

HISTORY OF THE IRAQI CONSTITUTION-MAKING PROCESS

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Appendix A List of Abbreviations

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HISTORY OF THE IRAQI CONSTITUTION-MAKING PROCESS¹

1. In this paper, an attempt is made to provide an accurate and objective factual account of the Iraqi constitutional process which led up to the ratification of a permanent constitution on October 15, 2005.
2. Generally speaking, the Iraqi constitutional process took place in two stages. The first phase began during the period immediately following the initial invasion of Iraq in March 2003 by the Multinational Forces and ended with the election of a Transitional National Assembly in January 30, 2005. During this phase, the framework for the drafting of the permanent constitution was established **(I)**. The second phase of the constitutional process began after the elections in January 30, 2005, and lasted until the referendum dated October 15, 2005 **(II)**.

I. THE PREPARATORY PHASE: FROM OCCUPATION TO SOVEREIGNTY

3. During the first phase of the constitutional process, Coalition members and Iraqi officials attempted to create a framework in which the permanent constitution would be drafted. These attempts proved intensely difficult as the various parties that were involved encountered unexpected problems at every stage, and were often confronted with conflicting interests that were difficult or even impossible to reconcile.
4. Firstly, the new administrators established the short-lived Office of Reconstruction and Humanitarian Assistance **(A)**; its successor, the Coalition Provisional Authority, proved to be more successful, and involved itself from the start in the elaboration of the November 15 Agreement, which set an initial structure for the constitutional process **(B)**; thirdly, as a result of pressure from both within Iraq, the United States and the international community, this agreement was modified **(C)**; fourthly, on the basis of the revised version of this agreement, a type of temporary constitution, typically referred to as the Transitional Administrative Law, was drafted **(D)**; fifthly, on the basis of that document, an interim Iraqi government was established in order to prepare the

¹ By Nicholas Haysom, Zaid Al-Ali and Michele Law.

country for the next phase of the constitutional process **(E)**; and, finally, sovereignty was transferred to this interim government in 2004 **(F)**.

A. The Office of Reconstruction and Humanitarian Assistance

5. The Coalition's first attempt to organize Iraq's political future started on January 20, 2003, when Jay M. Garner – who had successfully commanded Operation Provide Comfort to assist the Kurds at the end of the Gulf War in 1991 – was appointed by the Pentagon to head the Office of Reconstruction and Humanitarian Assistance (“ORHA”).² Garner's attempt to move Iraq forward proved to be short-lived.
6. In April 2003, shortly before departing Kuwait to assume responsibility in Baghdad, Garner told visitors from Washington that he intended to complete the transition to a permanent Iraqi government within four months. He explained his plan as follows: first, his team would go into Baghdad and appoint an Iraqi interim government; second, the latter would select an Iraqi constitutional convention that would write a democratic constitution, which would then be ratified; and finally, it would hold elections and hand over power to a sovereign Iraqi government by August.³
7. Garner's plan was met with immediate opposition and incredulity from both Iraqi political leaders and international actors. The two conferences that the ORHA organized on April 15, 2003 and on April 24, 2003 to discuss the formation of an interim government were boycotted or opposed by a variety of groups, including the Supreme Council for Islamic Revolution in Iraq (SCIRI), one of Iraq's leading political forces.⁴

B. The establishment of the CPA and of the November 15 Agreement

8. The US government reacted quickly and, in late April 2003, Garner received a call from US Secretary of Defense Donald Rumsfeld informing him that he was being replaced.⁵

² ‘Profile: US Governors of Iraq’, BBC News, February 27, 2003, at http://news.bbc.co.uk/1/hi/world/middle_east/2802053.stm.

³ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 33.

⁴ ‘Post-Conflict Iraq: A race for stability, reconstruction, and legitimacy’, Faleh A. Jaber, USIP, Special Report 120, at <http://www.usip.org/pubs/specialreports/sr120.html>.

⁵ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 36.

On May 6, 2003, the American government announced that L. Paul Bremer III would oversee the selection of an Iraqi transitional government.⁶ Shortly afterwards, the ORHA was dissolved and was replaced by the Coalition Provisional Authority (“CPA”).⁷

9. Although Bremer had served for 23 years at the US State Department, and had a wealth of experience in international diplomacy before arriving in Iraq,⁸ this did not make him immune to the same type of criticism that had been directed at Garner during his brief stint in Baghdad. During the year that he spent as the administrator of the CPA, Bremer was forced – by both Iraqi leaders and by members of the international community – to make several major revisions of his plans for Iraq. Although the CPA is often credited with impressive achievements in the short time frame that was available to it, its staff is also accused of failing to appreciate the importance and weight of Iraqi nationalism, and of being relatively ill-informed of the political reality in Iraq.
10. On May 22, 2003, shortly after Bremer’s arrival in Iraq, the United Nations Security Council passed Resolution 1483, which was the first time that the international community involved itself in Iraq in the period following the war. Resolution 1483 explicitly recognized the United States and the United Kingdom as “occupying powers” under international law, which meant that these countries had certain responsibilities to fulfill. America and Britain were called upon “to promote the welfare of the Iraqi people through the effective administration of the territory”, while creating the conditions for Iraqis to “freely determine their own future”.⁹
11. In this context, one of the first decisions that the CPA took was to establish an Iraqi Governing Council (“IGC”), which was given specific administrative tasks, and was responsible for overseeing the creation of a congress to draft a new Iraqi constitution. The creation of the IGC was widely considered to be a positive development, as it

⁶ ‘Bush names Iraq administrator’, BBC News, May 6, 2003, at http://news.bbc.co.uk/1/hi/world/middle_east/3005589.stm.

⁷ ‘The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities’, L. Elaine Halchin, Congressional Research Service, The Library of Congress, June 6, 2005, page 5, at <http://www.fas.org/sgp/crs/mideast/RL32370.pdf>.

⁸ ‘Ambassador Paul Bremer’, Biographies, Coalition Provisional Authority, at <http://www.cpa-iraq.org/bios/>.

⁹ United Nations Security Council Resolution 1483 (2003), May 22, 2003, S/Res/1483 (2003), at [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1483%20\(2003\)&Lang=E&Area=UND](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1483%20(2003)&Lang=E&Area=UND) OC.

allowed for more Iraqi control over the political process, even if its membership was allegedly slanted towards former exiles, and despite the fact that its membership was decided upon solely by the CPA.¹⁰ The IGC included the following members:

Shia members

Ibrahim al-Jaafari, Daawa Islamic Party
Ezzedine Salim, Daawa Islamic Party¹¹
Iyad Allawi, Iraqi National Accord
Ahmed Chalabi, Iraqi National Congress
Mohammed Bahr al-Ulloum, cleric from Najaf
Hamid Majid Mousa, Communist Party
Ahmed al-Barak, human rights activist
Raja Habib al-Khuzaai, southern tribal leader
Wael Abdul Latif, Basra governor
Mouwafak al-Rabii, doctor, author and human rights activist
Abdel-Karim Mahoud al-Mohammedawi, Hezbollah from Amara
Aquila al-Hashimi, foreign affairs expert¹²

Sunni members

Adnan Pachachi, former foreign minister
Naseer al-Chaderchi, National Democratic Party
Mohsen Abdel Hamid, Iraqi Islamic Party
Ghazi Mashal Ajil al-Yawer, northern tribal figure
Samir Shakir Mahmoud

Kurdish members

Massoud Barzani, Kurdistan Democratic Party
Jalal Talabani, Patriotic Union of Kurdistan
Salaheddine Bahaeddin, Kurdistan Islamic Union
Mahmoud Othman, Kurdish Socialist Party
Dara Noor al-Din, judge

Assyrian Christian members

Younadem Kana, Assyrian Democratic Movement

Turkman members

¹⁰ 'Overview: The Governing Council', BBC News, at http://news.bbc.co.uk/1/shared/spl/hi/middle_east/03/post_saddam_iraq/html/governing_council_overview.stm.

¹¹ Ezzedine Salim was assassinated on May 17, 2004 while he held the presidency of the IGC; see 'Iraqi council replaces slain leader', CNN News, May 17, 2004, at <http://www.cnn.com/2004/WORLD/meast/05/17/iraq.main/>.

¹² Aquila al-Hashimi was mortally wounded on September 19, 2003 and died on September 24, 2003; see 'Iraq governing council member shot', CBS News, September 19, 2003, at <http://www.cbsnews.com/stories/2003/09/21/iraq/main574366.shtml>.

Sondul Chapouk, teacher and engineer

12. Bremer suffered his first setback shortly afterwards. In June 2003, several publications reported that Bremer was planning to appoint a national conference that was to assist in the administration of Iraq, rather than holding democratic elections.¹³ This was immediately opposed by Grand Ayatollah Ali Al Sistani – Iraq’s leading Shiite religious authority, and arguably the single most influential person in the country¹⁴ – who argued that the plan was undemocratic.
13. As a result, on June 26, 2003, Sistani issued a fatwa – a legal pronouncement by an authority in Islamic law, which becomes incumbent on all believers – which declared that Bremer’s plan for an appointed body was “fundamentally unacceptable”. The full text of the fatwa reads as follows:¹⁵

“In the Name of The Almighty

“Those forces have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly. Also there is no guarantee either that this assembly will prepare a constitution that serves the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values. The said plan is unacceptable from the outset. First of all there must be a general election so that every Iraqi citizen--who is eligible to vote--can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum. All believers must insist on the accomplishment of this crucial matter and contribute to achieving it in the best way possible.

“May Allah The Blessed Almighty, guide everyone to that which is good and beneficial.

“Wassalamu alaikum warahmatullah wabarakatuh
(Peace and Allah's love and blessings be upon you)
Signed & Sealed
Ali Al-Hussaini Al Seestani
25 Rabiul-Akhar 1424
26 June 2003”.

[official translation]

¹³ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 41.

¹⁴ ‘Who’s who in Iraq: Ayatollah Sistani’, BBC News, August 26, 2004, at http://news.bbc.co.uk/2/hi/middle_east/3033306.stm.

¹⁵ Quoted in “Imposed Constitutionalism”, Noah Feldman, *Connecticut Law Review*, Summer 2005, at 37 Conn. L. Rev. 857, footnote 2.

14. Despite Sistani's fatwa, for the following few months, the CPA continued with its plans to appoint a national conference by establishing more specific institutions, and by setting out a more detailed outline for the political future of Iraq.
15. The CPA's additional measures included the establishment on August 11, 2003, of a 25 member Constitutional Preparatory Committee ("CPC") by the Governing Council.¹⁶ Also, on September 8, 2003, the Washington Post published an article by Paul Bremer in which he laid out his clearest vision of the political transition for Iraq. The article sets out a seven-step plan, which states unequivocally that early elections were not possible, as there were no voter rolls, no election law, no law on political parties and no electoral districts. He also wrote that "electing a government without a permanent constitution defining and limiting government powers invites confusion and eventual abuse". Bremer stated that the first three of his seven steps had already been completed – the appointment of the Governing Council, the naming of a constitutional preparatory committee in August, and its naming of twenty five ministers. Of the remaining four steps of his plan, Bremer wrote that:

"Writing Iraq's new constitution is the fourth step. It begins after the preparatory committee recommends a process for writing a constitution to the Governing Council later this month. Step five, popular ratification of the constitution, is indispensable. Once written, the constitution will be widely circulated, discussed and debated among the Iraqi people. All adult Iraqis will have the opportunity to vote for or against it. For the first time in history, Iraq will have a permanent constitution written by and approved by the Iraqi people. The sixth step, election of a government, follows naturally. Shortly after the constitution is ratified by popular vote there will be an election to fill the elective offices specified in the constitution. The officials in charge of that government will be chosen through universal adult suffrage in an open election."¹⁷

16. What this plan lacked however was a specific timetable for the drafting of Iraq's permanent constitution, and for the final transfer of authority to a permanent elected Iraqi government. Both the coalition forces and the United Nations realized this, and appreciated how this lack of clarity could be frustrating to Iraqis. The result was that on September 25, 2003, US Secretary of State Colin Powell indicated that the United

¹⁶ 'Iraq's constitutional challenge', International Crisis Group, Middle East Report Number 19, November 13, 2003, page 5, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=2369.

¹⁷ "Iraq's path to sovereignty", L. Paul Bremer III., The Washington Post, September 8, 2003, at <http://www.washingtonpost.com/ac2/wp-dyn/A39805-2003Sep7?language=printer>.

States would set a six month deadline for Iraqi leaders to write a constitution.¹⁸ In addition, on October 16, 2003, in its Resolution 1511, the United Nations Security Council declared that it:

“invites the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution”.¹⁹

17. With a view to meeting the deadline imposed by Resolution 1511, Bremer flew back to Washington on November 11, 2003 in order to consult with President Bush and his top national security advisers to present a new CPA plan for transition. During the visit, a plan for the drafting of a new constitution and for the holding of democratic elections under that constitution was settled.²⁰ On November 15, 2003, the details of this plan were published by the IGC and the CPA. The “Agreement on the Political Process,” signed by Bremer and by Jalal Talabani – on behalf of the IGC – set out a timetable for political transition for Iraq (the “November 15 Agreement” or the “Agreement”).²¹
18. The November 15 Agreement provided that a Transitional National Assembly (the “TNA”) was to be elected by May 31, 2004, and that the IGC was to be dissolved upon its establishment. The Agreement also provided that the CPA would disband by June 30, 2004, when the Assembly was due to assume “full sovereign powers for governing Iraq.” Also, delegates to a constitutional convention were to be elected by the Iraqi people by March 15, 2005. Finally, the agreement provided that the transitional phase was to end with a popular referendum to ratify the new constitution, and the election of a new Iraqi government by December 31, 2005.²²
19. The most controversial aspect of the November 15 Agreement proved to be the manner in which the TNA was to be elected. Indeed, the Agreement provided that a caucus would be appointed in each of Iraq’s eighteen governorates, and no direct

¹⁸ ‘Powell Says U.S. Hopes Iraq Has Constitution in Six Months’, US Embassy Diplomatic Mission to Italy, September 25, 2003, at http://www.usembassy.it/file2003_09/alia/a3092613.htm.

¹⁹ United Nations Security Council Resolution 1511 (2003), October 16, 2003, S/Res/1511 (2003), at [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1511%20\(2003\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1511%20(2003)&Lang=E&Area=UNDOC).

²⁰ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 51.

²¹ “Iraq’s Sovereignty to Be Restored by June 30, 2004”, US Embassy Diplomatic Mission to Italy, November 15, 2003, at http://www.usembassy.it/file2003_11/alia/a3111702.htm.

²² Id.

elections were considered. The caucuses would then elect the province's representatives in the national assembly.²³ These particular provisions of the November 15 Agreement remained in complete contradiction with the fatwa issued by Ayatollah Sistani on June 26, 2005, which called for direct and democratic elections to be held.²⁴

C. The modification of the November 15 Agreement

20. On November 30, 2003, Ayatollah Sistani maintained his view that direct elections should be held, and confirmed his opposition to the November 15 Agreement. Replying to questions from an Iraqi newspaper, he wrote that:

“First of all, the preparation of the Iraqi State (Basic) Law for the transitional period is being accomplished by the Interim Governing Council with the Occupation Authority. This process lacks legitimacy. Rather the [Basic Law] must be presented to the [elected] representatives of the Iraqi people for their approval. Second, the instrumentality envisaged in this plan for the election of the members of the transitional legislature does not guarantee the formation of an assembly that truly represents the Iraqi people. It must be changed to another process that would so guarantee, that is, to elections. In this way, the parliament would spring from the will of the Iraqis and would represent them in a just manner and would prevent any diminution of Islamic law. [...] Perhaps it would be possible to hold the elections on the basis of the ration cards and some other supplementary information.”²⁵

21. Also, Sistani reportedly issued a statement on November 30, 2003 in which he indicated that he would reconsider his decision to reject the caucus system only if a delegation from the United Nations came to Iraq and judged for itself that such elections were not possible.²⁶
22. The November 15 Agreement was therefore in serious trouble, and the CPA began making efforts to placate Ayatollah Sistani. Most of the CPA's staff, as well as the United Nations, believed that it would be very difficult to organize free and fair elections before June 30, 2004. Indeed, Bremer and Kofi Annan, the Secretary General

²³ Id.

²⁴ See *supra* at ¶ #.

²⁵ See <http://www.juancole.com/2003/11/sistani-position-on-new-elections.html>.

²⁶ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 84.

of the United Nations, discussed the issue and even Annan seemed to agree that elections could not be held so early.

23. At the CPA's request, Kofi Annan addressed a letter to Adnan Pachachi, in his capacity as chair of the IGC, in which he wrote that "there may not be time to organize free, fair, and credible elections" before the handover on June 30, 2004.²⁷ On January 11, 2004, Adnan Pachachi delivered Annan's letter to Sistani in Najaf, hoping that this would satisfy Sistani's concerns. Sistani responded by telling Pachachi that what he expected was for a UN team to come to Iraq and review the options, then make recommendations, and not for the UN to make cursory judgments from New York.²⁸
24. With Sistani unsatisfied, Bremer and several of his most senior aides flew to the United States for meetings in New York with Kofi Annan. Bremer met with Annan and his senior staff, as well as eight members of the IGC, on January 19, 2004 in order to discuss the possibility of holding direct elections in Iraq. It was decided that a UN team would have to visit Iraq first and assess the situation. Both the CPA and the IGC delegation stressed that they would welcome a UN mission to assess the feasibility of holding elections before the handover, and that they would accept the UN's conclusions.²⁹
25. On January 28, 2004, Kofi Annan announced that as soon as security arrangements could be worked out, he would "send a technical mission to Iraq to establish whether elections... can be held before the transfer of sovereignty on 30 June, and, if not, what alternative arrangement would be acceptable".³⁰
26. The Secretary General selected Lakhdar Brahimi, who was a special advisor to the Secretary General, to head the fact finding mission.³¹ Brahimi and his team were deployed in Baghdad from February 7, 2004 to February 16, 2004. During this time,

²⁷ Id. at page 133.

²⁸ Id at page 84.

²⁹ Id at page 135.

³⁰ 'With adequate security, UN will send electoral team to Iraq – Annan', UN News Center, January 27, 2004, at <http://www0.un.org/apps/news/storyAr.asp?NewsID=9578&Cr=Iraq&Cr1=>.

³¹ Brahimi was the special representative of the Secretary General to Afghanistan and Head of the United Nations Assistance Mission in Afghanistan (from 3 October 2001 to 31 December 2004). Mr. Brahimi also served as Special Representative for Haiti (from 1994 to 1996), and Special Representative for South Africa (from December 1993 to June 1994). Mr. Brahimi was also Minister for Foreign Affairs of Algeria from 1991 to 1993. See 'Biography of Lakhdar Brahimi', January 2004, at <http://www.un.org/News/dh/iraq/brahimi-bio-jan04.htm>.

Brahimi spoke with a wide-ranging number of Iraqis, including Ayatollah Sistani, who he spoke with on February 12, 2004.³² During the meeting, Brahimi asked Sistani if he could accept a process in which (1) the caucuses would be scrapped, (2) a Transitional National Assembly would be elected by the end of 2004 or no later than late January, and (3) in the meantime, an interim government would be appointed. Sistani accepted this proposal in principle.³³

27. Upon Brahimi's return to New York on February 14, 2004, the United Nations published a report specifying the findings of his fact-finding mission, entitled *The political transition in Iraq: report of the fact-finding mission*. The report sets out a number of recommendations, which include:

“(1) As outlined above, a consensus exists in Iraq that elections are a necessary step in the process of building democratic governance and reconstruction. No one doubts the importance of holding elections. The caucus-style system as it now stands is not practical and is not a substitute for elections; (2) Credible elections cannot take place by 30 June 2004. Substantial preparations are needed. Elections should be prepared well and should take place in the best possible conditions. Discussions held by the mission at both the political and technical levels have established that preparations will need at least eight months **after** a legal and institutional framework has been established [...]; (6) Many Iraqis already agree that a single elected assembly should be chosen through elections held by the end of 2004 or shortly thereafter, with the dual functions of drafting the country's constitution and at the same time acting as the principal law-making body or legislature.”³⁴

[emphasis in original]

28. It was therefore decided that direct elections would be held around the end of 2004, that Bremer's caucus system would be dropped entirely, and that an Interim Iraqi Government would be selected on June 30, 2004 in order to steward the country in the meantime.
29. All sides appeared to be committed to the June 30 date for the transfer of sovereignty. The result was that only two major issues remained to be resolved: the first was that a law specifically designed to administer government during the transition period had to be drafted; and the second was how the interim government that would rule Iraq for

³² ‘The political transition in Iraq: report of the fact-finding mission’, United Nations Security Council, February 23, 2004, S/2004/140. at <http://www.un.int/usa/s-2004-140-iraq.pdf>.

³³ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 137-8.

³⁴ ‘The political transition in Iraq: report of the fact-finding mission’, United Nations Security Council, February 23, 2004, S/2004/140 at <http://www.un.int/usa/s-2004-140-iraq.pdf>.

the seven months between the handover on June 30, 2004 and the elections in January 30, 2005 should be composed.

D. The drafting of the TAL

30. From January to March 2004, a committee of officials – including, amongst others, Larry Diamond (advisor to the CPA), Feisal Istrabadi (advisor to Adnan Pachachi), and Salem Chalabi (advisor to Ahmed Chalabi) – drafted the Law of Administration for the State of Iraq for the Transitional Period (the “TAL”). This committee dealt with a wide-ranging number of issues, including the basic rights that Iraqi citizens were to enjoy under the TAL, the structure of the judiciary, the powers of the executive, and the method of electing the TNA. The most difficult section of the document for the drafters was of course the issue relating to federalism.
31. The Bush administration was involved in the drafting process through the CPA, and made use of this position firstly in order to ensure that the document was to be completed on time and secondly to call for the inclusion of particular provisions in the final document.
32. On January 2, 2004, Bremer traveled to Irbil for the first serious discussions on federalism with Jalal Talabani and Massoud Barzani. Bremer was made to understand that the preservation of the Kurdistan Regional Government (“KRG”) was a fundamental priority for the Kurds. For his part, Bremer underlined his view that the Iraqi central government would need sufficient power to hold the country together and this would require a number of things, including exclusive authority over national defense, the country’s borders, fiscal and monetary policy and natural resources.³⁵ Bremer also appeared to favor a federal system of government that would be based on the existing governorates and not on ethnicities, which was completely opposed by the Kurds. The parties therefore agreed that the KRG would be maintained and that no other regional governments would be specifically provided for in the TAL.³⁶
33. One source of friction between the Coalition officials that were involved and the Iraqi drafters concerned security issues. The Coalition officials began the discussions by

³⁵ Larry Diamond, *SQUANDERED VICTORY*, Times Books (2005), page 162.

³⁶ *Id.* at page 164.

suggesting that the future prime minister should be able to conclude and implement international treaties. Iraqi critics suspected that the motivation behind this stance was an intention to enter into long term security agreements with the interim Iraqi government. Afterwards, Coalition officials urged a simple majority vote in the transitional assembly to ratify a treaty, which in comparative constitutional practice can be considered as a low threshold for treaty ratification. In the end, the two thirds requirement for treaty ratification was dropped from the TAL.³⁷

34. Also, at one point during the drafting process of the TAL, President Bush personally communicated to Bremer that the formulation of guaranteed religious liberty drawn from the international declaration of human rights should be included in the TAL. According to one commentator who was also involved in the drafting process, this was the only specific provision of the TAL that drew President Bush's interest.³⁸
35. According to the November 15 Agreement, the deadline for completing the TAL was February 28, 2004, but the process took an additional ten days to finish. On February 29, 2004, Bremer met with the Shiite members of the IGC. Among their demands was the right of other provisional governments to form regions – a provision that had been in a previous draft of the TAL but was taken out. The draft document was therefore amended to include a mechanism which would allow up to three governorates to join together and to form a region, which would then enjoy the same rights of self-government as the Kurdish region.³⁹
36. On March 3, 2004, as the key Iraqi players and CPA observers were approaching the end of their negotiations, Massoud Barzani proposed an amendment to article 61(c) – that ratification of the permanent constitution in the national referendum should require an additional threshold beyond a simple majority of the votes. According to the proposal, the constitution would be defeated if it was rejected by two-thirds of the voters in three or more provinces. The proposal was accepted by the other drafting parties. Larry Diamond, who was present at the negotiations, has argued that this

³⁷ Id at page 140-161.

³⁸ "Imposed Constitutionalism", Noah Feldman, Connecticut Law Review, Summer 2005, at 37 Conn. L. Rev. 857, 877.

³⁹ Larry Diamond, SQUANDERED VICTORY, Times Books (2005), page 172.

language was adopted more as a result of the fatigued state of the negotiators than on the merits of the amendment itself.⁴⁰

37. The reaction to this last-minute amendment amongst leading Shiite leaders was very negative. Mohammed Reda al-Sistani, Ayatollah Sistani's son, was reportedly livid upon hearing of the contents of article 61(c). However, the Shiite leaders that were present at the negotiations managed to win the Ayatollah's reluctant support for the TAL.⁴¹
38. The TAL was signed in an official ceremony by the IGC on March 8, 2004. However, differences in relation to article 61(c) resurfaced at the signing ceremony. Indeed, Ibrahim Jaafari read a statement on behalf of the Shiite members, declaring their intention to amend certain provisions of the document that they considered undemocratic. He argued that although they had signed the document, they did so merely in order to preserve the unity of the country, and that in any event, they would seek to change the TAL before the June 30 transfer of power. In addition, Ayatollah Sistani issued a statement on the same day, in which he wrote that the TAL "places obstacles in the path of reaching a permanent constitution for the country that maintains its unity, the rights of sons of all sects and ethnic backgrounds".⁴²
39. Despite the above, the TAL was in fact not amended until much later and in different circumstances,⁴³ and its provisions did set the course for Iraq's political transition for the next year and a half. The TAL provides in relevant part that:
- the first phase of the transitional period "shall begin with the formation of a fully sovereign Iraqi Interim Government that takes power on 30 June 2004" (article 2(b)(1));
 - the second phase of the transitional period "shall begin after the formation of the Iraqi Transitional Government, which will take place after elections for the National Assembly have been held as stipulated in this Law, provided that, if possible, these elections are not delayed beyond 31 December 2004, and, in any event, beyond 31 January 2005" (article 2(b)(2));
 - in the context of this second phase, "[t]he National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005" (article 61(a));

⁴⁰ Id at 173-4.

⁴¹ Id at page 176.

⁴² Id at page 177.

⁴³ See *infra* at ¶ #.

- “The draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005” (article 61(b));
- “The general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it” (article 61(c)); and
- “If the permanent constitution is approved in the referendum, elections for a permanent government shall be held no later than 15 December 2005 and the new government shall assume office no later than 31 December 2005”(article 61(d)).⁴⁴

40. Therefore, according to the TAL, the TNA that was due to be elected in January 2005 would have until August 15, 2005 to draft Iraq’s permanent constitution, which is to say 6 and a half months. Article 61(f) provided a mechanism for the extension of this period by an additional six months, but, as is well known, this provision was not made use of in the constitutional process.⁴⁵ Equally well known is that much of the six and a half month period was actually spent constituting a government, and selecting the members of the constitutional committee,⁴⁶ such that the time actually spent writing the constitution can actually be better measured in weeks, rather than in months.

E. The establishment of the Iraqi Interim Government

41. With the TAL completed, the only issue that remained was the appointment of the Iraqi Interim Government (“IIG”), which, in accordance with the terms of the agreement concluded between Lakhdar Brahimi and Ayatollah Sistani, was to be selected by the United Nations itself.

42. On April 4, 2004, Brahimi returned to Baghdad in order to carry out this task.⁴⁷ Brahimi’s view was that the new government would largely be made up of a new cast of nonpolitical technocrats, and proceeded on that basis.⁴⁸

⁴⁴ Law of Administration for the State of Iraq for the Transitional Period, March 8, 2004, at <http://www.cpa-iraq.org/government/TAL.html>.

⁴⁵ See *infra* at ¶ #.

⁴⁶ Id.

⁴⁷ ‘30 June Iraq handover questioned’, BBC News, April 6, 2004, at http://news.bbc.co.uk/1/hi/world/middle_east/3600813.stm.

⁴⁸ ‘Bush, Blair support UN on Iraq plan’, Dana Milbank, The Washington Post, April 17, 2004.

43. However, it has been alleged that Brahimi's hands were tied when it came to the selection of the prime minister. Indeed, on May 28, 2004, the IGC was informed that Iyad Allawi was the choice for prime minister of the interim government, which the IGC unanimously endorsed.⁴⁹ The decision was reportedly taken by Bremer and was accepted by Brahimi, but supposedly only reluctantly.⁵⁰

F. The transfer of sovereignty

44. On June 8, 2004, Bremer's plan to transfer authority to the Iraqis received an international seal of approval when the UN Security Council passed Resolution 1546, which provided the IIG with international endorsement. Resolution 1546 also authorized the "multinational force to take all necessary measures to contribute to the maintenance of security and stability in Iraq". Finally, Resolution 1546 provided that the United Nations Assistance Mission to Iraq ("UNAMI") should "promote national dialogue and consensus building on the drafting of a national constitution by the people of Iraq".⁵¹
45. Thus, as per the agreement that had been reached between Brahimi and Sistani on February 12, 2004, and as per the terms of Brahimi's report dated February 23, 2004, the CPA ceased to be an occupying power on June 28, 2004 and power was officially transferred to the Iraqi government.⁵² Thus began the second stage of the constitutional process.

II. THE DRAFTING PHASE OF THE CONSTITUTIONAL PROCESS

46. The second phase of the constitutional process was by far the more intense of the two, firstly because the time frame was shorter, secondly because there was so much

⁴⁹ 'Former exile is selected as interim Iraqi leader', Rajiv Chandrasekaran, The Washington Post, May 29, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A62691-2004May28.html>.

⁵⁰ Larry Diamond, SQUANDERED VICTORY, Times Books (2005), page 259.

⁵¹ United Nations Security Council Resolution 1546 (2004), June 8, 2004, S/Res/1546 (2004), at [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1546%20\(2004\)&Lang=E&Area=UNDOC](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1546%20(2004)&Lang=E&Area=UNDOC).

⁵² 'Q&A: The handover in Iraq', BBC News, June 28, 2004, at <http://news.bbc.co.uk/1/hi/world/americas/3742383.stm>.

more that had to be achieved within that shorter period of time and thirdly because the stakes were so much higher.

47. Because a number of procedural and administrative matters – including, amongst others, the formation of a government, the establishment of a constitutional committee, and the inclusion of the parties that boycotted the elections into the process – had to be satisfied before the drafting of the constitution could actually begin, the process was shortened even further **(A)**.
48. Also, although some of the parties that boycotted the elections were incorporated into the constitutional process, a number of factors worked in order to undermine their influence **(B)**.
49. A number of issues relating to the management of the drafting process – such as the division of labour between the drafters, and the efforts that were made to encourage the Iraqi public to participate in the constitutional process – will also be raised **(C)**.
50. Despite these difficulties, the permanent constitution was drafted and completed two days before the referendum that took place on October 15, 2005, although the manner in which the process took place may have affected the outcome **(D)**.
51. The constitution was finally approved in a referendum on October 15, 2005, although a number of concerns were raised in relation to the voting process itself and the implications that the results will have for the future of Iraq **(E)**.

A. Initial procedural and administrative issues

52. Before the drafting of the constitution could actually begin, a number of procedural and administrative matters had to be settled. These included organizing the parliamentary elections that took place in January 30, 2005 **(1)**, establishing a body that would be responsible for drafting the constitution **(2)**, making efforts to include those parties that boycotted the elections in the drafting process **(3)**, and deciding whether the TAL would be used a basis for discussions in the drafting process **(4)**.

1. The election of the TNA

53. The seven months that followed the transfer of sovereignty to the Interim Iraqi Government involved intense preparations by both the international community and by the Iraqi authorities in relation to the parliamentary elections that were scheduled for January 30, 2005. For this purpose, an Independent Iraqi Electoral Commission was established, and a number of political alliances were created with a view to participating in the upcoming elections. By way of example, on December 9, 2004, Iraq's leading Shiite parties announced a large coalition in order to contest the January 2005 elections as a single electoral list. Meanwhile, the main Kurdish parties announced a similar alliance, while the Association of Muslim Scholars – a major Sunni organization within Iraq – urged Iraqis to boycott the elections.⁵³
54. On January 30, 2005, elections for the TNA were held throughout the country.⁵⁴ Final results were announced on February 13, 2005.⁵⁵ Of the 275 seats in the TNA, the United Iraqi Alliance (the "UIA") – which was often described as the Shia Alliance – won 140 seats, the Kurdish Alliance won 75, and the Iraqiya list, which is led by Iyad Allawi, won 40. Because of their decision to boycott the elections, Sunni parties only held 17 of the remaining 20 seats.⁵⁶

2. The establishment of the Constitutional Committee

55. As provided for in the TAL, the TNA was responsible for writing Iraq's permanent constitution, and had until August 15, 2005 to achieve this objective.⁵⁷ However, as a result of the intense negotiations that took place between the winning parties, a proportionately large amount of time was spent by the newly elected authorities

⁵³ 'Iraqi Shias unveil poll coalition', BBC News, December 9, 2004, at http://news.bbc.co.uk/1/hi/world/middle_east/4082435.stm.

⁵⁴ 'Iraq votes as attacks hit Baghdad', BBC News, January 30, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4219569.stm.

⁵⁵ 'Iraqi Shiites win, but margin is less than projection', The New York Times, February 13, 2005, at <http://www.wilmingtonstar.com/apps/pbcs.dll/article?AID=/20050214/ZNYT/502140349/1002/BUSINESS>.

⁵⁶ 'Shia majority for Iraq parliament', BBC News, February 17, 2005, at http://news.bbc.co.uk/2/hi/middle_east/4273931.stm.

⁵⁷ See *supra* at ¶ #.

constituting a government. This rendered the time available to draft the constitution even shorter.

56. Indeed, Jalal Talabani was named the country's interim president on April 6, 2005,⁵⁸ and Ibrahim Jaafari was confirmed as the new prime minister the day after.⁵⁹ Meanwhile, the TNA managed to approve the new government on April 28, 2005, although several top posts had not yet been filled.⁶⁰ Thus, three months of the constitutional process were wasted as a result of the negotiations relating to the formation of the Iraqi government.
57. At the same time, although the TAL provided that the TNA was responsible for drafting the constitution, it did not indicate how this process should take place. In February 2005, models for a constitutional committee were discussed at a conference in Jordan of Iraqi lawyers, political advisers and international experts convened by the United States Institute of Peace and the American Bar Association.⁶¹ Some attendees at the conference recommended that a committee made up of parliamentarians and that would be answerable to the TNA should be constituted. This proposal was subsequently adopted by the TNA.⁶²
58. Such a committee (the "Constitutional Committee" or "Committee") was constituted from March to May, and was finally appointed on May 10, 2005. The Committee was made up of 55 places, which were distributed as follows:

⁵⁸ 'Kurd leader named Iraq president', BBC News, April 6, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4415459.stm.

⁵⁹ 'Shia named as Iraq prime minister', BBC News, April 7, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4420971.stm.

⁶⁰ 'Iraqi MPs approve partial cabinet', BBC News, April 28, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4492457.stm.

⁶¹ 'Draft constitution gained, but an important opportunity was lost', United States Institute of Peace, October 2005, at http://www.usip.org/newsmedia/releases/2005/1011_draft.html.

⁶² **[THERE IS A DISSENTING OPINION ABOUT THIS]**

United Iraqi Alliance	28
Kurdistan Coalition List	15
Iraqiya List	8
National Rafidain List	1
Front of Iraqi Turkomans	1
People's Union	1
Patriotic Cadres and Elites	1

59. The members of the constitutional committee were as follows:

Ahmed Al-Sáfi
 Abdel Hádi Al-Hakím
 Dr Ali Al-Dabágh
 Dr Hussein 'Atháb Th'bán
 Juád Al-Máliki
 Ali Al-Deeb
 Behá' Al-Á'reji
 Dr Jeneen Al-Qedou
 Sámi 'Azáze Al-Ma'joun
 Dr 'Aboud Al-'Isáwi
 Dr Hamám Hamoudi
 Ákram Al-Hakím
 Jalál Al-Deen Al-Sagheer
 Dr Sa'ad Qendeel
 Sámi Al-'Askeri
 Dr Jouad Smeisim
 Dr Nadím Al-Jáberi
 'Abáss Al-Bayáti
 Sheerouan Al-Ouáili
 Dr Khadheer Moussa Ja'fr Al-Khazá'i
 Ali Al-Sáfi
 Dr Muhsen Al-Qazwini
 'Aqíla Al-Dehán
 Zehrá' Al-Háshemi
 Al-Tefát Abed Al-Sá'ed
 Mareem Al-Raes
 Amán Al-'Asdí
 Nájehe Abed Al-Emír
 Dr Fouád M'soum
 Dr S'di Berzénji
 Freedoun Abed Al-Qáder
 Dr Mundher Al-Fadhli
 Dr Hussein Bálissáni
 Abed Al-Khaleq Zentena
 Sami Ahmed Ali Shébek
 Nértéz Majeed
 Dára Nour Al-Deen

Ahmed Waháb Majeed
Deendar Shafeeq
Hameed Majeed Moussa
Ádel Náser
Mouneera ‘Abdoul
Nouri Boutros
Kamrán Khairi Sa’íd
Younádem Youssef Kaná
Riádh Kéhia
Abed al-Ráhmen al-Na’ími
Qásem Daúd
Ouá’el Abel Al-Latíf
Adnán Al-Janábi
Rásem Al-Ouádi
Hussein Al-Sha’lán
Dr Radhá Al-Khazá’i
Thámer Al-Khadhbán
Táher Al-Baká’

60. On May 23, 2005, Sheikh Hamam al-Hamoudi was nominated as the president of the Constitutional Committee. In addition, Fouad Maassoum, a member of the Kurdish Alliance, and Adnan Al-Janabi, a Sunni member of the TNA, were appointed deputy presidents of the Committee.⁶³
61. If the Constitutional Committee had been ready to begin drafting the permanent constitution on that day, it would have had less than three months to complete its work. However, even after the Committee began its work, there was a debate as to whether it should be working at all, as many people considered that the Committee did not adequately represent the Sunni community.

3. The inclusion of Sunni representatives

62. The fact that the Sunni community in Iraq had by and large boycotted the elections meant that they were underrepresented in the TNA, and were therefore not adequately represented in the Constitutional Committee. This, coupled with the fact that the ongoing insurgency in Iraq was largely attributed to disaffection in the Sunni community, made it important for many of the parties involved in Iraq’s political transition to reach out to the Sunni and include them in the constitutional process.

⁶³ ‘Shiite to head constitutional panel’, The Daily Star, May 25, 2005, at http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=15352.

63. On May 16, 2005, US Secretary of State Condoleezza Rice made a surprise visit to Iraq in which she stressed the importance of Sunni Arabs being more involved in the constitutional process.⁶⁴ Also, on May 18, 2005, Robert B. Zoellick, one of Rice's deputies at the State Department, visited Baghdad and also urged the new government to reach out to the Sunni Arab minority.⁶⁵
64. The United Nations' Office of Constitutional Support (the "OCS") – which was headed by Nicholas Haysom – also actively encouraged Sunni participation in the constitutional process. Many of the parties that were involved in the drafting of the new constitution argued that even if the Sunni were allowed to participate, they could not enjoy full voting rights, as they were not members of the TNA. The OCS argued that if the Constitutional Committee had to function on the basis of consensus, their voting status was not material. This would also mean that the parties that were represented in the TNA should agree to respect any agreement reached by the consensus in (more representative) Committee. This formula was proposed in a UN 'non-paper' circulated to the parties and parliamentarians. It obtained the support from all the major players.⁶⁶
65. Other institutions, such as the European Union, also called for the inclusion of Sunnis in the constitutional process.⁶⁷
66. Many Sunni leaders were also determined to participate in the constitutional process despite the fact that they had encouraged members of their community to boycott the political process a few months earlier. This was justified on the basis that the January 30, 2005 elections were held in order to elect a national assembly and a government that were to remain in power for less than a year, whereas the constitution was designed to last for a much longer period.
67. Thus, on May 7, 2005, a number of political parties that boycotted the elections organized a meeting in Baghdad for the purpose of discussing the drafting of the general principles of the country's constitution. The meetings took place in the

⁶⁴ 'Rice pushes role for Iraq Sunnis', BBC News, May 16, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4548393.stm.

⁶⁵ 'Shiites offer to give Sunnis larger role on broader panel writing a constitution', The New York Times, May 26, 2005, at <http://www.nytimes.com/2005/05/26/international/middleeast/26politics.html?pagewanted=print>.

⁶⁶ **[THERE IS A DISSENTING OPINION HERE]**

⁶⁷ 'Parliament, Sunnis reach deal on Iraq's constitutional process', USA Today, June 16, 2005, at http://www.usatoday.com/news/world/iraq/2005-06-16-constitution-deal_x.htm.

headquarters of the Association of Muslim Scholars, which is considered to be the most influential Sunni body in Iraq.⁶⁸ Also, on May 21, 2005, a range of Sunni parties and local leaders declared their readiness to participate in drafting the permanent constitution and compete in the elections that were scheduled to take place in December 15, 2005.⁶⁹ It is important to note however that on June 22, 2005, the Association of Muslim Scholars declared that it would not take part in the constitutional process itself.⁷⁰

68. As a result of all these efforts, on May 25, 2005, the Constitutional Committee appointed a seven-member subcommittee, which was chaired by Adnan al-Janabi (deputy chairman of the Constitutional Committee), to consult the Sunni Arab community in order to decide how to select its representatives and bring them into the drafting process.⁷¹ The process of selecting and deciding which Sunnis would be welcomed into the Constitutional Committee took some time. Indeed, although the original 55 members of the Committee met for the first time on May 24, 2005, it was only able to hold its first meeting with the Sunni members on July 8, 2005.⁷²
69. After the decision had been taken by the various parties to the political process that the Sunni should be allowed to participate in the Constitutional Committee, the next step was to decide in what shape and form that participation would take place. The debate around this issue evolved as follows:
- After the circulation of the UN non-paper there was acceptance of a broad formulae which would see appropriate Sunni representation with the status of full membership on the basis of consensual decision making. The issues of who and how many Sunni representatives would be appointed continued.

⁶⁸ 'The Association of Muslim Scholars in Iraq: we are forming a legal council in order to participate in the drafting of the permanent constitution for the country', Al-Sharq Al-Awsat, May 7, 2005, at <http://www.aawsat.com/details.asp?section=4&issue=9657&article=297842>.

⁶⁹ 'Sunnis step off political sidelines', Ellen Knickmeyer and Naseer Nouri, The Washington Post, May 22, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/21/AR2005052100895.html>.

⁷⁰ On June 2, 2005, Mohsen Abd Al-Hamid Asaam Al-Raoui, a representative of the Association of Muslim Scholars, said at a conference organized by the Islamic Party: "I swear by God that we will not throw down our weapons. We will ignore the constitutional process. [...] All sectors of Iraqi society are convinced of the need to open channels of communications with the Islamic resistance, which is fighting for the independence of Iraq" (Al-Hayat, June 3, 2005).

⁷¹ 'Iraq: Don't rush the constitution', International Crisis Group, Middle East Report Number 42, June 8, 2005, page 4, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3506.

⁷² 'Draft constitution gained, but an important opportunity was lost', United States Institute of Peace, October 2005, at http://www.usip.org/newsmedia/releases/2005/1011_draft.html.

- On May 25, 2005, Ahmed Chalabi expressed the view that the Sunni representatives to the Constitutional Committee did not necessarily have to be members of the TNA;⁷³
- On May 26, 2005, the UIA suggested that the Constitutional Committee should be reconstituted, and that there should be 101 seats, with as many as 15 reserved for Sunni Arabs. Hamoudi indicated that 13 to 15 of the additional seats would be reserved for Sunni Arabs, and that the others would be reserved for representatives of tribal communities, and civic and other groups;⁷⁴
- On June 5, 2005, Bahaa al-Aaraji, a Shiite member of the Constitutional Committee, indicated that Sunni Arab leaders were expected to present a list of 25 to 35 Sunni Arabs willing to help draft a permanent constitution. Al-Aaraji stated that the additional Sunnis would not have formal voting power to approve or reject the draft but that the Committee would only agree to approve a draft reached through a consensus with the Sunnis;⁷⁵
- On June 7, 2005, the Gathering of the Sunni People demanded that 25 Sunni Arabs be named to the Committee;⁷⁶
- On June 9, 2005, President Jalal Talabani responded by acquiescing to the Sunni's demand that they be allocated 25 seats on the Committee. Talabani said that "We decided to include 25 Sunni members in the constitutional drafting commission with full rights like the other members elected by parliament";⁷⁷
- This was contradicted later on the same day by Sheikh Hamoudi, who said that Sunnis would have 13 more seats in addition to their present two on a body that would be expanded to 69 members from 55. This plan was also endorsed by Ibrahim Jaafari;⁷⁸
- Although the Gathering of the Sunni People issued a statement on June 10, 2005 in which it indicated that it would stick to its demand for 25 seats,⁷⁹ on June 13, 2005 Jawad Al-Maliki, a member of the Constitutional Committee, said that the Committee has decided that 13 members in the Committee was

⁷³ 'Chalabi and Al-Sadr encourage Sunni participation in the drafting of the constitution', Bab Al-Arbar, May 24, 2005, at http://www.bab.com/news/full_news.cfm?id=69892&cat_id_cache=242.

⁷⁴ 'Shiites offer to give Sunnis larger role on broader panel writing a constitution', The New York Times, May 26, 2005, at <http://www.nytimes.com/2005/05/26/international/middleeast/26politics.html?pagewanted=print>.

⁷⁵ 'Dozens of Sunnis Expected to Help Draft Iraq Constitution' Edward Wong, The New York Times, June 6, 2005, at <http://www.nytimes.com/2005/06/06/international/middleeast/06Iraq.html?pagewanted=print>.

⁷⁶ 'Sunni leaders set demands on Iraq constitutional body', Maher Mohammed, Reuters, June 8, 2005, at http://news.yahoo.com/s/nm/20050608/wl_nm/iraq_constitution_dc_4&printer=1.

⁷⁷ 'Sunnis win demand for 25 seats on panel to draft Iraq constitution', Reuters, June 9, 2005, at http://news.yahoo.com/s/afp/20050609/wl_mideast_afp/iraqpoliticsconstitution_050609131338&printer=1.

⁷⁸ 'Iraq Sunnis reject compromise on constitution body, Omar Anwar, Associated Press, June 10, 2005, at http://news.yahoo.com/s/nm/20050610/ts_nm/iraq_sunnis_dc_1&printer=1.

⁷⁹ Id.

enough for the Sunni. Al-Maliki also indicated that June 16, 2005 had been set as the cut off date for the submission of Sunni candidates;⁸⁰ and

- On June 16, 2005, senior members of the Committee reached a compromise with the Sunni, according to which 15 Sunni Arabs would join the two Sunni members already sitting on the Committee. An additional 10 Sunni Arabs would also join the deliberations, but only in an advisory capacity.⁸¹
70. This last proposal was accepted by the Sunni, on several conditions, including that all the decisions of the Constitutional Committee would be taken on the basis of unanimity, and that the TAL would not be considered a basis for discussions. On June 16, 2005, Salih Mutlaq, from the Iraqi National Dialogue Council – who emerged as a major figure in the negotiations – confirmed that “the different Sunni movements are working from now in order to select the 15 members and the 10 advisers in the Committee”.⁸²
71. During the weeks that followed, the Sunni community held extensive consultations in order to select its representatives in the Constitutional Committee. Security remained a vital issue during this period, which was underlined by the fact that on June 21, 2005, gunmen killed Jassim al-Issawi, a former judge who at one point had been considered a candidate to the join the Committee as a representative of the Sunni.⁸³
72. An additional factor that delayed the process even further was the work of the de-baathification commission. Indeed, although the Kurdish and the Shiite members of the Constitutional Committee agreed on June 22, 2005 to the list of Sunnis members and advisors that had been submitted to them,⁸⁴ these candidates had still to be investigated by the commission in order to be able to commence their work. They finally obtained the go-ahead from the de-baathification commission on June 30, 2005.

⁸⁰ ‘The constitutional committee rejects the participation of 25 Sunnis, Al-Sabah, June 14, 2005, at <http://www.alsabaah.com/modules.php?name=News&file=article&sid=7338>.

⁸¹ ‘Iraqi Shiites, Sunnis reach compromise’, Associated Press, June 16, 2005, at http://news.yahoo.com/s/ap/20050616/ap_on_re_mi_ea/iraq_constitution_2; ylt=AktZKe7Z3PTpb5RQW7Cd3eJX6GMA; ylu=X3oDMTBiMW04NW9mBHNIYwMIJVRPUCUJ.

⁸² ‘Annan's representative in Iraq meets with the head of the constitutional committee’, Al-Sharq Al-Awsat June 17, 2005, at <http://www.aawsat.com/print/default.asp?did=id306156>.

⁸³ ‘Gunmen Kill Iraqi Ex-Judge’, Frank Griffiths, Associated Press, June 22, 2005, at http://news.yahoo.com/s/ap/20050622/ap_on_re_mi_ea/iraq_050622084860; ylt=ArPyicraG_eFbMQ9HbWOQpIX6GMA; ylu=X3oDMTBiMW04NW9mBHNIYwMIJVRPUCUJ.

⁸⁴ ‘Ma'assoum to the Safir: Federalism will unite Iraq’ Al-Safir, June 21, 2005, at <http://www.assafir.com/iso/today/world/109.html>.

73. The Sunni members of the Constitutional Committee were generally considered to be representative of their community as a whole, although they essentially derived from two different groups: firstly, one group of Sunni Committee members seemed to derive from the Iraqi Islamic party, which is one of the country's leading Sunni parties; and secondly, another group appeared to stem from the National Dialogue Council, which is another major Sunni party in Iraq.⁸⁵
74. However, on June 29, 2005, in a reversal of what appeared to have been decided upon, Sheikh Hamam Hamoudi announced in a speech to the TNA that the Sunni representatives were to participate in the drafting of the constitution outside the context of the official committees, which grouped together the 55 members that were elected by the TNA. He stated that the Sunni members would not have voting rights within the Committee. Some read from his remarks that the Sunni might not be permitted to work in the same conference room.⁸⁶ This came as a complete surprise to most observers, and caused a great deal of confusion. As a result, some Sunnis threatened to resign from the Constitutional Committee before they had even been able to assume their positions, but in the end, the issue of Sheikh Hamoudi's statement was dropped after he clarified his position.
75. On July 5, 2005, the Sunni members officially joined the Constitutional Committee. Abbas Al-Bayati, a member of the Committee, said that "we have had a meeting in order to get acquainted. We have informed them of our work and we have given them copies of our drafts. We will have our first meeting tomorrow" with the 15 Sunni members. "We have informed them that we will be starting from zero".⁸⁷ Some Sunni members subsequently disputed this claim.⁸⁸

⁸⁵ [THERE IS A DISSENTING OPINION HERE].

⁸⁶ 'Differences surrounding Iraq's arab identity', Elaph, at <http://www.elaph.com/ElaphWeb/WebForm/PrinterFriendlyVersion.aspx?isArchive=False&ArticleId=72694>.

⁸⁷ 'The constitutional committee starts with the Sunni members 'from zero' - Attacks are driving away diplomats from Iraq', Al-Safir, July 6, 2005, at <http://assafir.com/iso/today/front/140.html>.

⁸⁸ See *infra* at ¶¶ ##-##.

4. The TAL as a basis for discussions

76. One issue that remained controversial throughout the constitutional process was whether the TAL should be used as a basis for discussions within the Constitutional Committee, or whether it should be excluded on the basis that it was a document that had been drafted by an unrepresentative and unelected body.
77. On May 25, 2005, in one of its first sessions, the Constitutional Committee debated this very issue, but the results of the session remain unclear. Some Committee members insist that the TAL was voted down, while others maintain that it was adopted as a basis for negotiations. Fouad Maassoum told reports that “We have agreed that the TAL will be the basis for our discussions. We can edit it, more or less. This way we can easily reach an agreement and finish the job on time.” Meanwhile Sheikh Hamoudi said that “We will rely on general principles of the TAL but in the drafting of the constitution it will be only one of several sources”.⁸⁹
78. Subsequently, on June 20, 2005, Massoud Barzani warned the Constitutional Committee against any retraction from the TAL, and stated that it is a “good basis for the constitution”.⁹⁰
79. In addition, towards the end of the constitutional process, when US authorities were pressing the Iraqis to complete their work on time, several reports indicate that the TAL was once again used as a backdrop. The United States Institute of Peace alleged that US officials pressed their views on substantive constitutional issues in order to reach fast compromises that resembled the terms of the TAL. For instance, they are reported as having favored a centralized petroleum sector even when the UN had identified shared regional and central control as the only way of reaching a compromise.⁹¹
80. The effect of all this is that many of the parties that boycotted the political process felt that their concerns of foreign influence were confirmed. Indeed, on August 8, 2005, Assam Al-Rawi, a member of the Association of Muslim Scholar, stated that “we are far from the drafting process and we reject the majority of its clauses which were

⁸⁹ ‘Iraq: Don’t rush the constitution’, International Crisis Group, Middle East Report Number 42, June 8, 2005, page 7, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3506.

⁹⁰ Al Hayat, June 21, 2005.

⁹¹ ‘Draft constitution gained, but an important opportunity was lost’, United States Institute of Peace, October 2005, at http://www.usip.org/newsmedia/releases/2005/1011_draft.html.

introduced from the TAL, and are now being presented on the tongues of the constitutional committee members.”

81. It should be noted that one of the stated conditions for Sunni participation by their delegations was that the TAL would not be the basis of discussions. The result was that it was a source for some of the provisions in the final text, although it was often not referred to in the debate nor relevant to many of the discussions.

B. Subsequent relations with the Sunni representatives

82. Although the Sunni were incorporated into the constitutional process, a number of factors worked in order to undermine their influence in the deliberations. These include the fact that the Sunni were presented with a ‘fait accompli’ when they joined the process on July 5, 2005 **(1)**; that they faced numerous difficulties relating to security **(2)**; and that they felt that they were excluded from the final negotiations that took place during the month of August 2005 **(3)**; and that, as a result of all this, the Sunni members of the Constitutional Committee only participated in the drafting process for approximately 3 weeks **(4)**.

1. Presenting the Sunni with a ‘fait accompli’

83. As set out above, the Sunni representatives joined the constitutional process on July 5, 2005, which is to say, more than a month after the Constitutional Committee met for the first time.⁹² When they joined the deliberations, the Sunni had been told that the deliberations would restart, and that nothing would be taken for granted.⁹³
84. However, some Sunni members complained that many issues had in fact been decided upon before they even joined the Constitutional Committee. On July 19, 2005, Mijbel Sheikh Issa told the International Crisis Group that:

“Our Kurdish and Shiite brothers are trying to impose their notion of federalism without consulting us. They have already made their own decision. We Sunnis joined the committee very late. They thought they had chosen the Sunnis who would not discuss matters with them. They thought that we would come and sign the papers. They were not

⁹² See *supra* at ¶ #.

⁹³ *Id.*

expecting us to respond to them and make comments. They were surprised when they read all our comments on their drafts”.⁹⁴

85. On the other hand, on July 20, 2005, Sheikh Hamoudi declared in a press conference that “the Sunnis have been very active and cooperative. Their points of view have been taken into account in the drafting.” Three days earlier he had told the International Crisis Group that “There is a lot of disagreement with the new Sunni members [of the Constitutional Committee]. The members of the National Assembly will be the final judge”.⁹⁵

2. Issues relating to security

86. On July 19, 2005, Committee member Mijbil Issa and Committee adviser Dhamin Hussein al-Obeidi were gunned down as they left a restaurant in Baghdad’s Karradah district. One of their bodyguards was also killed.⁹⁶
87. This killing prompted a rapid reaction on the part of the Sunni members of the Constitutional Committee. The following day, they suspended their participation in the Committee’s deliberations, and declared that they needed more security.⁹⁷
88. In the meantime, the remaining members of the Committee appeared to be continuing their work, despite the absence of their colleagues. On July 20, 2005, Sheikh Hamoudi stated that “A draft will be presented to the National Assembly in the first week of August. After it is discussed by the National Assembly and final changes are made, five million copies will be distributed to households on August 15.”⁹⁸
89. On July 21, 2005, the Sunni members of the Constitutional Committee laid out demands that they demanded be met by the Iraqi government prior to their rejoining the Committee. These conditions included: (1) the appointment of an international panel to investigate the assassination of Mijbil Issa; (2) the appointment of armed

⁹⁴ ‘Unmaking Iraq: A Constitutional Process Gone Awry’, International Crisis Group, Middle East Briefing Number 19, 26 September 2005, page 3, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3703.

⁹⁵ Id at page 4.

⁹⁶ ‘Sunnis suspend taking part in Iraq panel’, Bassem Mroute, Associated Press, at http://news.yahoo.com/s/ap/20050720/ap_on_re_mi_ea/iraq&printer=1; ylt=AnRdIx0dwDojb iY69o3cjg8UewgF; ylu=X3oDMTA3MXN1bHEOBHNIYwN0bWE-.

⁹⁷ Id.

⁹⁸ Id.

security guards for the Sunni members of the Constitutional Committee; and (3) the retraction of statements made by Hamoudi when he suggested that work on the charter was almost completed — even though the Sunni members had yet to agree to any of the major provisions.⁹⁹

90. On July 23, 2005, Salih Mutlaq declared that he and his colleagues had nearly reached an agreement on most of their demands, including better security, as well as a greater Sunni role in the deliberations, although the issue of the international investigation into the killings had not yet been agreed upon.¹⁰⁰
91. On July 25, 2005, the Sunni members ended their boycott. Saadoun Zubeidi, a Sunni member of the Constitutional Committee, stated that they had decided to resume their functions in the Committee as there was important work to be done. It was unclear however, whether the Sunni's final demands had been met.¹⁰¹
92. The effect of these events was to cause a further deterioration of the working relationship between the parties. Firstly, the four-day boycott took place at a vital moment in the negotiations. In addition, many of the Sunni members felt that the government had reacted inappropriately, and particularly reproached Sheikh Hamoudi for having moved ahead with the drafting process despite the death, and despite the fact that the boycott had only just begun.

⁹⁹ 'Sunnis set terms of return to panel', Alissa J. Rubin, July 22, 2005, at <http://www.latimes.com/news/nationworld/world/la-fg-iraq22jul22,1,3729037,print.story?coll=la-headlines-world>.

¹⁰⁰ 'Iraq sunnis say boycott nears end', Al-Jazeera, July 23, 2005, at <http://english.aljazeera.net/NR/exeres/45E2363D-7D8F-4566-ADE3-9B94D35C511B.htm>.

¹⁰¹ 'Iraq constitution boycott is over', BBC News, July 25, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4713481.stm.

3. Exclusion from the Leadership Council

93. Towards the beginning of August 2005, as the deadline for completion of the constitution approached, the Constitutional Committee referred the draft to an Iraqi council of political leaders (the “Leadership Council”). This informal body became responsible for producing the final version of the draft while the Committee effectively disbanded.¹⁰²
94. From the start of these extra-Committee negotiations, the Sunni complained that they were being excluded from the deliberations and that they were not aware of the substance of the discussions. On August 28, 2005, the Sunnis announced that they were officially withdrawing from the negotiations, and accused their Shiite and Kurdish counterparts of seeking to impose a document inimical to their community’s interests. Tareq Al-Hashimi, secretary general of the Iraqi Islamic Party, stated that “During the last weeks, we struggled to participate in the draft, but at the end of the day our role was one of advisers at most. We are very frustrated and disappointed”.¹⁰³
95. Others tend to agree that when this Leadership Council began convening, the Sunni members often found themselves not meeting with any other their counterparts. It has also been stated that when they did manage to meet with the other parties to the negotiations, they were often merely presented with a version of the text that had already been developed by the other two parties.
96. In fact, this treatment was not reserved to the Sunni members of the Committee. On August 25, 2005, Hunein Qaddo, a member of the UIA, complained that he too was being shut out of the negotiations. He stated that “We don’t know what is going on. Political leaders are meeting behind closed doors. Changes have been made to the draft, but we don’t know what they are. This is not right; it will only bring instability. It is a very bad sign”.¹⁰⁴ Sheikh Hamoudi too was somewhat marginalized during the Leadership Council phase of the negotiations as new leaders – not hitherto involved in the debates – took a lead in organizing meetings, developing alternative texts, etc.

¹⁰² See *infra* at ¶¶ ##-##.

¹⁰³ ‘Unmaking Iraq: A Constitutional Process Gone Awry’, International Crisis Group, Middle East Briefing Number 19, 26 September 2005, page 4, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3703.

¹⁰⁴ ‘Unmaking Iraq: A Constitutional Process Gone Awry’, International Crisis Group, Middle East Briefing Number 19, 26 September 2005, page 3, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3703.

4. The Sunni were involved in the drafting process for 3 weeks

97. One of the most remarkable aspects of the involvement of the Sunni members was that they were only involved for a very short period of time. The history of their involvement can be summarized as follows:

- July 5, 2005: the Sunni members held their first meeting with the Constitutional Committee,¹⁰⁵
- July 20 to July 25, 2005: the Sunni members boycotted the negotiations as a result of security concerns;¹⁰⁶ and
- August 5, 2005: The Committee was effectively dissolved and the role of negotiating the draft constitution was passed to the Leadership Council, at which point the Sunni members were mostly excluded.¹⁰⁷

98. Thus, one can say that the Sunni were involved in the drafting process for approximately three weeks. To make matters worse for the Sunni, their representatives in the Constitutional Committee were unable to speak with a united voice in the negotiations. As soon as the negotiations shifted to the Leadership Council, the Sunni members reverted to their initial demands, which often meant that they did not contribute meaningfully to the development of the text itself or in a real constitutional discourse.

C. The management of the drafting process

99. As the Constitutional Committee began its work, it set out a number of rules that were designed to manage the drafting process. These included dividing the task of drafting the constitution between a number of subcommittees **(1)**, and designing a mechanism through which the Iraqi public would be encouraged to participate in the constitutional process **(2)**.

¹⁰⁵ See *supra* at ¶ #.

¹⁰⁶ See *supra* at ¶ #.

¹⁰⁷ See *supra* at ¶ #.

1. The functioning of the Constitutional Committee and of the subcommittees

100. Very early on in the process, the Constitutional Committee decided to create six subcommittees, each of which would deal with different substantive areas. The subcommittees were each responsible for preparing a draft of the following sections of the constitution:

Foundational provisions

Rights and responsibilities

Federal institutions

Regional institutions

Institutions to protect the constitution (e.g. the Judiciary)

Transitional provisions

101. The work of the subcommittees was often considered to be unsatisfactory, as there were allegedly gaps that were left uncovered by their work, and a great deal of overlap as well. In addition, a Secretariat had been established, which was to be responsible for keeping track of the various drafts and the substance of the discussions that were being held in the various meetings. This body was required to harmonize these reports – which were of inconsistent detail. Also, the reports did not reflect the consensus – indeed there was no consensus on these reports or on the draft single text. This task would later, inevitably, be controversial – even where alternative or ‘not agreed’ clauses were listed.

2. Efforts to encourage the public to participate in the constitutional process

102. On July 1, 2005, the Committee of Communication and Public Dialogue (“CCPD”) was established as part of the Constitutional Committee’s Secretariat, and reported directly to Sheik Hamoudi. Its mandate was to use media, engage with civil society, and design and implement a formal public submission process in order to ensure that the public participated in the constitution making process. The CCPD received a certain amount of criticism for allegedly not being staffed by members that reflected the political or confessional diversity of Iraq.

103. The CCPD only had 6 weeks to activate public participation of which a significant amount of time was spent recruiting staff and establishing operating mechanisms. The result was that the media campaign began in the middle of July, civil society meetings started taking place towards the end of July, which is when the formal public submissions process was also launched – leaving some 3 weeks to receive, process, and deliver the views of the public to the Constitutional Committee.
104. The CCPD prepared a formal report, which summarized the content of the submissions that it had received, but it was only delivered to the Constitutional Committee and announced to the public at a press conference on August 14, 2005 – at which point the committee had almost effectively dissolved. It is unclear whether Committee members were apprised of the views of the public, or whether the Leadership Council, which took over the drafting process from the beginning of August onwards, was informed of the existence of the report.
105. In addition to the time constraints that the CCPD suffered from, the negative security environment also impeded its work. The safety of its analysis unit staff was called into question towards the end of the process, requiring the United Nations Development Programme funded additional security measures. Also, security constraints prevented real penetration into many Sunni areas, other than through TV and radio advertisements. In order to bridge this gap, informal networks through mosques and gatherings in people's living rooms were used to encourage public submissions towards the end of the process. Penetration in Kurdistan was apparently also weak.
106. Despite time and security constraints, the CCPD printed weekly, if not daily, advertisements in 61 newspapers, on 22 radio stations and across 16 television channels. It worked with 342 civil society organizations and organized 38 lectures, working with a network of 1500 employees and associates. Officially, the CCPD's analysis unit received 449 000 public submissions, mainly from the Shia governorates, and of which 35% came from women. In addition, participation by INGOs and NGOs contributed to the information campaign. For example, one INGO collected some 80 000 public submissions, nationally representative and each one a detailed response, which were transferred to the Constitutional Committee.
107. One of the justifications that were given to extend the August 15 deadline was that additional time was needed in order to examine the views of the Iraqi public. In the

end, though, the major Iraqi leaders that were involved in the final stage of the drafting process and who were responsible for a major rewriting of the draft have not indicated whether or not the views of the public in fact affected their constitutional negotiations. However, the summary of the CCPD report was circulated with the draft constitution to give Iraqi voters the opportunity to see for themselves whether or not their views had been taken into account. The report did indicate the regional origin of the submissions.

D. The conclusion of the constitutional process

108. By the time the Sunni were included into the Constitutional Committee, scarcely any time was left before a decision had to be taken in relation to whether or not to extend the deadline for completion of the drafting process **(1)**. The TNA decided to maintain the original deadline, but it was considered that it would be preferable for the final negotiations to be carried out by a council of the major political leaders in the country: The reason for this development was an apparent recognition that any consensus on the full text was unlikely between negotiators with lower levels of responsibility – and that consensus between the parties needed a special effort. The effect was that the Committee unofficially disbanded and responsibility for negotiating a final draft was passed to the Leadership Council **(2)**. It needs to be noted that this body did not constitute in fact a permanent structure, and there was no such thing as a regular set of meetings with constant interlocutors.
109. Following these developments, coalition officials were able to involve themselves more directly in the drafting process **(3)**, the August 15, 2005 deadline was missed **(4)**, the draft constitution was substantially rewritten by the Leadership Council **(5)**, and a number of *ad hoc* extensions of the deadline were agreed to, until the draft constitution was finally adopted in a referendum that took place on October 15, 2005 **(6)**.

1. The decision not to extend the August 15, 2005 deadline

110. As mentioned above, the TAL provided that the constitutional process could be extended by six months, but that in order for this extension to be effective, it needed to have been requested on or before August 1, 2005. Otherwise, the constitution would have to be finished by August 15, 2005. Therefore, as August 1, 2005 drew nearer, a number of Committee members asked themselves whether or not they would be able to finish on time.
111. On July 26, 2005, Mahmoud Othman, a Committee member from the Kurdish Alliance, said that “[i]f you’re talking about a consensus, something on which we all agree, I certainly don’t think it can be done on time. This is something too important to rush. We shouldn’t be driven by America’s domestic agenda.”¹⁰⁸ The following day, Sheikh Hamoudi stated that the Constitutional Committee would declare whether or not an extension was to be called for on August 1, 2005.¹⁰⁹
112. On July 31, 2005, Hamoudi had reportedly told the Constitutional Committee that he wished to extend the process to September 15. This view was publicly supported by some Kurdish members, including Mahmoud Othman.¹¹⁰ However, when the question was put to the Committee, the idea of extending the process was met with universal opposition, including from the Sunni members of the Committee. Indeed, Saleh Mutlaq is reported to have said that “Our priority is for the [December 15, 2005] elections to be held on time. We cannot bear six more months of this government.”¹¹¹
113. Also, on August 1, 2005, Committee-member Bahaa al-Araji said that “It is expected that the National Assembly will announce that we are committed to the deadline. The draft will be submitted on Aug. 15. If all the points are not completed we will have two more weeks for discussions.” Jawaad al-Maliky, another member of the Committee,

¹⁰⁸ ‘Iraqis losing race to draft constitution’, Liz Sly, Chicago Tribune, July 26, 2005, at <http://www.chicagotribune.com/news/nationworld/chi-0507260164jul26,1,1482196,print.story?coll=chi-newsnationworld-hed&ctrack=1&cset=true>.

¹⁰⁹ ‘Iraq may call for constitution extension,’ Agencies, Gulf News, July 28, 2005, at <http://www.gulfnews.com/Search/searchResultsNF.asp?CurPage=2&txtSearch=iraq>.

¹¹⁰ ‘Draft constitution gained, but an important opportunity was lost’, United States Institute of Peace, October 2005, at http://www.usip.org/newsmedia/releases/2005/1011_draft.html.

¹¹¹ ‘Iraqis race to fashion constitution as factions remain deeply divided’, KRT Wire, July 26, 2005, at <http://www.kentucky.com/mld/kentucky/news/world/12221198.htm>.

also said that “We decided yesterday in a meeting that there would be no extension and we will submit a draft of the constitution on Aug. 15.”¹¹²

114. The Committee’s refusal to back Hamoudi’s request was attributed by a number of observers to US pressure.¹¹³ US Defense Secretary Donald Rumsfeld had made an unannounced visit to Baghdad on July 26, 2005, in which he urged Iraqis to finish the draft constitution before the August 15, 2005 deadline. In the context of that visit, Rumsfeld even told reporters that “We don’t want any delays. Now’s the time to get on with it.”¹¹⁴ It is submitted here that there was undeniable US pressure to keep to the deadlines. However many commentators ignored the fact that the Iraqi political actors themselves were against their own interests in so far as they relate to a sustainable constitutional agreement, as driven to complete the process on time.

2. The Leadership Council and the dissolution of the Constitutional Committee

115. Towards the end of July, a number of Constitutional Committee members, including Sheikh Hamoudi, shared the view that the negotiations were stalling and could benefit from more direct involvement from the political leadership of each of the political parties that was involved in the negotiations.¹¹⁵ This idea was eventually implemented, and because the discussions within this council of political leaders (the “Leadership Council”) were considered to be sensitive, access to many of the deliberations remained restricted.
116. The Leadership Council was an unofficial grouping of political leaders which met irregularly from August 7, 2005 to October 13, 2005. Its first meeting was scheduled to take place on August 4, 2005, but because of a major sandstorm in Baghdad on that

¹¹² ‘Iraq parliament to announce constitution on time’, Associated Press, August 1, 2005, at http://news.yahoo.com/s/nm/20050801/ts_nm/iraq_constitution_dc_2&printer=1; ylt=AhZV NVX9_9ig_Fa2l_t.QDxg.3QA; ylu=X3oDMTA3MXN1bHEOBHNIYwN0bWE-.

¹¹³ ‘Iraq hopes to finish constitution on time’, Bassem Mroute, Associated Press, August 1, 2005, at <http://news.yahoo.com/s/ap/iraq&printer=1; ylt=At5HyxGBtUct13X9izel8RQUewgF; ylu=X3oDMTA3MXN1bHEOBHNIYwN0bWE->.

¹¹⁴ ‘Rumsfeld urges Iraq to meet constitution deadline’, Reuters, July 27, 2005, at http://news.yahoo.com/s/nm/20050727/ts_nm/iraq_rumsfeld_dc_1&printer=1; ylt=AneifOgw YF2Qhr_SX54nuuNg.3QA; ylu=X3oDMTA3MXN1bHEOBHNIYwN0bWE-.

¹¹⁵ ‘Iraq’s constitution panel calls for summit’, Global Security, July 29, 2005, at <http://www.globalsecurity.org/wmd/library/news/iraq/2005/07/iraq-050728-28bd281a.htm>.

day,¹¹⁶ the meeting was put off until August 7, 2005.¹¹⁷ As of that point, the Constitutional Committee went into limbo – not formally dissolved but not engaged in the process.

117. This new context brought about a major change to the dynamics of the constitutional process.
118. Firstly, the Leadership Council's make-up, procedures, and responsibilities were for the most part left undefined. Although the Constitutional Committee's secretariat and system of reporting was relatively effective, very little effort was made to keep a record of the Leadership Council's deliberations. It was unclear which parties were permitted to attend meetings, which party was responsible for maintaining the official copy of the draft, or even who was meeting with whom. At one point during the Leadership Council phase of the negotiations, many of the major political leaders in Iraq were actually outside the country. The result was that there were often several drafts that were in circulation at one given time, and that it was difficult to determine which was the authoritative draft.¹¹⁸
119. Secondly, as a result of the fact that authority over the draft was passed to the Leadership Council, US officials were able to play an organizing and facilitating role in the negotiations, something that had not been possible while the Constitutional Committee was still active.¹¹⁹

3. US involvement in the constitutional process

120. Prior to the disengagement of the Constitutional Committee, US officials were not practically and visibly involved in the drafting process, as one of the procedural rules that existed at the time was that only Committee members could attend the drafting sessions. However, this changed when responsibility over the drafting process was passed to the Leadership Council.

¹¹⁶ 'Iraq PM in constitution talks' BBC News, August 5, 2005, at http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/4747665.stm.

¹¹⁷ 'Iraqis meet to break impasse on drafting of Constitution', Dexter Filkins, The New York Times, August 8, 2005, at <http://www.nytimes.com/2005/08/08/international/middleeast/08iraq.html?pagewanted=print>.

¹¹⁸ Id.

¹¹⁹ See *infra* at ¶¶ ##-##.

121. During the Leadership Council phase, Zalmay Khalilzad, the US Ambassador to Iraq, was able to play a major role in the negotiations. Indeed, at least one of the Leadership Council’s plenary sessions was actually held at the Ambassador’s residence. Also, because the Leadership Council’s meetings were by nature informal, Khalilzad attended negotiation sessions regularly, and other American officials became implicated in the negotiations in order to accelerate a final draft constitution.¹²⁰
122. It should be noted that the involvement of US officials during this period was clearly more intense. Their efforts appeared designed to facilitate agreement (especially between the UIA and the Kurdish Bloc) so as to ensure that the negotiations ended on time. Indeed, the US officials that were involved in the negotiations pursued a limited number of discrete issues, which were those that were significant for US domestic politics, especially, amongst others, women’s rights and the role of Islam. For example, on the issue of the role of Islam, Salih al-Mutlaq said that “The Americans agreed [with the Shia position] but on one condition – that the principles of democracy should be respected”.¹²¹ Also, a previous version of article 44, which related to international human rights standards, was removed from the final version of the draft constitution, reportedly at the request of US officials.¹²²
123. US officials clearly focused on encouraging the parties to reach a compromise in order to complete the negotiations on time. They apparently based many of their suggestions on the terms of the TAL, for instance favoring a centralized petroleum sector even when the UN had identified shared regional and central control as a feasible way of achieving a compromise.¹²³ A number of major western news outlets also reported that Zalmay Khalilzad presented to selected Iraqi leaders a US version of provisions of the new Iraqi constitution that remain in dispute. Mahmoud Othman described the American document as follows: “It’s the full constitution but with the American points of view on the main points where we have differences. For them it’s

¹²⁰ ‘Draft constitution gained, but an important opportunity was lost’, United States Institute of Peace, October 2005, at http://www.usip.org/newsmedia/releases/2005/1011_draft.html.

¹²¹ ‘US concedes ground to Islamists on Iraqi law’, Luke Baker and Michael Georgy, Reuters, August 20, 2005, at http://news.yahoo.com/s/nm/20050820/ts_nm/iraq_dc_123&printer=1;_ylt=AvOILNUkzf5mPRzXuXGpok9g.3QA;_ylu=X3oDMTA3MXN1bHE0BHNIYwN0bWE-.

¹²² See *infra* at ¶ #.

¹²³ *Id.*

very important, and it is to us too, to meet the deadline. Hopefully we will reach it ... but there are some basic things that are important to us.”¹²⁴

124. Some of the Iraqi participants reacted negatively to the pressure that was being placed by the US officials. On August 21, 2005, Mahmoud Othman said that “It seems like the Americans want to have a constitution at any cost.” At the same time, Salih Mutlaq said of Zalmay Khalilzad that “His main interest is to push the constitution on time, no matter what the constitution has in it. No country in the world can draft their constitution in three months. They themselves took 10 years. Why do they wish to impose a silly constitution on us?”¹²⁵
125. It has been argued that most of the parties to the negotiations realized that the US was capable of facilitating the negotiations, even exercising influence over ‘the other parties’. By the end, most of the parties also realized that the US did not enjoy as much leverage with the Iraqis as many observers believe. Indeed, the Iraqis themselves also made significant changes to the draft during this period, sometimes against the advice of the US officials that were involved.¹²⁶

4. The failure to meet the August 15, 2005 deadline

126. Despite all the efforts that were being made, the Iraqis were unable to meet the August 15, 2005 deadline. The negotiators actually decided to extend the process at the last minute, which is to say, when they realized that it was impossible to finish on time.
127. Indeed, on the morning of August 15, 2005, Hussein al-Shahristani, the deputy speaker of the TNA, said that talks would continue until midday, at which point a decision would have to be taken as to whether to present a draft to the TNA or whether to look at other options. He said that “The first option is that everyone agrees on a draft of the constitution and it is presented to the National Assembly for approval on time. Another possibility is that, if a final draft is not ready, the National Assembly could

¹²⁴ ‘Envoy delivers US vision for Iraqi constitution’, Los Angeles Times, August 12, 2005, at <http://www.latimes.com/news/nationworld/iraq/complete/la-fg-constitution12aug12,1,2073335,print.story?coll=la-iraq-complete>.

¹²⁵ ‘Kurds Fault US on Iraqi Charter’, Ellen Knickmeyer, Washington Post, August 21, 2005, available at www.washingtonpost.com/wp-dyn/content/article/2005/08/20/AR2005082001202.html.

¹²⁶ See *infra* at ¶¶ ###-###.

hold a vote and if agreed by three-quarters of the house amend the interim constitution to allow more time to draft the document". He said that that option was a "very likely possibility" and said that if that route were taken, an extension of between two weeks and one month would likely be sought.¹²⁷

128. In the end, the Leadership Council failed to complete the negotiations, and so the TNA voted at 20 minutes to midnight to extend the process by another week in order to resolve the remaining disagreements. Several of the leaders involved in the negotiations even said that the disagreements, revolving around Islam, oil and the distribution of political power, grew sharper and more numerous as the day dragged on. Salih Mutlaq said that "The differences are huge, and there is not enough determination from the political leaders to solve the problems. Almost 50 percent of the constitution is not finished yet."¹²⁸

129. It should be noted that the legal basis for this one-week extension, and the extensions that were decided upon in the following weeks, are of dubious legal standing. Indeed, the TAL did not provide for a mechanism which allows a one week extension, so the decision to extend was presented as an amendment of the TAL itself. Indeed, article 32(c) of the TAL provided that the TNA could vote on a bill in the first four days after a bill is presented to it. An amendment passed in the final moments before the August 15 deadline expired clearly does not meet this four-day requirement. The TAL was amended not in the form of a bill, but through resolution.

5. The evolution of the constitutional debate and the rewriting of the final draft by the Leadership Council

130. It can be said that the debate on the substance of the constitution, as opposed to the process, went through three main phases:

- firstly, from February to April 2005, during the course of the negotiations that led up to the formation of the Iraqi government, a number of discussions were held on fundamental constitutional principles. Indeed, it has been alleged that the UIA and the Kurdish Alliance linked their agreement on the formation of the government to constitutional issues;

¹²⁷ Reuters, August 15, 2005.

¹²⁸ 'Iraqi constitution panel fails to deliver a draft', Borzou Daragahi and Alissa J. Rubin, Los Angeles Times, August 15, 2005, at <http://www.nytimes.com/2005/08/16/international/middleeast/16iraq.html?pagewanted=print>.

- secondly, from May to August 2005, during which responsibility for drafting the constitution was passed to the Constitutional Committee, the text evolved in a relatively balanced manner; and
- thirdly, from August to October 2005, when the role of drafting the constitution was transferred to the Leadership Council, which had a significant impact on the substance of the constitution itself.

131. The effect of this evolution could be seen in the way each of the draft constitution's chapters evolved over time. Indeed, whereas the Constitutional Committee often attempted to follow international best practice, the Leadership Council was more interested to ensure that individual interests were maintained.

132. For example, in the last days before the draft was passed to the Leadership Council, the chapter relating to federalism – which was Chapter Five in most drafts – hardly changed and contained a detailed list of institutions and powers that were to be exclusively exercised by the federal government.

133. However, on August 22, 2005, the structure of this chapter was changed altogether by the Leadership Council. Firstly, the list of powers to be exercised by the federal government was greatly reduced. Secondly, a second list (article 112 of the draft), which sets out a list of powers that were to be shared between the federal and regional authorities, was reduced and limited in scope. Finally, article 111 of the draft produced by the Leadership Council indicated that:

“All powers not stipulated in the exclusive authorities of the federal government shall be that of the regions. The priority goes to the regional law in case of conflict regarding other powers shared between the federal and regional governments.”

[unofficial translation]

134. The effect was therefore that a number of powers that were originally intended to be exercised by the federal government, or be shared between both the federal and regional governments, were transferred to the regions. In addition, control over natural resources, including oil and water resources, were also shifted in favor of the regions at the Leadership Council stage.

135. This can be explained by the fact that, in the Leadership Council, Kurdish leaders approached the negotiations from the standpoint that they should not surrender any of the advantages that they enjoyed during the 1990s. Many of the Shia members

eventually decided that they should also enjoy whatever powers the Kurds had. Those parties that would have been expected to defend the position of a coherent system of federal government – such as the Iraqiya list – displayed little interest in participating in the substance of the negotiations.

6. The *ad hoc* extensions of the deadline, continued modifications, and the conclusion of the draft constitution

136. Over the weeks that followed, a number of additional extensions were agreed upon by the negotiators and by the TNA. Sometimes, it was unclear if the TNA was even consulted in relation to some of the extensions. The following extensions, both official and non-official, were made between August 15, 2005 and the referendum which took place on October 15, 2005:

- On August 22, 2005, the deadline for completion of the constitution was extended by another three days by the TNA.¹²⁹
- On August 25, 2005, the TNA announced that it had no plans to meet and that it did not set a date for a future session.¹³⁰ Hajim Hassani, the president of the TNA, said that “We needed one more day to reach a result that will, God willing, please everyone. We do not draft a constitution every now and then, nor even every year, but rather, this constitution might be drafted every hundred years. Therefore, the issue really deserves for us to dedicate the time it requires.”¹³¹
- On August 28, 2005, the TNA convened to receive the draft constitution after members of the Committee signed the charter, but Sunni members of the team said that they had rejected the final draft. The TNA had apparently accepted the draft although a vote had not been held. It also called for preparations for a popular referendum to be held no later than October 15, 2005, in keeping with the timetable laid down by the TAL.¹³²

¹²⁹ ‘Iraq PM ‘confident of agreement’, BBC News, August 23, 2005. at http://news.bbc.co.uk/1/hi/world/middle_east/4176610.stm.

¹³⁰ ‘Iraq lawmakers won’t meet on Constitution’, Qassim Abdul-Zahra, Associated Press, August 25, 2005, at http://news.yahoo.com/s/ap/20050825/ap_on_re_mi_ea/iraq_4&printer=1;ylt=Akt3nju6DwGri.Pilijik4UewgF;ylu=X3oDMTA3MXN1bHE0BHNIYwN0bWE-.

¹³¹ ‘The Struggle for Iraq: negotiations; charter talks in Iraq reach breaking point’, Dexter Filkins and James Glanz, The New York Times, August 26, 2005, at <http://www.nytimes.com/2005/08/26/international/middleeast/26iraq.html?pagewanted=print>.

¹³² ‘Unmaking Iraq: A Constitutional Process Gone Awry’, International Crisis Group, Middle East Briefing Number 19, 26 September 2005, page 2, at http://www.crisisgroup.org/home/index.cfm?action=login&ref_id=3703.

- On August 30, 2005, Zalmay Khalilzad said that “I believe that a final, final draft has not yet been, or the edits have not been, presented yet”.¹³³
- On September 6, 2005, Bahaa al Arajji stated that “The talks have ended. We did not reach any agreement on making changes to the draft. It will be printed in the form it was read to the National Assembly last week.” He said that five million copies were being printed.¹³⁴
- On September 8, 2005, Nicholas Haysom, the director of the United Nations’ Office of Constitutional Support, which had committed to printing and distributing 5 million copies of the constitution, said that the United Nations was not yet prepared to start printing Iraq’s draft constitution. He stated that “We haven’t been given authority to print it. We are helping in printing and distribution [and] we are awaiting a text certified by the National Assembly. We don’t expect that to happen before Sunday.”¹³⁵
- On September 13, 2005, leaders of the TNA said they approved a final, modified version of the new constitution. However, some Committee members said that they were not aware that a draft had been agreed and suggested that more delays could be in store.¹³⁶
- On September 14, 2005, Hussein al-Shahristani said that “Today we accomplished the final amendments of the new constitution and the final version has been presented to the United Nations to print it and to be distributed to the Iraqi people”.¹³⁷
- However, on September 15, 2005, United Nations officials stated that they would wait until the most recent changes were formally presented to the TNA. Nicholas Haysom stated that “We do not want to be exposed to any risk that the text given to us is under dispute”.¹³⁸
- On September 18, 2005, the TNA “signed off” on revisions to the country’s draft constitution. The original draft was not voted on by the TNA, and

¹³³ ‘More changes said likely to Iraq charter’, Bassem Mroue, Associated Press, at http://news.yahoo.com/s/ap/iraq&printer=1;_ylt=AgHVLL2dQrNJ1BbeLiRGINQUewgF;_ylu=X3oDMTA3MXN1bHE0BHNIYwN0bWE-.

¹³⁴ ‘Final Iraq charter talks end, text being printed’, Reuters, September 6, 2005, at http://news.yahoo.com/s/nm/20050906/wl_nm/iraq_constitution_dc_3&printer=1.

¹³⁵ ‘UN holds presses on Iraq constitution’, Reuters, September 8, 2005, at http://news.yahoo.com/s/nm/20050908/wl_nm/iraq_constitution_dc_1&printer=1;_ylt=AvHQfkoHdmKITHiw9CoFMHJn.3QA;_ylu=X3oDMTA3MXN1bHE0BHNIYwN0bWE-.

¹³⁶ ‘80 Killed in Baghdad Blast; Amended Charter Approved,’ Robert F. Worth, The New York Times, September 14, 2005, at <http://www.nytimes.com/2005/09/14/international/middleeast/14iraq.html?ei=5094&en=8c8a7dc919b73025&hp=&ex=1126756800&partner=homepage&pagewanted=print>.

¹³⁷ ‘Iraqi Constitution to be sent to UN’, Associated Press, September 14, 2005, at http://news.yahoo.com/s/ap/20050914/ap_on_re_mi_ea/iraq_constitution_1&printer=1;_ylt=Aj8vD32nDQ5Pa09NpTsobTcUewgF;_ylu=X3oDMTA3MXN1bHE0BHNIYwN0bWE-.

¹³⁸ ‘Draft constitution finished, lawmakers announce’, Ashraf Khalil, Los Angeles Times, September 15, 2005, at <http://www.latimes.com/news/nationworld/iraq/complete/la-fg-constitution15sep15,1,4493583,print.story?coll=la-iraq-complete>.

Hussein al-Shahristani did not call for legislative approval of the amendments.¹³⁹

- On October 13, 2005, an amendment was introduced which related to the distribution of water resources.¹⁴⁰ This is one of the many issues that the OCS was asked to provide advice on.

137. That the TNA was not made to vote on the draft constitution, or to debate its provisions was peculiar considering the extent to which some quarters within Iraq went to ensure that an elected body be responsible for drafting the constitution.¹⁴¹

This was something that a number of TNA members noted, although their complaints had no effect in practice.

138. In addition, and perhaps more importantly, after the constitution had been printed and distributed to Iraqi citizens, several additional changes were made, such that most Iraqis no longer knew what text they were being asked to approve.¹⁴² Indeed, on October 13, 2005, two days before the referendum in which Iraqi voters were to decide whether or not to grant their approval to the constitution, the document was changed in an agreement between several political parties, including the Iraqi Islamic Party. These changes included, amongst others:

- amending article 1 of the constitution, such that it now reads that “the constitution is a guarantee for the united of Iraq” [unofficial translation];
- article 44 in Section Three (relating to rights and liberties) was dropped from the final draft.¹⁴³ Although this was done at the request of the Kurdish negotiators, it has been alleged that the discussion was in fact instigated by US officials;
- amending article 131 so that it now provides that “Merely being a member of the Baath party is not grounds for prosecution and any former member is treated equally before the law and has all protections of the law” [unofficial translation]; and

¹³⁹ ‘Iraqi lawmakers OK amended constitution’, Sameer N. Yacoub, Associated Press, http://news.yahoo.com/s/ap/20050918/ap_on_re_mi_ea/iraq_constitution&printer=1;_ylt=AkWsHZ2G64N.P.HI_vYZkTAUewgF;_ylu=X3oDMTA3MXN1bHEOBHNIYwN0bWE-.

¹⁴⁰ ‘Iraqi MPs approve charter changes’, BBC News, October 13, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4332902.stm.

¹⁴¹ See *supra* at ##-##, and ##-##.

¹⁴² ‘Iraqi MPs approve charter changes’, BBC News, October 13, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4332902.stm.

¹⁴³ The article that was eliminated provided that: “All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution” [unofficial translation].

- including a new article 142, which provides in part that “The house of representatives shall form at the beginning of its work a committee from its member to represent the key components of the Iraqi society. The mission of the committee is to present a report within four months including the recommendations of the necessary amendments to the constitution. The committee will be dissolved after it presents its suggestions” [unofficial translation].

139. The TNA approved such changes on October 13, 2005, and Iraqis went to the polls two days later.¹⁴⁴ The public was informed of the changes through extensive media coverage of the press conference in which the changes were announced, and through an interview with Sheikh Hamoudi that was broadcast on television and on radio.¹⁴⁵

E. The approval of the constitution in the referendum

140. The referendum on the constitution was held on October 15, 2005, although the final results were announced on October 24, 2005. In the end, the constitution was approved by a fairly wide margin, although a large number of Sunni voters appeared to have voted in favor of rejecting it.

141. The Independent Electoral Commission of Iraq (the “IECI”) eventually published a report on the referendum which stated that “the IECI is confident that the referendum process throughout Iraq was conducted in accordance with international standards”. The report also sought to explain the delays in publishing the results, and in which it detailed a number of voting irregularities that arose in the administration of the referendum itself.¹⁴⁶

142. The IECI noted in its report that, amongst other things, a number of irregularities took place in some of Iraq’s northern areas, including in Mosul and Kirkuk, some of which involved the manipulating of ballot boxes. Although the IECI indicated that it was satisfied that these incidents did not affect the final outcome of the referendum, a

¹⁴⁴

Id.

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[REFERENCE].

¹⁴⁶

‘Final Report of the IECI on the Referendum Audit Process’, The Independent Electoral Commission of Iraq, Undated, at <http://www.ieciraq.org/final%20cand/FINAL%20REPORT%20OF%20THE%20IECI%20ON%20THE%20REFERENDUM%20AUDIT%20PROCESS%20English.pdf>.

number of parties within Iraq have questioned this conclusion.¹⁴⁷ These doubts may have long term implications for the future.

143. What was especially striking about the results of the referendum was the manner in which Iraq's various communities retreated to their communities' respective positions. Indeed, as is well known, the Sunni community overwhelmingly rejected the constitution, whereas the Kurdish and Shia communities equally emphatically approved it. This poses a challenge for the future of Iraq.

144. Having said that, one of the last amendments that were introduced to the constitution on October 13, 2005 provided that during the first four months of the next parliament, there will be an opportunity to put forth amendments to the constitution. This opportunity will hopefully be used in order to bring the current text closer towards something that all parties within Iraq can agree upon.

* * *

¹⁴⁷ [REFERENCE].

APPENDIX A

LIST OF ABBREVIATIONS

CCPD	Committee of Communication and Public Dialogue
CPA	Coalition Provisional Authority
CPC	Constitutional Preparatory Committee
IECI	Independent Electoral Commission of Iraq
IGC	Iraqi Governing Council
IIG	Iraqi Interim Government
KRG	Kurdistan Regional Government
OCS	Office of Constitutional Support
ORHA	Office of Reconstruction and Humanitarian Assistance
TAL	Law of Administration for the State of Iraq for the Transitional Period
TNA	Transitional National Assembly
UIA	United Iraqi Alliance
UNAMI	United Nations Assistance Mission to Iraq