11.00-11.10 Michel Rentenaar, until recently political adviser with Dutch troops

Political reconstruction in the province of al-Muthanna as a model for the other provinces: how city and provincial councils were set up. The role of tribes, political parties, clerics etc. Would the caucus system for the selection of delegates to the transitional assembly at national level work in al-Muthanna?

11.10-11.30 Marina Ottaway, democracy and rule of law project, Carnegie Endowment for International Peace

Shaping the political transition and reconstruction: the desirability, feasibility and timing of elections in the various stages of the process between now and December 2005. Lessons from other reconstruction efforts.

11.30-12.45 discussion

12.45-13.45 lunch

### **Session 3: Report from a mission in the field: matching theory and practice**

Are things moving in the right direction? What are the scenarios? What are the odds of a successful outcome versus chaos and disaster? Will developments in Iraq determine US elections or are the presidential elections determining US policy? The CPA is to be dissolved by June 30<sup>th</sup>? To what extent will Iraqi institutions take over and to what extent will foreign advisors continue to play a role? What control would the US have on the way its 18.6 billion aid package will be spent after June 30<sup>th</sup>? Can one prevent corruption and patronage from returning? What will be the status of American and other foreign troops after June 30<sup>th</sup>? What latitude will they have in relation to the new sovereign Iraqi government? Will there be a sufficient majority within the transitional assembly and the new interim Iraqi government to request US and/or those of other troops to stay on? Or should the continued presence of foreign troops rather be based on a mandatory UN resolution? Is the Iraqisation of security working? Will Iraq end up with one army and one police force or many militias and many guerrilla groups.

13.45-14.05 Patrick Clawson, deputy director of the Washington Institute for Near East Policy

Impressions from a 10-day field trip to Iraq.

14.05-15.00 discussion

15.00-15.30 tea

**Session 4: The transitional and permanent constitutions: how to combine religion, federalism, democracy and power-sharing?**

Is anything approaching a Western style democracy feasible? How about “Islamic democracy”? What will be the role of clerics and the shari’a in the new Iraq? Is separation of the state from the mosque feasible? What kind of federalism with how many provinces can we expect? How about Kirkuk? Can the Kurds ask for both power-sharing in the centre and far reaching federalism or can genuine power-sharing to some extent obviate the need for federalism? Who will control the oil revenues? What are the pros and cons of a presidential versus a parliamentary system and of parliamentary districts versus proportional representation in the context of a multi-ethnic society like that of Iraq? How should minority rights be protected? Is the Lebanese experience with power-sharing relevant to the new Iraq?

15.30-15.45 Martin Hetherington, research department Foreign and Commonwealth Office

The current negotiations on a “Fundamental Law” or “Transition Administration Law” for Iraq. What are the main issues? Will the document be ready by February 28th? What is the relationship between the provisional and the permanent constitution? Which issues are likely to be left to be resolved in the permanent constitution?

15.45-16.00 Nathan Brown, Professor of political science and Director Middle Eastern Studies at George Washington University

The comparative perspective: what do the constitutions in other Arab/Muslim countries say about Islam and the role of the Islamic shari’a with regard to law making and the judiciary? How much can constitutional texts encourage accountable and democratic government? Does the regional experience suggest any positive or negative models for language, institutions or procedures in drafting an Iraqi constitution?

16.00-17.15 discussion and concluding words

19.00 informal dinner

## List of Participants

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### Speakers

Baram, Mr Amatzia	Professor Haifa University, senior fellow United States Institute of Peace (abaram@usip.org)
Ottaway, Mrs Marina	Carnegie Endowment for International Peace, Washington (mottaway@ceip.org)
Rentenaar, Mr Michel	Until recently political adviser with Dutch troops in Iraq (michel.retenaar@minbuza.nl)
Clawson, Mr Patrick	Deputy Director Washington Institute for Near East Policy (patrickc@washingtoninstitute.org)
Hetherington, Mr Martin	Research department Foreign and Commonwealth Office London (Martin.Hetherington@fco.gov.uk)
Brown, Mr Nathan	Professor George Washington University (nbrown@gwu.edu)

### Participants

Bakker, Mr Edwin	Research Department Clingendael Institute + organisation of the Seminar (ebakker@clingendael.nl)
Boer, Mr Leen	Policy Planning Staff, MFA, The Hague (leen.boer@minbuza.nl)
Bourbon, Mr Jaime de	Peace Building and Good Governance Section, MFA, The Hague (jaime-de.bourbon@minbuza.nl)
Bratkiewicz, Mr Jaroslaw	Head Iraq desk, MFA, Warsaw (jaroslaw.bratkiewicz@msz.gov.pl) and/or (pawel.herczynski@msz.gov.pl)
Douma, Stynke	NATO/security department (incl. SOFA), MFA, The Hague (stynke.douma@minbuza.nl)

Faber, Mr Mient-Jan	Director of the Helsinki Citizens Assembly and former director Dutch InterChurch Peace Council
Frantzen, Mrs Josephine	Desk officer Iraq, MFA, The Hague (josephine.frantzen@minbuza.nl)
Goor, Mr Luc van de	Conflict Research Unit Clingendael Institute (lgoor@clingendael.nl)
Ham, Mr Peter van	Deputy Director of Studies Clingendael Institute (pham@clingendael.nl)
Heijblom, Mr Jan-Paul	Analyst, Ministry of Defence, The Hague (jpheijblom@zonnet.nl)
Kaye, Mrs Dalia	George Washington University, temporarily MFA The Hague (dkaye@gwu.edu)
Koene, Mr Martin	Netherlands Embassy, Amman/Baghdad (martin.koene@minbuza.nl)
Lak, Mr Maarten	Director Policy Planning Staff, MFA, The Hague (maarten.lak@minbuza.nl)
Lamentini, Mr Patrick	Policy Planning Staff (analyse et prévision), MFA, Paris (patrick.lamentini@diplomatie.gouv.fr)
Reijlink, Mrs Maike	General policy department (Iraq portfolio), MOD, The Hague (mjb.reijlink@mindef.nl)
Rood, Mr Jan	Director of Studies Clingendael Institute, Prof European integration Utrecht University (jrood@clingendael.nl)
al-Shaikhly, Mr Salah	Leading spokesman of Iraqi National Accord in UK (sashaikhly@aol.com)
Stad, Mr Jeroen	Until recently deputy commander legal HQ South East (Basra) (jeroens@clingendael.nl)
Staden, Mr Alfred van	Director Clingendael Institute, prof international relations Leiden University (astaden@clingendael.nl)
Stoel, Mr Max van der	Former human rights rapporteur on Iraq and OSCE HCNM (nathalie-de.frel@minbuza.nl)
Swart, Mr Frederik	Major Royal Netherlands Marines, until recently deputy commander Dutch troops in Iraq (1bnrnlmc@marns.navy.dnet.mindef.nl)
Vigevano, Mr Guido	Policy Planning Staff, MFA, The Hague + organisation of the Seminar (gwf.vigevano@minbuza.nl)
Vink, Mr Marcel de	Until recently CPA South East (Basra), now with Dutch perm. rep. EU (not confirmed) (marcel-de.vink@minbuza.nl)
Zeeuw, Mr Jeroen de	Conflict Research Unit Clingendael Institute (jzeeuw@clingendael.nl)

# Agreement on Political Process, 15 November 2003

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## 1. The “Fundamental Law”

- To be drafted by the Governing Council, in close consultation with the CPA. Will be approved by both the GC and CPA, and will formally set forth the scope and structure of the sovereign Iraqi transitional administration.
- Elements of the “Fundamental Law”:
  - Bill of rights, to include freedom of speech, legislature, religion; statement of equal rights of all Iraqis, regardless of gender, sect, and ethnicity; and guarantees of due process.
  - Federal arrangement for Iraq, to include governorates and the separation and specification of powers to be exercised by central and local entities.
  - Statement of the independence of the judiciary, and a mechanism for judicial review.
  - Statement of civilian political control over Iraqi armed and security forces.
  - Statement that Fundamental Law cannot be amended.
  - Timetable for drafting of Iraq’s permanent constitution by a body directly elected by the Iraqi people; for ratifying the permanent constitution; and for holding elections under the new constitution.
  - Drafting and approval of “Fundamental Law” to be complete by February 28, 2004.

## 2. Agreements with Coalition on Security

- To be agreed between the CPA and the GC.
- Security agreements to cover status of Coalition forces in Iraq, giving wide latitude to provide for the safety and security of the Iraqi people.
- Approval of bilateral agreements complete by the end of March 2004.



### **3. Selection of Transitional National Assembly**

- Fundamental Law will specify the bodies of the national structure, and will ultimately spell out the process by which individuals will be selected for these bodies. However, certain guidelines must be agreed in advance.
- The transitional assembly will not be an expansion of the GC. The GC will have no formal role in selecting members of the assembly, and will dissolve upon the establishment and recognition of the transitional administration. Individual members of the GC will, however, be eligible to serve in the transitional assembly, if elected according to the process below.
- Election of members of the Transitional National Assembly will be conducted through a transparent, participatory, democratic process of caucuses in each of Iraq's 18 governorates.
  - In each governorate, the CPA will supervise a process by which an "Organizing Committee" of Iraqis will be formed. This Organizing Committee will include 5 individuals appointed by the Governing Council, 5 individuals appointed by the Provincial Council, and 1 individual appointed by the local council of the five largest cities within the governorate.
  - The purpose of the Organizing Committee will be to convene a "Governorate Selection Caucus" of notables from around the governorate. To do so, it will solicit nominations from political parties, provincial/local councils, professional and civic associations, university faculties, tribal and religious groups. Nominees must meet the criteria set out for candidates in the Fundamental Law. To be selected as a member of the Governorate Selection Caucus, any nominee will need to be approved by an 11/15 majority of the Organizing Committee.
  - Each Governorate Selection Caucus will elect representatives to represent the governorate in the new transitional assembly based on the governorate's percentage of Iraq's population.
- The Transitional National Assembly will be elected no later than May 31, 2004.

### **4. Restoration of Iraq's Sovereignty**

- Following the selection of members of the transitional assembly, it will meet to elect an executive branch, and to appoint ministers.
- By June 30, 2004 the new transitional administration will be recognized by the Coalition, and will assume full sovereign powers for governing Iraq. The CPA will dissolve.

### **5. Process for Adoption of Permanent Constitution**

- The constitutional process and timeline will ultimately be included in the Fundamental Law, but need to be agreed in advance, as detailed below.

- A permanent constitution for Iraq will be prepared by a constitutional convention directly elected by the Iraqi people.
- Elections for the convention will be held no later than March 15, 2005.
- A draft of the constitution will be circulated for public comment and debate.
- A final draft of the constitution will be presented to the public, and a popular referendum will be held to ratify the constitution.
- Elections for a new Iraqi government will be held by December 31, 2005, at which point the Fundamental Law will expire and a new government will take power.

For the Governing Council:

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Jalal Talabani

For the Coalition Provisional Authority:

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L. Paul Bremer

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David Richmond

Date: November 15, 2003

## Interim Iraqi Constitution; January 2004 draft Translation and Commentary

Nathan J. Brown\*

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On 1 February 2004, the Kuwaiti daily *al-Qabas* published an Arabic-language draft of an interim Iraqi constitution. (I was referred to the publication by the website of Juan Cole, Professor of History at the University of Michigan; Professor Cole included a commentary on some of the articles.)

The Iraqi Governing Council has been wrestling with constitutional issues almost since its creation (an excellent review of the issues as of November 2003 is available from the International Crisis Group). Initially, the Council formed a committee to recommend mechanisms for constitution drafting. Its report was due in September 2003. While I do not believe that the committee's report has been made public, it was reportedly unable to develop a definitive recommendation. The work of the committee was superseded by the agreement reached on 15 November 2003 between the Coalition Provisional Authority and the Iraqi Governing Council. That agreement required the Council to approve a "Transitional Administrative Law" by the end of February 2004. Such a law would make possible "local caucuses" by the end of May; the convening of a "Transitional National Assembly" based on those caucuses; the dissolution of the Iraqi Governing Council and the Coalition Provisional Authority; and the restoration of Iraqi sovereignty by the end of June 2004. Elections for a constituent assembly would follow in 2005, it would quickly write and seek ratification of a permanent constitution – elections would be held under the new constitution by the end of 2005.

The Iraqi Governing Council did not take up the constitutional draft as a body until February 2004, but some of its members have been active in drafting documents for the full body to consider. The first draft seems to have been circulated by Kurdish parties; in response, a second draft was circulated, apparently under the sponsorship of Council member Adnan Pachachi.

The draft published by *al-Qabas* is the "Pachachi draft." It is not the most current form – I believe that some changes have been made – but it does seem to me to be an authentic earlier version. *Al-Qabas* is not one of the more sensationalist newspapers in the region and it is clear that some drafts of the document have been leaked to journalists. And the *al-Qabas* draft closely

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\*) Professor of Political Science and International Affairs, The George Washington University and Adjunct Scholar, Middle East Institute

follows the provisions (and even the language) of the 15 November 2003 agreement between the Coalition Provisional Authority and the Iraqi Governing Council. Nevertheless, the version it published varied from other accounts of the document (most particularly on the matter of representation for women and a multi-member presidency) and some of its provisions seem incomplete. Further, the *al-Qabas* version is not dated. Thus, a variety of external and internal evidence suggests that the draft is now dated, but no later draft has been publicly leaked.

While the Iraqi Governing Council is considering the draft, many of the most difficult issues (involving elections and timetables) are being debated not only within the Council but also more widely in Iraq and internationally as well.

Thus, the document presented here is very much a work in progress. The interim constitution is designed to take full effect after the expiration of the Coalition Provisional Authority on 30 June 2004 (though some of its provisions, such as for a transitional assembly, are to take effect before that date).

Because this is a legal document, I have attempted to translate as literally as possible. I have also included some of my own italicized comments on some of the articles.

## **Chapter I – General Provisions**

Article 1. This law shall be called the “Law of Administering the Iraqi State for the Transitional Period.” Where the expression “this law” appears in this legislation, it shall mean the “Law of Administering the Iraqi State for the Transitional Period.”

Article 2. This law shall be effective in all provinces of Iraq and it may not be amended in the transitional period.

It is odd for amendments to be barred, and it is possible that this could lead to some complications. The first Iraqi constitution of 1925, for instance, required amendment shortly after promulgation because of some oversights in the drafting process.

The ban would have the salutary effect of directing constitutional debates toward the permanent constitution.

Article 3. Iraq is an independent state possessing full sovereignty. Its capital is Baghdad. Its system is democratic, parliamentary, pluralist, and federal. The territory of Kurdistan shall remain in its current status in the transitional period. The central authority shall continue in Baghdad, exercising the following competencies:

- 1 Setting foreign policy and diplomatic representation
- 2 Defense affairs, including guarding the borders
- 3 Declaring war and concluding peace

- 4 Setting monetary policy, issuing currency, and establishing development policy
- 5 Establishing standards, weights, and measures and setting general policy for wages
- 6 Establishing the public budget for the state
- 7 Controlling citizenship affairs.

Article 4. Islam is the official religion and shall be considered a basic source among the sources of legislation. This law shall respect the Islamic identity of the majority of the Iraqi people and shall completely guarantee freedom, practice, and rites of the other religions.

*This article will undoubtedly attract great attention because of the provisions for Islam and religious freedom. It is not clear, however, that it will have much effect on the Iraqi constitutional and legal order. Designating Islam the official religion has tremendous symbolic importance and is standard in Arab constitutional documents, but the practical meaning of such a designation is probably quite limited.*

The rest of the article is characterized by more innovative wording. It is common for Arab constitutions to declare “the principles of the Islamic shari’a” to be “a” or “the” principle source of legislation. Even when Egypt adopted the stronger wording – making shari’a the principle source – the legal effect has been limited. First, the provision sidesteps the question of who has authority to issue authoritative interpretations of Islamic law. The effect is to leave it to normal legislative organs (chiefly the parliament, but also the executive and the judiciary). Second, the provision has been interpreted to be prospective rather than retrospective in nature; that is, it requires that future legislative acts draw on the shari’a but those adopted before the promulgation of the constitution are still valid and are to be brought into compliance with the shari’a through the normal legislative process. As a result, the language in the Egyptian case has had limited effect.

This article in the Iraqi law is weaker than the Egyptian provision. It does not mention the shari’a or its principles but only Islam. More significantly, this is only “a” source. Absent any structure that has the authority to issue authoritative interpretations of Islam, the article by itself will have little impact on the Iraqi legal order. It may, however, give significant symbolic support to those who call for a greater measure of Islamic legal influence, however.

In most current Arab legal systems, Islamic law leaves the realm of the symbolic and enters the realm of the practical in matters of personal status. All Arab countries draw from Islamic law in matters of marriage, divorce, and inheritance, though they do so in very different ways. Nothing in this document directly mentions personal status law, but the end of the Coalition Provisional Authority may have an important indirect effect: in January 2004, the Governing Council reportedly voted to repeal the relatively egalitarian Ba’thist-era law of personal status. Such a repeal has no effect so long as the Coalition

Provisional Authority does not endorse it. But restoration of Iraqi sovereignty might cause the measure to take effect.

*The religious freedom provisions of Article 4 are placed on a communal rather than individual basis.*

Article 5. The flag and emblem of the state shall be defined by law.

Article 6. The Arabic language shall be the official language in the country, while the current special situation in the territory of Kurdistan shall be respected.

*In 1970, the Iraqi government negotiated an agreement with Kurdish leaders for regional autonomy. Talks on implementation of that agreement broke down, however. The Iraqi government did implement the agreement according to its interpretation, but it did so in a way that Kurdish leaders found extremely lacking; it also put down Kurdish challenges with tremendous brutality. In 1991, international protection for the Kurdish areas allowed leaders to implement their understanding of the agreement. The result has been effective autonomy for Kurdish areas. The status (and demarcation) of Kurdish areas in post-Ba’thist Iraq has been sharply contested. Among the issues debated has been the degree of autonomy and the extent to which Kurdish areas are to be treated as a unit (rather than as separate provinces). In general, this document allows for a significant level of federalism, but only on a provincial basis. Articles 3 and 6 depart from that pattern, however, by treating Kurdistan as a unit. Article 6 does so for language policy; Article 3 provides for the continuation of current arrangements (which allow for very significant autonomy) in the transitional period.*

## **Chapter II – Basic Principles**

Article 7. The people are the source of authorities.

*The word “authorities” here refers not simply to political authority in the abstract but also to the three branches of government: executive, legislative, and judicial. The al-Qabas draft skips from article 7 to article 9.*

Article 9. Iraqis are equal in rights and duties. With respect to sex, nationality, sect, and race, they are equal before the law.

The provision for gender equality is very generous. Indeed, it is far more generous than in the United States (where an equal rights amendment was not ratified). However, other Arab countries with similar provisions (such as Kuwait) have not always implemented them fully. Kuwait bars women from voting in a manner that almost certainly violates its constitution. Yet it took over three decades for a court case to be raised challenging the ban, and the Kuwaiti courts have thus far escaped from ruling on the matter because of technical deficiencies in the cases that have been raised.

Article 10. Public and private freedoms are sacrosanct. The people have the right to freely express [themselves], organize, meet, move, and publish, and they have the right to demonstrate and strike in accordance with the provisions of law.

The rights to demonstrate and strike would seem to depend on necessary legislation (and the legislation in effect from the Ba‘thist period would likely be extremely restrictive). The other rights seem to be absolute, though (in contrast to article 11) they are offered to “the people” as opposed to individuals. It is not clear that this distinction would have any practical meaning.

*Article 11. The individual has the right to education, well-being, work, and security and the right to a fair public trial.*

*Article 12. The various nationalities are fraternal in service to the homeland, with the framework of a federal, united Iraq.*

*Article 13. The judiciary is independent from the legislative and executive branches in accordance with the principle of separation of powers.*

The Coalition Provisional Authority has already issued a law establishing a fairly independent Council of Judges.

*Article 14. Private property shall be preserved. It shall not be taken from its owner except for public benefit in return for just and swift compensation. This appropriation shall be regulated by law. An Iraqi citizen has ownership rights in all areas of Iraq.*

The last sentence grants rights to Iraqi citizens but not foreigners; in most Arab countries, ownership of land by foreigners is a sensitive issue.

The article clearly establishes a principle, but gives little guidance on how to settle property claims that have already arisen in post-Ba‘thist Iraq. For instance, in areas in the north, populations moved in the wake of the establishment of Kurdish autonomy in 1991. Additionally, Palestinian refugees – who are generally not citizens – sometimes were awarded seized property.

*Article 15. The first task of the army is to preserve the integrity of the lands of the country. It may not intervene in politics.*

Iraqi military intervention has a long history – from 1936 until 1941 it was the main arbiter of political power. From 1958 until 1979 every Iraqi president came from the military.

*Article 16. It shall be forbidden to carry weapons for self-defense except by permit issued according to law.*

The Coalition Provisional Authority has already issued a firearms law.

*Article 17. There shall be no tax, crime, or punishment except by law.*

*Article 18.*

- a. *An Iraqi national may not be deprived of Iraqi citizenship.*
- b. *Political refugees may not be surrendered.*
- c. *It is forbidden to torture someone accused of a violation, misdemeanor, or felony in any manner of physical or psychological torture.*

By including psychological as well as physical torture, the Iraqi constitution closes a potentially important loophole. It still leaves two others. First, the Egyptian constitution bars the use of evidence obtained under torture; this document has no such provision. Second, torture is not barred for those not accused of any crime.

*Separate article. In accordance with the agreement signed 15 November 2003 between the president of the Governing Council and the administrator of the Coalition Provisional Authority, a security agreement between the Governing Council and the said Authority shall be concluded, provided that it is signed by both of them before the end of March 2004. This security agreement shall be presented to the Transitional National Assembly for approval in the month of June 2004.*

It is not clear why this is not a numbered article. But while the article lacks a number, it does not want importance.

First, it clearly is designed to ensure that any security agreement between the Coalition Provisional Authority and the current Governing Council binds the sovereign Iraqi government. It therefore answers an American concern that the restoration of Iraqi sovereignty at the end of June 2004 not terminate the American security and military presence.

Second, it introduces a ratification procedure for a security agreement, and brings the Transitional National Authority – a body not yet created – into the process.

Third, it suggests the drafters are students of history. A virtually identical procedure was used to conclude an Anglo-Iraqi treaty in 1924: an Iraqi constituent assembly was elected to issue a constitution; the British also insisted that the body ratify a treaty. That step led some Shi'i leaders to boycott elections to the assembly. The assembly finally did approve the treaty but did so only after a British ultimatum.

Anyone aware of this history, however, would also note that the British success in predicating sovereignty on negotiation of security arrangements was successful in the short term only in a way that undermined the long-term viability of those arrangements and the governments that acquiesced to them. What was reluctantly accepted in Iraq and elsewhere the 1920s became unpalatable in later decades; regimes that agreed to security arrangements often found their legitimacy undermined.



### Chapter III – The Transitional Legislative Authority

*Article 19. During the transitional phase, there shall be formed a transitional legislative authority for the state of Iraq, called the “Transitional National Assembly.” Among its chief tasks shall be legislation of laws and oversight over the work of the executive branch.*

This chapter is devoted largely to the formation of the National Assembly; very little is devoted to its duties and authorities.

*Article 20. The Transitional National Assembly shall be composed of members representing all the provinces of Iraq, so that for every 100,000 inhabitants, there will be one member, according to the census.*

*Article 21.*

- a. A committee will be formed immediately called the “Organizing Committee” in each province of Iraq, consisting of fifteen members. Five of them shall be appointed by the Governing Council; five of them shall be appointed by the provincial council; and five of them shall be appointed by the local councils of the five largest cities in the province with one member from each of these councils.*
- b. Decisions in the Committee shall be taken by a majority of eleven votes.*
- c. Members of the Committee may not be candidates for the Transitional National Council.*

*Article 22. The Organizing Committee shall receive, in times that it sets and announces, candidacies for the Transitional National Assembly from political parties and civil society institutions such as professional and civil unions and syndicates, university faculties, religious and tribal associations, and independents as well. Members of the Governing Council similarly have the right of candidacy for the Transitional National Assembly.*

*Article 23. A candidate for the Transitional National Assembly must meet the following conditions:*

- 1 Be not less than thirty years of age.*
- 2 Not belong to the dissolved Ba‘th Party or be affiliated with the agencies of repression or have contributed to the oppression of citizens.*
- 3 Not have illegitimately been enriched at the expense of the people and public funds.*
- 4 Not have been convicted of a crime of moral turpitude and be known for good conduct.*
- 5 Have a degree.*

*Article 24. The Organizing Committee, in cooperation with the Coalition Provisional Authority, shall undertake to examine if the candidates have met the conditions specified in article 23 for the purpose of certifying their qualification for nomination.*

*Then the Committee shall be open for appeals according to the procedure it has prepared for that purpose.*

*Article 25. The work of the Organizing Committee shall be conducted under Iraqi judicial supervision and the monitoring of representatives of the United Nations if feasible.*

In several ways, this article is an innovation in constitutional procedures in the Arab world. First, many documents simply do not mention any oversight body, generally leaving control over elections to the Ministry of Interior. Second, when some judicial supervision is allowed (as in Egypt), it is generally restricted to balloting itself. This article extends it to the entire electoral process. Third, international monitoring is rare (though not unknown) in the region, and there has never been any constitutional provision mentioning it.

However, it must be added that the Organizing Committee is not conducting an election but overseeing “electoral assemblies,” the term chosen in article 27 for caucuses.

*Article 26. The Organizing Committee shall operate to make the number of nominees within the bounds of a reasonable number according to the specified standards the Committee has established for this purpose, including meeting the conditions for nomination expressed in article 23 and likewise realizing a balance among various groups.*

This clause seems to grant the Organizing Committee extremely vague authority to discourage candidacies (and perhaps encourage them) with an eye to an undefined appropriate number. Similarly, the sort of balance among groups that is desired is completely undefined.

*Article 27. The Organizing Committee shall invite the eligible candidates to an electoral assembly to be held in the headquarters of the province on a date that it sets and announces. There it shall select representatives of the province to the Transitional National Assembly, doing so under the supervision of the Committee itself and whoever assists it from the Iraqi men of the judiciary, representatives of the Coalition Provisional Authority, and monitors from the United Nations. The number of these representatives shall be in accordance with article 20.*

The Coalition Provisional Authority plays a direct role in the process (according to articles 24 and 27) in a way that could provoke some criticism in Iraq and perhaps undermine the legitimacy of the outcome in some quarters.

*Article 28. The Transitional National Assembly formed from the representatives selected in accordance with article 27 shall assemble and its first session shall be held no later than 31 May 2004.*

*Article 29. This Transitional National Assembly shall establish its standing orders. Its sessions shall be public unless necessity dictates otherwise in accordance with what is stipulated in its standing orders.*

*Article 30. A member of the Transitional National Assembly shall not be questioned on opinions expressed in its sessions during his performance of official duties, nor shall it be allowed to prosecute him judicially or arrest him when the Assembly is in session without its permission except in flagrante delicto nor is it permitted when [the Assembly] is not in session without permission from its speaker except in flagrante delicto.*

#### **Chapter IV – The Transitional Executive Authority**

*Article 31. The executive authority is composed of the president of the state and the cabinet. It, along with the Transitional National Assembly, shall complete the establishment of a temporary Iraqi government with full sovereignty and qualified for international recognition at a time no later than 30 June 2004.*

While there are provisions for the cabinet below, there are no provisions in this draft for the selection of a president, suggesting that the drafting process is incomplete.

*Article 32. The transfer of complete sovereignty and authority to the Iraqis in the time defined in article 31 shall dissolve the Coalition Provisional Authority and end the work of the Governing Council.*

*Article 33. The Presidency of the state shall appoint a prime minister as well as the ministers at the suggestion of the prime minister. The government must obtain the confidence of the Transitional National Assembly before assuming its duties.*

The document refers generally to the Presidency rather than the President, suggesting the possibility of – but not requiring – a multimember body.

The document seems to use the term “government” and “cabinet” [literally, council of ministers] interchangeably. This is common not only in many parliamentary systems but also generally in the Arab world.

*Article 34. The government (its chairman [i.e., the prime minister] and members) is responsible to the Transitional National Assembly. The Assembly may withdraw confidence from it or from one of its members.*

*Article 35. The responsibility of the government is a collective responsibility.*

This article seems to be in tension with the possibility of removing confidence from an individual minister stipulated in article 34.

*Article 36. The government shall establish an internal regulation for its work and undertake the issuing of the necessary regulations to implement effective laws. It shall raise draft laws to the Transitional National Assembly so that they may be legislated after the agreement of the Presidency. The appointment of civil servants in the special grades and the appointment of deputies for the ministries and ambassadors shall be by*

*nomination from the relevant ministry, the agreement of the cabinet, and the approval of the Presidency. All decisions of the cabinet shall be connected to the agreement of the presidency.*

This article leaves some critical matters ambiguous. First, it contains the only detailed provisions for legislation, but it does not make clear whether all legislation must be introduced by the government. Article 19 assigns legislative authority to the Transitional National Assembly, suggesting – but hardly requiring – that the Assembly has the authority to initiate legislation on its own. If the Assembly does have such an authority, there is no provision that its laws can only be promulgated after presidential approval.

Second, the final sentence seems to indicate that the cabinet can take no action without presidential approval, dramatically increasing the importance of the presidency. But I am aware of no country that has experimented with such a provision. Without it, the draft leans very heavily towards a parliamentary rather than a presidential system (at least on paper – the precise balance of power among parliament, cabinet, and head of state often depends not only on the constitutional text but also on other factors such as the party system and is thus very difficult to predict).

## **Chapter V – The Judicial Branch**

*Article 37. The judiciary is independent, and there is no authority over it except the law.*

*Article 38. The judicial apparatus shall be organized according to law.*

*Article 39. No judge shall be dismissed except by a decision from the cabinet and the agreement of the presidency of the state, acting on a recommendation from the council of the judiciary.*

Most Arab states have a judicial council and the Coalition Provisional Authority has issued a law on the subject. Oddly, this passing mention in article 39 is the only constitutional mention of the body.

*Article 40. A court called “The Supreme Court” shall be formed by virtue of a law issued for that purpose to observe that laws and regulations do not violate what is provided for by this Law [i.e. the interim constitution].*

## **Chapter VI – The Permanent Stage**

*Article 41. The Transitional National Assembly shall issue a law for the press and for meetings and other laws.*

*Article 42. Elections shall be conducted according to the law of elections that the Provisional National Assembly shall issue. These elections shall have the aim of forming a constitutional conference, charged with drafting the permanent constitution. This shall be completed by a date no later than 15 March 2004. This draft must include the provisions and basic principles included in the first and second chapter of this Law in addition to the following:*

- 1 Establishment of a democratic, pluralist federal system including a unified Iraq and organizing the relationship between the territory of Kurdistan and the central government*
- 2 Guaranteeing basic private and public freedoms*
- 3 Protecting basic human rights*
- 4 Confirmation of the principle of separation among the three powers: legislative, executive, and judicial*
- 5 Defining the decentralized competencies of the provinces not included in the federation*
- 6 Guaranteeing the rights of women to political participation and other rights in a manner that is equivalent to the rights of men in all of society*

*Article 43. The draft of the permanent constitution shall be published with the aim of promoting general discussion among the people. Its final text shall then be presented to a popular referendum for approval.*

*Article 44. After the permanent constitution is promulgated, a general election shall be conducted immediately for the legislative body in accordance with what that constitution stipulated, and that shall be on a date no later than 31 December 2004.*

*Article 45. This elected legislative body shall appoint by the above-mentioned date the new Iraqi government that shall assume authority.*

*Article 46. At that time, the effectiveness of this law for the transitional period shall end.*