

**Final Report on**  
**THE TRANSITION TO DEMOCRACY IN IRAQ**

Final version of the working document of the Conference of the Iraqi Opposition  
as amended by the members of the  
**Democratic Principles Work Group**

November 2002

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## Preamble

Between September 3 and 5, in Cobham, Surrey, UK, a group of thirty-two Iraqis convened for the first meeting of the Democratic Principles Working Group. The working group is part of an initiative of the Department of State of the Government of the United States called the "Future of Iraq" project. At that meeting the membership of the working group broke up into four task forces:

1. Transitional Issues
2. Human Rights and the Rule of Law
3. Civil Society and Democratization
4. Federalism as the basis of a new Iraqi polity

Each task force voted in two of its members to join a Coordinating Committee whose brief was to continue the work pending the next full meeting of the workshop. These eight Coordinators were joined by two Coordinators-at-large to form a ten person Coordinating Committee.<sup>1</sup>

This report was prepared by the Coordinating Committee as a draft, and discussed and amended by the whole working group. It is a work in progress that represents the collective effort of all those individuals in the working group who committed time and effort to contacting their fellow task force members and producing it. The report embodies input from members of the working group, Iraqis outside the working group, and non-Iraqi experts. In putting it together, the Coordinating Committee has avoided naming the authors of the various ideas contained in it. However attached to the report are individual papers received by the Coordinating Committee from members of the

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working group. These are identified by author and do not necessarily reflect the views of other members of the working group.

This report takes as its point of departure the resolutions of the 27-31 October 1992 conference of the Iraqi National Congress (the "INC") held in Salahuddin, northern Iraq (Arbil province). In brief, these called for a democratic and federally structured Iraq based on the principle of the separation of powers, and the principle of the protection of individual human rights and group rights. These 1992 Salahuddin principles were reaffirmed by the group of six Iraqi opposition parties that met with senior representatives of the government of the United States on August 9, 2002. At that August 2002 meeting, the representatives of the Iraqi opposition agreed to hold a large conference of the Iraqi opposition, preceding any American or UN action in Iraq. That conference will need to adopt a detailed program for the transition from dictatorship to democracy in Iraq.

This report is an attempt to fulfill that need. It sets out a roadmap for the transition in Iraq beginning with its legality, the necessary phases it would have to traverse, culminating in a phase in which national elections are held that would vote in both a permanent constitution and a fully legitimate authority. The report concludes with variations on a democratic vision for a future state in Iraq that the members of the Democratic Principles Working Group have collectively decided upon.

The report, therefore, describes alternative policy options within the common framework of a democratic system of government. It is up to the collectivity of the Iraqi opposition to choose between them, or to decide to set up a mechanism for making such choices.

The ideas presented in this report are feasible on the basis of certain assumptions made by us:

- That the government of the United States actually proceeds with its stated policy of democratic change in Iraq;
- That the unseating of Saddam's regime does not take place at the cost of large scale civilian casualties which could introduce considerable volatility and unpredictability into the political situation;
- That this report, or some variation on it, is actually adopted at a genuinely representative conference of the Iraqi opposition;
- That the Government of the United States, as the partner of the Iraqi people in liberating Iraq, itself agrees to support the guiding framework of this report following its adoption by the Iraqi opposition;
- That the international community, including the Government of the United States, by a treaty with a duly constituted Iraqi government, undertakes to guarantee the territorial integrity of Iraq.

Nothing in this report, however, requires of the United Nations or United States to police or manage into existence the new and budding democratic institutions. That is a challenge that the people of Iraq must and will face up to on their own.

A historic opportunity that is as important as anything that has happened in the Middle East since the fall of the Ottoman Empire and the entry of British troops into Iraq in 1917 presents itself. Once the regime of Saddam Hussein is removed from power, Iraq can be remade out of the ashes of decades of brutality, domestic and foreign wars, nightmare weapons, and near total economic collapse. Such an extraordinary event calls for extraordinary measures and procedures. Iraqis abroad, who are in a position to act, are morally obligated to do so and to do so fast. It is in that spirit of great urgency and responsibility, that this report has been put together.

## 1.0 The Legal Basis of a Transitional Authority

### 1.1 The Problem

The July 1958 revolution abrogated the 1925 Constitution, the most legitimate constitution of Iraq because it was adopted after a process of social debate. Since 1958 five “interim” constitutions have been promulgated. All were issued in the wake of the military coups that brought army officers or narrow political parties to power. Short-term considerations of personal or party political self-interest were by and large the shaping force behind each "interim" constitutional initiative. In 1990, a draft of a permanent constitution was for the first time put forward by the Ba'ath Party, but it never underwent ratification because of the August 1990 invasion of Kuwait and its consequences. The last interim constitution, and therefore the one that is in principle still in effect today, was promulgated by the Ba'ath Party in July 1970. It was amended in 1974 to reflect the provisions of the March 11, 1970 accords. And it was "interpreted" in 1977 as follows:

If the people are “the source of authority and its legitimacy,” as is stated by the Iraqi Constitution (article 2), then it is the definition of the concept of the people on which the definition of democracy depends. ...

The people as interpreted by the Revolution and the Leading Party, the Arab Ba'ath Socialist Party, is all the members of the society who enjoy equal rights and equal duties. But in exercising democracy ... it is inevitable to exclude all persons who take a political, economical or intellectual attitude hostile to the Revolution and its programme. The status of such people shall be defined [and] revolutionary political consciousness shall play a decisive role in immunizing public opinion towards them. This being an exceptional case created by the necessity of transforming society.

(Law no.35 of 1977, Legal System Reform, Alwaqai al-iraqiyya 20, no. 37, September 14, 1977: 21)

**1.2** A Transitional Authority, however it is set up, must operate under some governing law, or constitution, if it is to become the vehicle of a new constitutionally based democratic government. An important question facing the Democratic Principles Work Group is what should the governing law contain and be based on. Two principal options present themselves:

1. Accept to work with an amended version of the existing interim constitution of July 1970; or
2. Begin the road to true legitimacy by repudiating the constitutional basis of the old regime.

The Coordinating Committee at its meeting of October 4, 2002, voted for the second option, a process that was accepted by the Democratic Principles Working Group that met on October 10-11, 2002 in Wilton Park, Sussex (the "Wilton Park Meeting").

**1.3** What might the legal basis of a new Transitional Authority be? In considering this question, Iraqis must take into account the frame of mind into which Iraqi politics has descended, namely that of considering all constitutional questions as being "transitional", forever on their way to becoming permanent but never actually getting there. This abuse of power by one regime after another since 1958 has resulted in the practice of "legislation through decree", the tendency to subvert constitutionalism by way of a flurry of proclamations, decrees and laws which ultimately serve the purpose of strengthening autocratic politics.

On an annual basis, approximately 1,500 RCC Resolutions are passed, and they are extremely varied in scope. They range from those amending articles of the Constitution, to those dealing with issues affecting individuals (such as exemption from the payment of particular types of duties). In practice, the more important legislative decisions are made through an RCC Resolution. For example, following the invasion of Kuwait, the RCC passed a number of resolutions addressing the incorporation of Kuwait as the "19th Province of Iraq" (RCC Resolution No. 312 of 1990), amalgamating and absorbing Kuwaiti entities into their Iraqi counterparts and - following the defeat at the hands of the allies in the Gulf War - the nullification and voiding of previous RCC Resolutions relating to Kuwait (RCC Resolution No. 55 of 1991).

Without a fixed timetable for the transition period, culminating in a nation-wide referendum on a draft constitution proposed by the Constituent Assembly (see Section 2) and national elections for a parliament and government, Iraq will fall into the same trap as it has in the past half a century, whereby politicians maintain control of the country by creating a number of crises to delay the next stage of the transition. This happened with respect to the interim constitution of 1958, which envisaged that it will be replaced by a permanent constitution following a national referendum; since a number of crises prohibited the carrying out of a referendum, the interim constitution of 1958 continued to govern until Abdul Karim Qassem was overthrown in February 1963.

*Conclusion: The Coordinating Committee and the Democratic Principles Working Group placed a very high priority on the abolition of "transitionalism" as a practice through the careful design of the new legal framework of the Transitional Authority. Integral to this design is the idea of an absolute set of time limits governing the transition period which cannot be amended by any decree, proclamation, or law issued by the Transitional Authority.*

#### **1.4 Two Alternative Approaches to Constitutionalism in the Transitional Period**

There were two alternative proposed approaches to the constitution that would govern the interim period in Iraq - (i) reliance on an amended version of the Iraqi Constitution

of 1925 or (ii) a newly introduced interim constitution (introduced by a transitional government or coalition that would take place). Below is a discussion of both alternatives, each of which has advantages and disadvantages. In either case, at the Wilton Park Meeting, there were certain key principles raised that should be contained in whichever interim constitutional approach is adopted. These were:

1. There must be strictly adhered to timetables incorporated in the constitution or that govern the transitional authority.<sup>2</sup>
2. There must be a separation of powers during the transitional period. The participants stated that one of the key principles of democracy is the separation of powers, and the checks and balances emanating therefrom. The participants further stated that, since the practices during the transitional period will be key determinants of the ultimate or permanent structure of the state, then the separation of powers must be introduced during the transitional period. The participants stated that, especially in light of the recent history of Iraq, where the executive has subordinated all other powers in the state, without such separation of powers, the transitional government in Iraq might fall into the same trap as previous transitional governments in Iraq.
3. There must be some basic laws relating to matters such as human rights that would govern the rights of the transitional government. See subsections 1.5.3 and 1.6.3 below.

### **1.5 The First Alternative - The Iraqi Constitution of 1925**

This proposal provides that the Iraqi Constitution of 1925 be adopted as the governing law during the transitional period, with certain amendments such as the removal of references to the monarchy. Indeed, this was the approach made by the Bonn Agreement - with the support of the international community - in December 2001 with respect to the transitional constitutional structure in Afghanistan.<sup>3</sup>

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<sup>2</sup> During the discussions, some participants mentioned the need to have flexibility with respect to the timetables and deadlines, because the process of regime change was so uncertain. If a constitutional court were established, it was suggested, such a court should be the only entity able to address any changes in the deadlines.

<sup>3</sup> "The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions", otherwise known as the Bonn Agreement, provided for a constitutional structure to govern the interim period, that is until a permanent constitution is established in Afghanistan. The legal framework laid out in the Bonn Agreement that governed both the Interim Authority (the first six months) and the Transitional Authority (for two years) were to be based on the Constitution of 1964, as amended, repealing any provisions relating to the monarchy and any provisions that are inconsistent with the Bonn Agreement; in addition, all existing laws and regulations were to govern, provided that they are not inconsistent with the Bonn Agreement, with the applicable provisions of the Constitution of Afghanistan of 1964 and with the international obligations of Afghanistan. In certain ways this Afghanistan model is similar to the model used by the government of General Charles de Gaulle after the establishment of his government in Paris in 1944 and the removal of the Vichy Government. During the interim period, General de Gaulle's government relied on the constitution of the Third Republic, making certain amendments to it.

The reasoning behind this proposal is that the Iraqi Constitution of 1925 was adopted after debate and recommendation by the Constituent Assembly, which was established in 1924. The Constituent Assembly was - in a manner of speaking - a representative body, one which represented a relatively broad segment of the Iraqi population. There were criticisms of this argument expressed at the Wilton Park Meeting, namely that the members of the Constituent Assembly were really chosen by the palace, rather than duly elected by the population, and therefore represented the view of the palace more than any other view. The point raised by those who supported the use of the 1925 Constitution is that it was adopted following a broader process of discussion among the population (and, to an extent, representatives of the population at large) than any other subsequent constitution. Moreover it was ratified by the population-at-large, something that was not true of any other Iraqi constitutional initiative.<sup>4</sup>

### 1.5.1 *Amendments to the 1925 Constitution*

Under this alternative, there would need to be amendments made to the Constitution of 1925, in particular to remove all articles relating to the monarchy. The amendments that would need to be made, include:

- The abrogation of Part II (the Prerogatives of the Crown) and references to the King and the Royal Irada (the royal will) throughout the document. The powers of the Crown shall be taken over by the powers of the transitional government or transitional authority, as the case may be;
- A decision should be made as to whether there would be one legislative entity during the transitional period or two. Should the decision be that there would be one legislative entity, then the 1925 Constitution would need to be amended accordingly to reflect only one legislative entity. In addition, Part III shall be amended as appropriate to reflect the above and the number of members agreed upon;
- Section 64, which limits the number of the ministers shall be amended as appropriate to reflect the number of the members of the transitional authority as agreed;
- Certain of the administrative structures should be amended, such as the administrative divisions (reflecting the current 18 administrative divisions of Iraq) and the courts and the judicial system; and
- Section 120 addressing the emergency powers of the King shall be deleted in full.<sup>5</sup>

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<sup>4</sup> There was criticism of the ratification process, namely that a constitution that is ratified through the use of a referendum may not really reflect the wishes of the people at large, especially if the ratification process gives only two alternatives - either vote in favor of a constitution or vote against it. There is no process of commenting or voting in favor of an alternative constitution.

<sup>5</sup> There was no discussion at the Wilton Park Meeting specifically relating to whether any transitional authority or government would have emergency powers. However, there was discussion that the methodology of regime change may have certain exigencies that require emergency powers.

In addition to the amendments above, the 1925 Constitution, which provided for certain protections of human rights, would need to be amended, or rather superseded, to reflect international developments relating to the protection of human rights.

### 1.5.2 *Rights Under the 1925 Constitution*

The rights enumerated in the 1925 Permanent Constitution address the following areas:

- *No discrimination among Iraqis:* Article 6 provides that there shall be no discrimination in the rights of Iraqis. In addition, article 18 provides that "Iraqis shall be equal in status as regards the enjoyment of their rights and the discharge of their obligations. Government appointments shall be bestowed upon them alone, to each one without discrimination, in accordance with his capacity and fitness";
- *No Interference among Iraqis without due process of law:* Article 7 provides that the state shall not violate or interfere with the personal liberty of any Iraqis, and provides that no Iraqis shall be arrested, detained or punished, except in accordance with Iraqi law;
- *No Torture:* Indeed, Article 7 specifically states that "torture and the deportation of Iraqis ... are specifically forbidden";
- *Right to Property and No Unreasonable search and seizure:* Article 8 guarantees that all places of residence are inviolable, and that they may not be entered or searched except in accordance with the manner prescribed by law. This article is in many ways similar to the Fourth Amendment to the U.S. Constitution. In addition, article 20 provides for the safeguarding of all rights of ownership of property. More specifically, it provides that there shall be no expropriation of the property of any Iraqi "except in the public interest, and in such circumstances and in such manner as may be prescribed by law, and on condition that just compensation be paid".<sup>6</sup> Moreover, article 15 provides that all "postal and telegraphic correspondence, and all telephonic communications shall be secret and free from censorship or detention, except in such circumstances and manner as may be prescribed by law"<sup>7</sup>;

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<sup>6</sup> If the 1925 Permanent Constitution is the alternative to be adopted during the interim period, the rights provided for in Article 10 would constrain the rights of the Transitional Government to take the property of any member of the family of Saddam Hussein or those associated with him. The handling of this matter must be carefully reviewed. In addition, if the 1925 Permanent Constitution is to be adopted in the interim period, the rights of those whose property was expropriated by the current Ba'athist regime must be reviewed - otherwise, there may be a large number of claims against the transitional authority.

<sup>7</sup> The issue here is that if the transitional authority shall revoke most laws prescribed by the Ba'athist government, then there would be no ability for the transitional authority to, for example, tap telephones. There could be security ramifications for this and therefore a more moderate law would need to be established, limiting the ability to tap telephones

- *Freedom of expression*: Article 12 provides for the "freedom of expression of opinion, liberty of publication, of meeting together, and of forming and joining associations", but within such limits as may be prescribed by law<sup>8</sup>; and
- *Community rights*: Article 16 provides that the "various communities shall have the right of establishing and maintaining schools for the instruction of their members in their own tongues", although in Article 17, Arabic is stated to be the official language.<sup>9</sup>

### 1.5.3 *Necessary Additions to the 1925 Constitution*

There have been significant developments in the field of international human rights law over the last seventy-five years. In addition, critics of this constitutional alternative for the interim period state that the rights granted to, for example, the Kurds are far behind developments with respect to the rights of the Kurds. (See footnote 9 for a possible amendment to the 1925 Constitution with respect to Kurdish rights).

Accordingly, the provisions of the following international treaties and declarations would hereby be made part of the interim constitution and would replace any contrary provisions in the 1925 Constitution. In addition, the provisions of these treaties would supercede any contrary laws currently in effect. The treaties to be included are: the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide<sup>10</sup>, the 1949 Universal Declaration of Human Rights<sup>11</sup>, the 1949 Geneva Conventions and their Protocols, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the 1951 Convention on the Status of Refugees and its 1966 Protocol, the 1969 International Convention on the Elimination of all Forms of Racial Discrimination<sup>12</sup>, the 1957 International Labor Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations<sup>13</sup>, the 1966 UN Covenant on Civil and

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<sup>8</sup> In this instance, one would need to review the laws prescribed with respect to the freedom of association, which would tend to limit the applicability of Article 12. As a first step, however, the transitional authority must not recognize any such laws.

<sup>9</sup> One critic of this alternative stated that the rights granted the communities, especially the Kurds, may have been progressive in 1925 but are now regressive, especially within the context of current Iraqi constitutional law. Accordingly, one possible amendment that could be made here to the 1925 Constitution is that, with respect to the Kurds, the provisions of the March 11, 1970 Agreement between the Kurds and the central government hereby replace any contrary provisions of the 1925 Constitution.

<sup>10</sup> Iraq ratified, accepted and approved this convention without qualification as of January 1, 1959.

<sup>11</sup> Iraq was one of 48 countries which voted for this declaration.

<sup>12</sup> Iraq ratified, accepted and approved this convention with qualifications as of January 14, 1970.

<sup>13</sup> Iraq ratified, accepted and approved this convention without qualifications as of July 16, 1986.

Political Rights<sup>14</sup>, the 1976 International Covenant on Economic, Social and Cultural Rights<sup>15</sup>, the 1979 International Convention on the Elimination of All forms of Discrimination against Women, the 1984 Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child and the European Union's 2000 Charter of Fundamental Rights<sup>16</sup>.

## **1.6 The Second Alternative - A New Interim Constitution**

In the Wilton Park Meeting, a participant stated that, since there was a proposal to amend the 1925 Constitution, the entity making such amendments or implementing them would have obtained an element of legitimacy or power - or at least would have given itself the legitimacy to make such amendments. Therefore, in light of certain inherent weaknesses of the 1925 Constitution, and the consequent amendments that would need to be made to it, it would be more appropriate to adopt a new interim constitution. Others agreed with the concept that a new interim constitution should be put in place. Accordingly, we lay out below a framework for such interim constitution.

### *1.6.1 The Need for this Interim Constitution to be Interim*

Since the fall of the Iraqi monarchy in July 1958, Iraq has been governed by a series of interim constitutions. The one common factor of these interim constitutions has been their lack of "interim-ness". Indeed, the currently governing constitution of Iraq, the 1970 Interim Constitution, has been governing Iraq for approximately 32 years. This is the strongest argument against another interim constitution whose fate so easily could just repeat the patterns of the past.

But if a new interim constitution is to be the procedure adopted (by the conference of the Iraqi opposition or otherwise), it must, for the reason stated above, be subjected to extremely rigid time limits.<sup>17</sup> And it is questionable if these time limits should be amendable (if they are to be amended then it should be according to a process that is

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<sup>14</sup> Iraq ratified, accepted and approved this convention with qualifications as of January 25, 1971.

<sup>15</sup> Iraq ratified, accepted and approved this convention with qualifications as of January 25, 1971.

<sup>16</sup> Other international treaties or resolutions could include the 1976 European Convention on the Suppression of Terrorism, the 1978 U.N. General Assembly Resolution on Disappeared Persons. Moreover note should be made of UNICEF's work in the area of child rights which is informed by the World Summit for Children (1990), as well as by the World Conference on Education for All (1990), the World Conference on Human Rights (1993), the World Summit for Social Development (1995) and the Fourth World Conference on Women (1995).

<sup>17</sup> Due to the fact that Iraqis may be sensitive to the term "interim constitution" as a result of its abuses since 1958, one proposal would be to label this interim constitution as the "Basic Laws of Iraq", rather than refer to the term constitution in the title.

incorporated into the constitution<sup>18</sup>). In order to ensure that the time limits are met, they should feature prominently in the interim constitution. The reason is that if the time limits are set within the interim constitution, and they clearly state that the constitution would no longer be valid once these time limits expire, then this would be an impetus for the Transitional Authority to start the procedures quickly to establish a permanent constitution.

### 1.6.2 *The Procedures for the Establishment of a Permanent Constitution*

Whatever the governing law during the transitional period, there must be procedures established within that law for the establishment of a permanent constitution. The basis for this is again the need to ensure that the transitional law is indeed transitional, or interim, and does not fall into the trap of being made permanent.

The procedures laid out for the establishment of the permanent constitution should be the following:

- A committee within the constituent assembly of jurists and constitutional experts should be established that begins the process of drafting a permanent constitution.<sup>19</sup>
- This committee must be given certain drafting deadlines, which would follow established procedures. For example, prior to coming up with a first draft or the first drafts of the proposed permanent constitution, a census of sorts would have to be completed under international supervision.<sup>20</sup>
- This committee must consult with as large a group of Iraqis as possible, taking into account the broadest scope of opinion. The point here is to avoid having a referendum establishing a permanent constitution that would essentially provide for a yes/no answer, without making the broadest segment of the population (within the confines of efficiency) feel like they have a say in the process of establishing the permanent constitution.<sup>21</sup>

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<sup>18</sup>One proposal is for the establishment of a constitutional court, which would be the only body that is able to decide whether to extend the time limits imposed by the interim constitution.

<sup>19</sup>Clearly, the election or selection of this committee would be a matter for debate. Yet, it would seem most appropriate that the constituent assembly would select a committee from among its members (which committee would have the right to consult both Iraqi and international legal experts to assist).

<sup>20</sup>Such a census would be crucial in demarcating, for example, the boundaries of the federal states.

<sup>21</sup>In this regard, the committee must establish an office (which would include the funding for the office) to administer its activities and take in comments from the population at large on the constitution and the constitutional process. In addition, the deliberations of this committee must be held in public and must be reported on by the press. Again, broad guidelines with respect to the openness of the process should be included in the interim constitution, leaving the details to a law that would be passed.

- Once the process of debate and consultation is completed (which may include putting to the public drafts of the permanent constitution), the permanent constitution would be put forth to a referendum of the public at large. Should the public at large vote against the draft, then the committee would need to undergo further re-drafting, debate and consultation, and put forth a new draft permanent constitution until such time as it is adopted by the majority of the population, or a larger requisite percentage.<sup>22</sup>

### 1.6.3 *Certain Key Legal Provisions of the Transition*

*1.6.3.1 Respect for human rights and the rights of individuals and communities.* A key principal of any interim law must be that there be certain inviolable rights that all Iraqi citizens, regardless of race, creed or sex, have and that the transitional government must respect. These key principals must take effect the day after the fall of the Ba'athist regime, and they must be binding on any transitional authority (whatever form it takes place). They cannot be amended by the transitional government or during the transitional period without a referendum - that is, the whole point is to make them very difficult to amend. In addition, in an effort to enshrine these rights at an early stage, it is proposed that no immunity for government officials would be granted for transgressions of these key rights.<sup>23</sup> These principals should include:

- The right to life (including freedom from political and extrajudicial killing);
- The right to protection under, and due process and equality before, the law;
- Freedom of religion, conscience and thought;
- Freedom of speech, opinion and expression;
- Freedom of peaceful assembly and association;
- Freedom of movement within the country, foreign travel, emigration and repatriation;
- The right of ownership of private property;

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<sup>22</sup>The question of whether the approval of the permanent constitution must be made by a majority of the population who can vote, or a percentage larger than a majority, must be included in the interim constitution.

<sup>23</sup>In a number of constitutions, the right of immunity is granted to government officials in connection with carrying out their duties. By eliminating these rights in the interim period, one would enshrine the need to protect these rights by demonstrating to all government employees that they would be punished for transgressions of these basic human rights.

- The innocence of defendants until proven guilty and the right to obtain legal counsel at the expense of the state<sup>24</sup>;
- Illegality of torture and other cruel or inhuman treatment or punishment;
- Illegality of arbitrary arrest, detention or exile;
- No arbitrary interference with privacy of individuals;
- Protection against discrimination based on race, religion, political or other opinion, national origin or language.

*1.6.3.2 The Administrative Divisions during the Interim Period.* Iraq is currently divided into eighteen governorates. Although these governorates were established during the Ba'athist period, and therefore it may be argued that they have an element of illegitimacy, the proposal would be to leave them as is under any interim constitution. The reason for this is that, due to the issue of federalism, redistricting Iraq during the interim or transitional period would by its very nature be difficult; in addition, as federalism is - to an extent - a highly debated issue (that is, a politically charged one), attempting to change Iraqi administrative divisions along particular lines (ethnic or administrative) during the transitional period would be destabilizing and would, due to the lack of a popular referendum on the matter, be illegitimate (or at least imposed).

*1.6.3.3 The Independence of the Judiciary.* It is vitally important that, as a check on the powers of the executive, the judiciary be made independent as early on as possible during the interim period.

*1.6.3.4 Transitional Justice Mechanisms:* The bases of the transitional justice mechanisms to be proposed (discussed in Section 3.0) must be included in any interim legal system to demonstrate their importance and to ensure that they are carried out immediately by any transitional government.<sup>25</sup> By placing them in the interim constitution, it would place an obligation on the transitional authorities to implement these transitional justice mechanisms.

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<sup>24</sup>This issue is extremely important in the context of transitional justice, which is discussed in Section 3. It is vitally important for the international legitimacy of the new state that there be no presumption of guilt (or the collective guilt) of members of the Ba'athist regime, otherwise there would be criticism of "kangaroo-courtism".

<sup>25</sup>This principle - that is, of introducing a transitional justice mechanism in an interim constitution - was used in South Africa in 1993 in the Interim South African Constitution.

## 2.0 Phases of Transitional Government

### 2.1 The Problem

2.1.1 The practice of politics in Iraq has been dead for 35 years. There are no political parties other than the Ba'ath Party<sup>26</sup>, and membership of any unapproved party is a crime. Dissent, whether public or private, is a crime; criticism of Saddam Hussein is a capital crime. Consequently, despite universal antagonism to the regime, there are no organized opposition parties operating inside the country worthy of the name, and no individual dissidents inside the country with a public profile, such as arose in some communist countries of Central Europe in the 1980s. Opposition, in Arab Iraq at least (excluding northern Iraq), is a state of mind or a conspiracy; it is not an organized public activity. Therein lies a great danger for the future of civil society in Iraq.

Within the existing state structure, there are no political figures, only functionaries. Unlike communist politburos in Central Europe and the latter days of the Soviet Union, the Ba'ath Party Regional Command<sup>27</sup> is a paper cutout with no content. The Ba'ath Party merely serves propaganda purposes, and no member in it has any stature in the country or independent will. Meanwhile, the Revolutionary Command Council (the "RCC"), virtually a replica of the Ba'ath Party Regional Command, is a rubber stamp body for Saddam Hussein.

*As a result, there are no recognized domestic political institutions, groups or individuals that can step forward, invoke national legitimacy and assume power. A political vacuum will arise during the period of disintegration and following the downfall of the regime. Many groups and individuals will eventually emerge and compete for power, but this will only happen gradually, as the environment becomes safe for public participation.*

On the administrative level, on the other hand, Iraq's civilian agencies employ a large class of competent professionals and technocrats, including doctors, engineers, educators, civil servants and others, who have maintained some distance from the regime and provided service to the community. Once safety is established, they will be the first to step forward to assist in providing essential services, and should be the

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<sup>26</sup> There are a number of front parties for the Ba'ath Party that do not have any real following.

<sup>27</sup> In theory, the Ba'ath Party governs Iraq. The highest body is the Ba'ath Party National Command, which includes members from different Arab countries. Below that is the Ba'ath Party Regional Command (for the region of Iraq), which contains the leadership of the Ba'ath Party inside Iraq, and nominates the members of the Revolutionary Command Council, being the highest entity pursuant to the Iraqi Constitution of 1970.

primary recourse for the management of civilian affairs and the apparatus of civil service.

Nevertheless, a temporary problem may still arise. The civilian agencies are governed by political appointees loyal to the regime rather than by these professionals, and as the structure of the state disintegrates, senior officials, including government ministers, heads of agencies, provincial governors, security officials, police chiefs, and others responsible for issuing orders and running the engine of state, can be expected not report to work. Some may be killed, others will flee and yet others will stay home and wait for an environment of safety to be established. The chain of command in the government departments and agencies will be broken, creating temporary but serious administrative paralysis. Cities and towns will be left without a civil administration, leading to disruption of law and order, the food distribution systems and emergency health care. Because of the high likelihood of a political vacuum and the possible administrative vacuum in the period immediately preceding and following the fall of the regime, other strategies must be devised to fill these needs quickly.

*The Iraqi armed forces are often cited as a national institution that has an organizational and command structure, and can therefore replace the regime of Saddam Hussein. This argument is without merit. Most senior military officers are heavily compromised by their association with the regime of Saddam Hussein, and the military establishment itself requires thorough reform and de-politicizing; it cannot and should not be trusted with national politics. See Section 5.0 of this report.*

Should U.S. and allied military intervention lead to the collapse of Saddam Hussein's regime, we can assume that foreign troops, possibly assisted by émigré Iraqis, will play a role in maintaining security and providing critical humanitarian response in the initial phases.

*It is therefore paramount that many thousands of Iraqis, currently in exile, begin training for law and order duties to be undertaken jointly with US troops in the immediate aftermath of a change in regime.<sup>28</sup>*

2.1.2 An alternative view is that there will not be a collapse of the structure of authority in Iraq after regime change. The Iraqi army can have an important role to play in the process of change and in maintaining peace and security after the change. The various ministries, which have competent professionals, can continue their uninterrupted operation. Therefore, the primary responsibility for maintaining the political and administrative integrity of the state should be entrusted to those now inside Iraq. Furthermore, it is contended by the upholders of this view, that some of the opposition

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<sup>28</sup> An opposite view holds that the training of Iraqis currently in exile for law and order duties merely adds another militia group to the already large number of militias in Iraq, and that a new militia will serve only as an appendage to one of the existing political organizations. This view holds that it would be preferable to reform the existing army and police force to undertake the duties of law and order. Furthermore, we cannot assume that the US will act alone, without the involvement of a coalition or of the U.N.

parties have contacts within the military and security sectors inside Iraq, and can identify the most capable of these to work alongside those external groups.

## **2.2 Forming a Transitional Authority**

2.2.1 Within Iraq, only Iraqi Kurdistan, with its two regional governments in Arbil and Suleimaniya, is equipped to respond to the needs of the situation. In the rest of the country, no such possibility can arise in the short term without the help of an external agency. However unsatisfactory the options, a solution to this problem has to be sought in the pre-transition period, by and among Iraqis who have the freedom to operate outside the control of Saddam Hussein's regime.

To prevent disarray and a repeat of 1991, a temporary Iraqi authority of some sort (henceforth referred to as the Transitional Authority) must be on the ground and capable of operating as soon as the regime begins to disintegrate. Preparations for this eventuality must be made in advance, before the fall of the regime.

The Transitional Authority must represent Iraq's national unity, and reflect fairly the multiple social and political constituencies of Iraq. Inclusiveness should not be limited to unproven political parties; it also requires the participation of a diversity of social groups in the shape of prominent individuals from those groups who reflect the interests of civil society in Iraq. The Transitional Authority must strike a balance that accords due recognition to groups but checks their competing ambitions. If the Transitional Authority fails to be inclusive or to provide adequate checks and balances, the Iraqi national project will fail, and the integrity of Iraq will be endangered. In addition, the Transitional Authority must be seen by all Iraqis as a modernizing national project geared towards a complete opening up and transformation of the country. To that end, the composition of the Transitional Authority should aim for professionalism and individual capability, and not political or sectarian and confessional representation.

The expatriate Iraqi community comprises three million people, and an additional four million or so people live in Iraqi Kurdistan. This seven million strong community of Iraqis is the logical and presently available pool of resources for creating a Transitional Authority for change in Iraq. These are the human resources for fulfilling the immediate law and order and administrative tasks required for the period of transition. Out of this community has emerged an Iraqi opposition with professional qualifications and leadership capabilities. It thinks differently than its counterparts in the rest of the Arab world and it is the first opposition inside an Arab or Muslim country to work so closely with Western powers. Given the repression under the Ba'ath regime, it is impossible to quantify the numerical support enjoyed by any group or individual inside Iraq. Nevertheless, by its size and its social and political diversity, the broad conglomerate of groups we call the Iraqi opposition can convincingly claim to be a true reflection of Iraqi pluralism.

*Therefore, the nucleus of the Transitional Authority should be constituted from this Iraqi opposition outside Iraq, through a mechanism of broad participation and representation, and a structure that is capable of expansion within Iraq.*

2.2.2 A different opinion on the formation of the Transitional Authority states that the manner in which regime change occurs will determine the nature, size, duration and responsibilities of the transitional authority. Consequently, this view holds, we should only present general ideas regarding the transition, and not enter into the kind of specifics that this report proposes. The principle of power sharing among the existing parties and political and social forces, based on religious and ethnic percentages of doubtful validity, should be confirmed according to this point of view, not rejected. Any conference of Iraqis that selects a transitional authority, this view maintains, must be held on Iraqi territory directly preceding the process of regime change, and it must include forces that will participate in the change.

The conference can recommend to the transitional authority that it take weapons away from armed elements; declare an amnesty to those who participate in the change; reorganize the armed forces and security organizations; negotiate with the UN and the international community regarding Iraq's debt and reconstruction needs; form advisory councils of tribal leaders, senior clerics, retired military officers, judges, professionals and academics; form a supreme court that will create judicial committees to review existing laws, and address transitional justice issues.<sup>29</sup>

### **2.3 The Conference of the Iraqi Opposition**

*2.3.1 The conference of the Iraqi opposition (the Conference), due to take place in the autumn of 2002, offers an exceptional opportunity for forming the Transitional Authority. To that end, the conference should be large and diverse, including a broad range of groups and individuals, and as reflective of Iraqi society as practically possible. A large meeting has greater representative value and is better able to confer credibility on the Authority and give it a provisional and conditional mandate.*

The issue of the legitimacy of a Transitional Authority elected by a conference of Iraqis operating outside Iraq, needs to be addressed. The Iraqi opposition is no less legitimate than the regime of Saddam Hussein. In fact it is no less legitimate than any Iraqi regime that followed the 1958 military coup. In 1968, a small Ba'ath Party came to power on the shoulders of an equally small group of army officers in a military coup that seized power by force, not through the ballot box. The regime established in 1968 has endured for nearly 35 years not through the freely expressed national will of the Iraqi people, but through fear and repression. The country does not have a permanent constitution, and is run by a self-appointed RCC. The Ba'ath regime is not legitimate, and it can be argued that there has been no real legitimacy in Iraq since 1958.

With its multiple voices, the opposition speaks for many Iraqi constituencies, rather than for one group. The opposition shares in the suffering of the rest of the Iraqi people. It is

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<sup>29</sup> Yet a third view on the transitional authority proposes that it be formed inside not outside Iraq after the change of regime, in consultation between leading opposition groups and the forces of the international coalition. See Sections 2.10 and 2.11 for summaries of other opinions.

a far truer reflection of the condition of the Iraqi people than the regime can ever claim to be. The election of a Transitional Authority by this diverse group of Iraqis, albeit in exile, is a powerful symbolic act of participation and empowerment that is denied to Iraqis under the regime's rule. It would set a good political precedent.

The Iraqi opposition has already begun writing an alternative Iraqi history. The October 1992 conference of the INC in Salahuddin is an example. That conference, which had nearly 400 participants, covered the gamut of Iraq's social and political mosaic, and Iraqis saw it as truly representative. The political principles it adopted remain the most widely accepted political statement among Iraqis. Ten years later, the INC meeting and its declared principles have preserved their landmark status among Iraqis. The Kurdish elections of 1992 and the setting up of Kurdish regional administrations are another example of a landmark achievement of Iraqis freed from the control of the Ba'athist regime. Through actions, statements and publications, in other words, Iraqis in exile have created an alternative Iraqi political reality.

*Nonetheless, a Transitional Authority formed out of a Conference of the Iraqi opposition in exile should be clearly and unambiguously transitional. Its foremost responsibility is to pave the way for its own demise and the rise of legitimate government in Iraq within a specified timetable. Its legitimacy is extraordinary and temporary.*

2.3.2 We propose thinking about the building of a Transitional Authority as a two-phase process. The first phase will be the formation of a nucleus transition structure outside Iraq. The second phase will take place inside Iraq, with the expansion of the nucleus structure and the formal constitution of the Transitional Authority.

***Phase One:***

This phase involves the formation of a nucleus authority, emerging from the Conference of the Iraqi opposition and prior to the collapse of the Ba'ath regime, which will be instrumental in establishing order during the process of change and in the immediate aftermath. This nucleus authority will organize all aspects of the Iraqi contribution to the proposed U.S. and allied military intervention in Iraq.

Procedurally this nucleus authority should start from the election of a National Assembly of the Iraqi Opposition from the floor of the conference. The size of this assembly might be, let us say for the sake of argument, one hundred people. From this assembly, an executive should be elected.

*The Transitional Authority would then be defined as being made up of these two separate branches: a National Assembly of the Iraqi Opposition, and an Executive Council. It will also be composed of a Judicial Task Force as described in Section 6.0. Each branch of the Transitional Authority will be responsible for different tasks to be defined in this report, and subject to a system of checks and balances.*

The whole of this nucleus Transitional Authority must satisfy a number of conditions:

1. It must arise out of a large and representative body of Iraqis convened at the Conference;
2. It must be visibly inclusive of both the social and the political pluralism of Iraq;
3. It must pledge in advance to expand its executive, judicial and legislative bodies by adding people inside Iraq, and agree on a mechanism for expansion;
4. It must adopt the basic laws set out in Section 1.6.3 of this report, and it must adopt a set of internal guidelines governing its conduct. These basic laws will only be superceded by a permanent constitution at the end of the transitional period;
5. It must appoint professionals and experts to head specialized task forces of the Transitional Authority (as laid out in Sections 4, 5, 6 and 7 of this report);
6. It must set a time limit on its mandate of a period not less than 24 months and not more than 36 months<sup>30</sup>;
7. The Executive Council, the National Assembly, and the Judicial Task Force must have clearly separate responsibilities and powers that are defined later;
8. The Executive Council (eventually to become the Transitional Government inside Iraqi territory) will present quarterly reports on its activities to the National Assembly, and submit such oral or written reports at other times as may be requested by a simple majority of the Assembly;
9. The Executive Council must develop a plan of action that addresses the emergencies and needs of the transition period;
10. All members of both branches of the Transitional Authority must be absolutely committed to moving into Iraq as soon as the opportunity arises;
11. The Transitional Authority in both its branches must guarantee in advance the absolute right of free entry and free operation of international human rights monitors, whether UN appointed or international Non-Governmental Organizations, such as Human Rights Watch and Amnesty International, and encourage the formation of local independent, non-governmental, watchdog groups;
12. A legal mechanism has to be established within the judicial system, through the agency of a Human Rights Commission (see Section 2.7.1 and 4.2.4), to receive

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<sup>30</sup>One view holds that Iraq has conducted a census every ten years, and therefore has the basics for conducting elections within 18 months, and therefore moving to permanent status in less than two years.

and adjudicate complaints and grant redress. (In the case of Russia, an office of Ombudsman was created after the fall of the Soviet regime. However, it could only compile a record and speak out: it had a moral voice only, and no authority to take action that could lead to redress of grievances.) In Iraq, the Human Rights Commission should be given power to put cases of abuse before the provisional Constitutional Court and other channels of the legal system. See Section 4.0 of this report.<sup>31</sup>

This Transitional Authority must be expected to assume responsibility for the country simultaneously with the erosion of the Ba'ath regime in liberated areas of Iraq. To that end, the Conference must empower it to create an operating structure, acquire staff, and train personnel in a number of disciplines. The institutions of the Transitional Authority should freely seek the assistance of other governments, experts and the international community in its own capacity-building efforts, and in the enterprise of rebuilding Iraq and establishing democratic institutions and practices.

## **2.4 Establishing a Constituent Assembly and Transitional Government**

### ***Phase Two***

*Phase Two will unfold within Iraq. The National Assembly and the Executive Council of the Transitional Authority will now become the Constituent Assembly and the Transitional Government. Both branches of the Transitional Authority will expand by adding individuals inside Iraq. An independent judiciary will begin to be formed as the third pillar of the Transitional Authority in accordance with the procedures laid out in Section 6.0.*

2.4.1 The second phase of the Transitional Authority follows immediately upon the fall of the outgoing regime and ends with the promulgation of a permanent constitution and the convening of national elections.

Phase Two begins with a reconvening of the National Assembly of the Iraqi Opposition in Baghdad in the form now of a Constituent Assembly made up of twice the number of seats that were in the original nucleus of the National Assembly of the Iraqi Opposition. Fifty percent of these seats are to be filled right away by the members of the National Assembly of the Iraqi Opposition who were voted in by the Conference of the Iraqi Opposition.

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<sup>31</sup> There are proposals to ban selected members of the Transitional Authority from future public office for a period of time. These proposals range from a ban for one electoral cycle to a ban for a finite number of years. While this idea helps prevent the members of the Transitional Authority from becoming permanent fixtures thus opening the way for others, it has several disadvantages. First, it will encourage the Transitional Authority to put off the transfer of power to a legitimate government. Second, it will discourage committed and capable people from joining the Transitional Authority, and prompt them to wait for the next round.

The remaining fifty percent of the seats of the Constituent Assembly will remain unfilled at the outset, pending either the holding of local elections that could be used as a vehicle to fill these seats, or the establishment of “co-optation criteria” for the selection of notable Iraqis based inside Iraq.

One view holds that it is up to the Transitional Government, or Executive, to make a recommendation to the National Assembly with regard to the remaining unfilled seats in the Constituent Assembly. Another view proposes that the Assembly itself must establish the criteria for expansion and selection of its new members to prevent the Executive from controlling the Assembly. A third view holds that a Constituent Assembly must be elected, and that its members, however nominated, should not promulgate a constitution. The primary function of the original National Assembly formed outside Iraq is to prepare the ground for the election of a Constituent Assembly that would approve a permanent constitution.

#### *2.4.2 Local Elections*

The holding of local elections within a period of not more than 12 months from the fall of the regime has many advantages. It will create genuinely representative local administrative authorities whose presence will complement the role of the Transitional Authority. It will introduce politics at the grassroots level and provide a trial run for the national elections which follow at the end of the transitional period. And it will help expand the nucleus of potential political leaders in Iraq to encompass senior civil servants, professionals, and technocrats who are not tainted by their past.<sup>32</sup>

Countries in transition that have aimed for national elections as a first step (Bosnia for example) have bogged down and generally handed over power to avatars of the old regime. By contrast, Kosovo and East Timor began with local elections, with a far better result of bringing forward new talents and capabilities, and giving people a sense of empowerment. Local elections at the level of Qadha' could be held within 12 months of the transition, to elect regional officials and administrators, including Qai'm-maqams, the senior executives of the Qadha's, district (nahiya) senior executives, mayors and other local officials as may be determined. The Transitional Authority should set aside funds for these local elections, and Iraqi election officials must be trained by international organizations, who should participate in monitoring these elections.<sup>33</sup>

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<sup>32</sup> There was an objection that such an experiment would not succeed in Iraq, and that it is inconceivable to adopt a "from the ground up" process by holding elections for regional administrative officials before the election of a national parliament. According to this view, this would confer greater legitimacy and authority on the local elected officials than the Transitional Authority would enjoy. The first elections should be for the national parliament, followed by elections for municipal councils. Local administrative officials should not be elected but appointed.

<sup>33</sup> Local elections in the transitional period are for local administrations, not local legislatures. Elected administrators can only issue administrative orders.

2.4.3 Upon convening in Baghdad, the Constituent Assembly must begin expanding in two directions. First, it will need to appoint legal experts and professionals in various fields. Second, it will need to establish a mechanism, either of co-optation or through local elections, whereby it can fill its unoccupied seats. In its final form, therefore, a Constituent Assembly, say of two hundred people, will be composed in equal parts of Iraqi expatriates who have moved back to Iraq, and Iraqis who have remained in Iraq and can contribute expertise to the legislative process. Both the Assembly, and the Executive, must be able to independently consult non-Iraqi scholars and experts.

*The expansion of the Constituent Assembly of the Transitional Authority, however it is arrived at, should be complete within the first 12 months of the transition.*

Through this expansion, it is important to retain the national unity character of the Constituent Assembly, and to include as members of the executive and legislative bodies Iraqis who come from different social and regional backgrounds and bring different experiences and expertise. The Transitional Authority should not implicitly or explicitly adopt the practice of proportional representation based on ethnicity or religion in national agencies, and resist proportional allocation of positions to traditional political affiliations. Political allocations are validated after the formation of political parties within Iraq and only after the first national elections are held. The bias should tilt rather toward introducing professionalism and fresh energies in the transitional period, and building a new political environment that is consistent with the needs of Iraq rather than with the tired old ideologies of the past.

## **2.5 Tasks of the Constituent Assembly**

The primary function of the Constituent Assembly is to develop, discuss and approve a permanent constitution for Iraq. Prior to the end of its fixed term (be that 24 or 36 months), the constituent assembly must have ready a draft of the constitution and a draft of an electoral law to present to the nation in a national referendum. See Section 4.1 of this report.

But the Constituent Assembly should address other important national questions. It should, for instance be responsible for:

1. *Drafting an electoral law.*
2. *Establishing a Truth and Reconciliation Commission.* A history of truth telling and reconciliation has accumulated over the past 14 years from the experiences of countries emerging from dictatorships and internal conflict. These experiences were based on the expectation that if survivors found out the truth, and if perpetrators confessed to wrongdoing, national reconciliation between victim and violator would be that much easier. The preference has been for acknowledgement and compensation rather than punishment and a settling of accounts. Truth and Reconciliation experiences have varied enormously from

one country to another, and have had mixed results. Given the huge number of victims in Iraq and the large number of oppressors, and the impossibility in many cases of distinguishing the one from the other, the Constituent Assembly should deal with this legacy by way of establishing a Truth and Reconciliation Commission in Iraq (See Section 3.5). Such a commission would also have to make a recommendation on the subject of amnesty as a way of recognizing and healing the wounds of victims.

3. *Consideration of the proposed amnesty laws.* The issue of amnesty is a sensitive issue, because it is likely to raise a heated national debate on the rights of victims, fairness, limitations, and the extent and nature of individual responsibility under the old regime. An amnesty law may be complemented by lustrations laws that restrict participation in elected or appointed institutions of government. However the amnesty law is crafted, it will be an essential element in promoting stability and returning the country to normal conditions.<sup>34</sup> For more information on the proposed amnesty laws and other transitional justice issues, see Section 3.0.
4. *Drafting a new nationalities law.*
5. *Ensuring the repatriation of Iraqis and internally displaced persons.*
6. *Drafting and overiewing new referendum laws.*
7. *Establishment of a committee on community relations,* to promote inter-community dialogue, peaceful resolution of differences, and toleration
8. *Preparation for a national census.* The issue of a census prior to national elections will be a difficult problem. Because of massive population displacements over the past decades, and particularly the displacement caused by the Arabization campaigns and the campaign in the marshes in the 1990s, many communities now live in exile or in locations which are not their traditional homes. The 1997 census carried out by the Ba'ath regime is a poor indicator of people's normal home districts. The census of 1987 is outdated because of population growth, and attrition through emigration and forced population transfers. However, the 1987 census, updated as needed, may be a more reliable guideline. In all cases, the internal deportations and population displacements that took place in Iraq after 1991 must be accounted for in new national elections. A further complicating factor is the likely influx of Iraqis returning home from countries of exile. Iran and Jordan together have over a million Iraqi exiles, many of whom will probably return to Iraq once there is confidence over

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<sup>34</sup> An alternative proposal to issuing an amnesty law during the transition period is to defer the question of amnesty until a constitutional government is formed, and instead issue a moratorium on prosecutions during the transition period. This can be considered, but it has a number of drawbacks. In any event, even if a moratorium is declared for lesser officials, prosecution of the top officials should proceed during the transition period.

security. Ascertaining their domicile and property rights and including them in a census will be an important task for the Constituent Assembly.

9. *A Constitutional Commission to consider the detailed working out of a federal system of government and a bill of rights.* This commission will take charge of all matters related to preparing a draft constitution of Iraq to be submitted to the Constituent Assembly for discussion and a vote, and then to the country at large. It is recommended that this Constitutional Commission work closely with, or perhaps even take charge of, the Committee preparing the census of Iraq (item 8 above).

## **2.6 The Transitional Government**

*2.6.1 The Executive will become the Transitional Government the moment it is able to convene inside Iraq. Upon becoming the Transitional Government, it will expand by nominating individuals of professional excellence and merit, and confirming their appointment by a two-thirds majority of its members.<sup>35</sup> Aside from such an expansion, in the interest of continuity and the maintenance of law and order, the composition of the Transitional Government should remain unchanged during Phase Two.<sup>36</sup> The role of the Transitional Government is that of maintaining peace and security, protecting national and religious communities, establishing new institutions of democracy, reforming law and order institutions (Section 6.0), reforming the army (Section 5.0), resource management, provision of human services, and administration of government agencies. In general upon the shoulders of the Executive, during the transition period only, will fall all other tasks not identified in 2.5.*

During the process of change and in the period following such change, there will be widespread fear of the breakdown of law and order, former officials will fear random reprisals and acts of revenge, there will be widespread fear of communal conflict, and the population at large will be afraid of what the future holds for Iraq. It will be the first responsibility of the Transitional Government to establish an environment of personal safety, trust, and confidence in the future.

Once Iraqi towns and regions are liberated, the Transitional Government must also be ready to step in to restore administrative functions. Excluding officials who have fled or are implicated in criminal activities, the Transitional Government must be able to work with the existing civil service, service providers and civic groups in each liberated region, and implement the de-Ba'athification program discussed in Section 4.4. It should actively encourage the return of government employees to their jobs and provide

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<sup>35</sup> An alternative proposal would make the appointment of new members of the Executive Council subject to approval and confirmation by the General Assembly.

<sup>36</sup> Another suggestion is to give the General Assembly the right to dissolve, enlarge, or introduce changes in the composition of the Transitional Government, in order to adapt to changing circumstances.

assurances of safety. The Transitional Government in liberated Iraq should be vigilant to prevent acts of reprisal, vandalism, and corruption. Over the next months, as the security situation in Iraq begins to settle and confidence is established, new political leaders will emerge within the country. These will include technocrats, professionals, academics, local and regional dignitaries, and others. The Transitional Government should progressively encourage and seek out the emergence of such potential leaders and find ways of involving them in the emerging new institutions of the country.

The huge task of reconstructing Iraq physically, socially and politically will require the mobilization and training of a wide cadre of professionals who can occupy positions of responsibility and ensure that the systems of government function smoothly in the early days and weeks of transition. In the pre-transition period and during the transitional period, a large body of Iraqis will need training in policing, law enforcement, legal procedure, the administration of justice, and humanitarian critical response in several areas. The Transitional Government must seek training from the relevant institutions of democratic nations, and in the pre-transition period the conference of the Iraqi opposition should empower the emerging executive to request and obtain such training.

#### *2.6.2 Tasks of the Transitional Government*

1. In connection with the transitional justice program discussed in Section 3 below, arresting indicted leaders of the old regime pursuant to judicial deliberations and in preparation for legal prosecution;
2. Establishing the rule of law and an environment of personal and public safety and the prevention of private acts of revenge;
3. Attending to urgent civilian and humanitarian needs, including access to food, health services, schooling, refugee and displaced person needs;
4. De-Ba'athification of the institutions of government and restoration of the smooth functioning of the civil service as per Sections 3.7 and 4.3 below<sup>37</sup>;
5. Reforming and rebuilding the armed forces and the civilian law enforcement bodies (Sections 5.0 and 6.0 below);
6. Negotiating with the international community and third parties to relieve Iraq of the financial burdens and encumbrances imposed on it by the regime of Saddam Hussein;
7. Promotion of civil society institutions and protection of rights (see section 2.7 below);
8. Repairing Iraq's economic infrastructure, including the oil industry sector; and

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<sup>37</sup> There have been objections to the notion of de-Ba'athification and the use of the term. These objections have not focused on the terms of a de-Ba'athification program, but rather on these use of the term because it would imply an attack on the ideals from which the Ba'ath Party emerged, as well as possibly on the misperception that all members of the Ba'ath Party, whether past or present, would be subject to the program.

9. Preparing for a national referendum on the draft constitution and for national elections with international monitoring.

## **2.7 Promoting Democracy**

2.7.1 As a guarantee of the rights of citizens, the Transitional Government must establish the office of a “Human Rights Commission, “ or ombudsman, to receive complaints from citizens and refer them to the court system for adjudication (See Section 4.2 below). The Transitional Government must also permit the entry and free operation of international human rights monitors and encourage the formation of local independent, non-governmental, watchdog groups.

2.7.2 To promote democratization, the Transitional Government should set up a Democracy Fund, governed and administered independently of the Transitional Government, to provide seed funding for civil society organizations.

2.7.3 The transitional authority must encourage political expression and participation, including especially the participation of women, through free press and independent media and communication vehicles. Political parties, trade unions, special interest groups, and independent non-governmental organizations and associations should be formed freely, without the need for approval from government authorities. The right of peaceful advocacy and dissent, whether by groups or individuals, must be respected.

2.7.4 The Iraqi system of education and school curricula must be reformed, and education in the principles, practices and universal development of democracy must be incorporated in school curricula. See Section 4.4 below.

## **2.8 Provisional Constitutional Court/ Court of Review**

As part of an independent judiciary, the Transitional Government must establish a court of judicial review to:

1. ensure that the laws and actions of the Constituent Assembly and the Transitional Government do not violate the basic laws and the bill of rights discussed in Section 1 above;
2. adjudicate between the Constituent Assembly and the Transitional Government in cases of difference; and
3. hear cases of human rights violations referred to it by the Human Rights Commission. ( See also Section 7.0 below.)

## **2.9 An Alternative Opinion on Transition** (See Appendix)

An alternative opinion on transition was proposed premised on the idea that there may not be a broad-based meeting of the opposition in light of differences among the group of six Iraqi opposition parties that met with the U.S. government on August 9, 2002. In addition, in light of these differences, this opinion holds that even if there was a broad-based meeting of the opposition, they may not agree on a leadership council to lead the opposition. Accordingly, this opinion holds that the most effective way to proceed is for the U.S. government to invite each of the six Iraqi opposition parties, along with a number of other representatives of the Iraqi opposition, to a meeting held under the auspices of the U.S. government. The purpose of this meeting, which is to be composed of approximately 30 Iraqis, would be to approve the more detailed vision of the future Iraqi state and to be transformed into an opposition front, whose task will end upon the change of government.

Another premise of this opinion is that there may be exigencies, such as the taking place of a coup d'etat by a group of military officers either during or immediately before any military operations commenced by the U.S., that may create different regime change scenarios and accordingly these should not be ignored. However, in the event that a U.S. led military campaign takes place - either as part of a limited coalition or a coalition based on a resolution of the United Nations Security Council - then this opinion holds that the opposition front discussed in the above paragraph would participate in the choice of a transitional government composed of technocrats; the key positions of prime minister, minister of defense, minister of foreign affairs and interior minister would however be political appointments.<sup>38</sup> The legislative authority would be composed of (i) a council of five respected individuals that would broadly represent the main communities in Iraq, (ii) the prime minister, minister of defense, minister of foreign affairs and the interior minister and (iii) the chief of staff of the armed forces or another senior officer. This legislative authority would pass laws relating to elections, the implementation of a census and the drafting of a permanent constitution.

## **2.10 A Second Alternative Opinion on Transition** (See Appendix)

Another opinion on the transition states that the Iraqi opposition in exile offers a pool of resources, but it cannot, in its present shape, form a transitional authority and provide a credible leadership. Most expatriate Iraqis do not support the opposition political parties, which are deemed bogus and self-serving. The history of political opposition parties in exile, including the INC according to this point of view, does not inspire trust and confidence.

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<sup>38</sup>There is an objection that the Transitional Government cannot be composed of technocrats, because the country will need a government that can control the situation and requires ministers with influence, who are respected and known for their political and professional capabilities.

Therefore, the conference to be held by the Iraqi opposition in the fall of 2002 should have only a limited role in forming the Transitional Authority. It should only create the nucleus for a political assembly, to be expanded inside Iraq. The legitimacy of such a conference is derived from the participation of political parties; their legitimacy as representatives of organized political groups cannot be questioned.

The Transitional Authority should have a diffuse power structure, and receive endorsement from the main Iraqi groups and notables, before, during and after the opposition conference. It should have four councils, with defined powers and responsibilities:

1. A temporary lower house of representatives, appointed by political groups and parties, both inside and outside Iraq;
2. A temporary upper house comprising 10 members from each of Iraq's 18 governorates, representing notables, tribal, religious and ethnic leaders;
3. A military and security council, including officers from the current Iraqi military and security establishment, as well as the Kurdistan Democratic Party, Patriotic Union of Kurdistan and The Supreme Council for the Islamic Revolution in Iraq. The functions of this council will be to secure the borders, prevent violent conflict, and assert control over weapons and militias;
4. A presidential council of three members, from the north, center and south respectively, who have a record of integrity and public service. The presidential council should have the power to appoint cabinet ministers, to approve nominations to the two temporary houses, and oversee the operations of the constitutional assembly. The presidential council will consult with the Kurdistan Democratic Party and the Patriotic Union of Kurdistan concerning the north, and with The Supreme Council of the Islamic Revolution in Iraq concerning the south; and
5. The formation of these councils can begin now, from the opposition groups in exile, and expanded within Iraq. Members of the presidential council will be banned for 10 years from running for political office, and members of the cabinet will be so banned for 5 years. The cabinet should be composed of technocrats accountable to the presidential council.

The functions of the Transitional Government should be to:

1. deal with the forces of the United Nations and the United States in maintaining law and order and clearing Iraq of Weapons of Mass Destruction;
2. run the bureaucracy and attend to administrative, civic and humanitarian needs;
3. manage the gradual assumption of authority from the United Nations and the United States in general; and

4. manage the process of forming a constituent assembly and arranging the peaceful handover of power to an elected government.

## 3.0 Transitional Law And Justice

### 3.1 Introduction

Commencing with the National Court (known as *Mahkamt al-Sha'ab* or the Mahdawi Court), established after the *coup d'etat* of 1958, Iraqis have become inured to mock trials of the leaders of the previous regimes and others tried for political crimes. This situation has deteriorated dramatically since the *coup* of 1968, which brought the Ba'ath Party to power. In light of the history of Iraq since then, issues of transitional justice will play an important role in the transformation of Iraq following the change of Saddam Hussein's regime. The key goals of transitional justice in this context relate first to the need to hold certain key individuals accountable for their participation in the regime's crimes and to do so while avoiding a spirit of vengefulness and revenge throughout Iraq. Second, it is to ensure that legal mechanisms are set in place that make certain that truthfulness and a complete account of past abuses takes place within a spirit of reconciliation and forgiveness. In this regard, the importance of the acknowledgement of the criminality of the current regime must supersede the impulse to punish the members of the regime. Although perhaps in tension with each other, these key tenets of the transitional justice program must govern Iraq's transition from dictatorship to democracy.

There is virtually no disagreement amongst Iraqis that various officials of, and those closely connected to, the regime must be held accountable for crimes committed by the regime over the years. There is, however, wide disagreement as to where to draw the line of who is to be held accountable. Some would look to holding a limited number of high-ranking people, for instance fifty, accountable for war crimes and then providing some sort of amnesty for the rest. This point of view was first articulated in the 1993 "Crimes Against Humanity and the Transition From dictatorship to Democracy" report of the INC (widely circulated inside Iraq). Others would look to hold all those who have committed "crimes" accountable - a number that could go into the tens or even hundreds of thousands. An intermediate view, between the extremes, would limit the number of prosecutions, but not announce an amnesty as to individuals guilty of crimes under international law, while making available (under conditions to be discussed below) an amnesty to those guilty of crimes only under domestic Iraqi law. One key determinant of where to draw the line relates to the type of regime change; should the change include, to one extent or another, the participation of large numbers of people in the army and security services, thereby becoming a considerably less bloody affair, then a new provisional government is likely to act in a less retributive manner. If, on the other hand, military and security officers compel open fighting which results in a larger number of civilian casualties, the transitional authority might be less inclined to limit the scope of prosecutions. In any event, because the Ba'athist regime has implicated many

Iraqis in the crimes it has carried out, this process would need to be delicate; under no circumstances must it appear to be creating collective guilt. One final point must be stressed regarding all trials, regardless of the number of them held. Since 1968, trials on "political" charges of one kind and another have been absolute travesties of justice, in which nothing resembling due process and the rule of law has occurred. The Transitional Government (the entity that takes over immediately after regime change) must, as a first order of business, reverse this trend. Those tried under international or domestic laws must not only be taken through what resembles due process; they must be accorded due process in the Euro-American sense of the word, and their rights as criminal defendants must be meticulously and scrupulously observed.

### 3.2 General Principles and Observations

In any scenario, the process of transitional justice must have a few key principles, some possibly contradictory, that ought to be agreed on by the Iraqi opposition to the current regime, prior to drawing the lines as to whom to hold accountable

1. Upholding Iraq's obligations under international and domestic law *vis-a-vis* transitional justice issues. In the context of transitional justice, this would mean the need to rely on international legal precedents<sup>39</sup>, to ensure that the accountability process complies substantially with principles of due process of law, and to ensure that the rights of all defendants are meticulously and scrupulously observed;
2. The need for a new Iraqi government to attain legitimacy by reconciling the twin objectives of justice and reconciliation within the parameters set above;
3. The need for a new Iraqi government to maintain law and order. In the context of transitional justice, this would mean arresting people to avoid revenge killings and to create actual and perceived fairness by removing any hints of collective punishment;
4. The need to create a level of reconciliation in a society devastated by a regime that has substantially undermined civil society. This means ensuring that accountability is pursued at the individual level and not at a group level and to ensure that no groups are made to feel alienated. Moreover, above all, victims of the current regime need to feel that what has been done to them has been socially acknowledged;
5. The need to ensure that the mistakes of the past are not repeated (in the context of transitional justice, this would mean a process of de-Ba'athification<sup>40</sup> and, on a wider

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<sup>39</sup>This would mean that the transitional authority must comply with its non-derogable duty to investigate and prosecute those Iraqis suspected of, and punish those responsible for, war crimes, crimes against humanity and other crimes of an international character.

<sup>40</sup>See Sections 3.7 and 4.3 for a more thorough discussion of De-Ba'athification.

scale, putting in place a political system that would have checks and balances which would protect the human rights of all citizens); and

6. The need to "move on" politically and economically after having achieved some of the other goals (in the context of transitional justice, this would mean to have fair but efficient trials, and could include addressing the issue of amnesty in order to expedite the resolution of this process).

The transitional justice process in Iraq must be designed to meet all of the above requirements, as well as meeting the realities of the current Iraqi judicial system and the need for Iraq to engage the international community (to whom Iraq must look in rebuilding Iraq's judicial and legal system).

An appropriate transitional justice mechanism would be one in which the following structure is established.

*First, a special tribunal*<sup>41</sup> would be established to try those senior members of the Ba'athist regime, as well as others who have committed prescribed crimes (see Section 3.4.2 below). This category of crimes consists of crimes of an international character, such as war crimes, crimes against humanity, genocide and crimes against peace, as well as crimes committed by the Ba'athist regime against its own people, which crimes would have been deemed crimes under international law had they been committed in the context of an international armed conflict.

*Second, a truth and reconciliation commission* would be established to hear cases of people who would seek to give a truthful account of their abuses (abuses which would be prescribed but would not reach the level of the crimes tried by the above tribunal). The truth and reconciliation process should involve an amnesty that would be granted under certain conditions related to the depth and nature of the truth telling on the part of perpetrators. Alternatively, rather than issuing an amnesty, the transitional government could simply cease prosecutions (i.e., announce a *nolle prosequi*) in appropriate cases, or at a time when it appears that a sufficient number of people have been prosecuted to assuage the need for accountability. In any event, should people who have committed these prescribed crimes not voluntarily come before the commission, then victims and

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<sup>41</sup> There are two alternatives with respect to the establishment of this tribunal. The first alternative would be the establishment of two special tribunals - an *ad hoc* international tribunal (similar to the International Criminal Tribunal for Yugoslavia), which would try the key members of the current regime, as well as simultaneously a special domestic Iraqi tribunal (with international legal assistance), which would try middle and lower ranking members of the current regime who have committed or participated in the commission of crimes, including crimes of an international nature. The second alternative would be the establishment of only a special domestic Iraqi tribunal (again with international legal assistance and providing for rights of defendants), which would try all members of the regime who have committed or participated in the commission of crimes, including crimes of an international nature. For a more thorough discussion of this, see Section 3.4 below. One of the key variants under the two alternatives revolves around the death penalty. Current Iraqi criminal law provides for the death sentence; indeed, it is argued that Iraqi mentality would require the existence of this punishment. However, should a new government and the international community want to establish an *ad hoc* international tribunal, the *quid pro quo* would likely be the abolishment of the death penalty. Another issue relates to the lack of interest in the international community with respect to establishing another *ad hoc* international tribunal, especially after the establishment of the International Criminal Court (which would in fact not have any jurisdiction on the crimes committed by the current Iraqi regime).

their families would have the right to request prosecution under Iraqi criminal law and procedure for such crimes.

*Third*, in connection with the prosecutions described above, and especially in connection with the truth and reconciliation process, the laws adopting these mechanisms must eliminate obstacles (such as immunities<sup>42</sup> or statutes of limitations) to prosecutions which might have been put in place artificially by the regime. This process, however, will need to observe principles of procedural and substantive due process.

*Fourth*, to the extent that it is desirable for prosecutions to be conducted by a domestic tribunal (with some yet to be determined international oversight or observation), it will be necessary to construct an independent judicial branch, with real standards of professionalism required of judges and lawyers. An independent, highly competent judiciary may be the most important institution a future democratic Iraq would need. There will have to be much training on the part of the international community. See Section 7 for a discussion of the reform of the judicial branch.

*Fifth*, one key dimension of the prosecution of war crimes by a tribunal is the need to establish an investigative arm that includes the use of forensics experts. It is essential for the legitimacy of the whole process that these investigations be conducted at an international standard; therefore, they should be kept open to include UN observers and international experts.

### 3.3 Legal Principles

The processes of transitional justice in Iraq will be played within a political framework, in which it will not, as a practical matter, be possible to prosecute each and every individual arguably guilty of a crime. The decisions whether or not to grant a general or conditional amnesty, for instance, and at what point to cease prosecutions, are questions with long-term social and moral consequences. The over-arching considerations in transitional justice are accountability, forgiveness and societal healing; but transitional justice also has legal considerations that cannot be ignored. Iraq is bound, of course, by international law on certain fundamental issues, and there may well be an interplay between international and domestic legal principles.<sup>43</sup> A brief consideration of these two topics, is, therefore, essential.

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<sup>42</sup> A legal question arises as to whether the immunity rights provided in the 1970 Interim Constitution would be available to those to be prosecuted. Although there is a need to avoid the precedent of *ex post facto* laws, one would need to abrogate these immunity rights (and there are precedents for this); moreover, these immunity rights are not available for international crimes.

<sup>43</sup> Where there has been a transitional justice program of the type envisaged in this report, the establishment of a successful interplay between international legal principles and domestic legal principles has been important in attaining the success of the transitional justice program.

### 3.3.1 *International Legal Norms: International Conflicts*

The government of Iraq has involved itself in at least two distinct international conflicts, during which it has attacked no less than four countries. Several treaties and other principles of international law are implicated, therefore. For instance, Iraq has bound itself to several international norms relating to international conflicts, starting with the Four Geneva Conventions of 1949, to which it acceded on February 14, 1956. It has also bound itself to international treaties or conventions banning the use of certain weapons, such as poison gas and biological weapons. Indeed, Iraq is a signatory of, or has acceded to, virtually every important treaty dealing with human rights and armed conflict.

The first principle of these international norms is that immunity even for heads of states is barred.<sup>44</sup> In addition, the principle of command responsibility and superior orders are also enshrined as matters of international law.<sup>45</sup> Not only do those in command have the obligation to avoid unlawful acts during international conflicts, they have an affirmative duty to take steps to prevent those in their command from committing such violations.<sup>46</sup> In addition, international law provides specific limited criteria for the application of the defense of superior orders (that is, a junior officer would in his defense state that he was ordered by somebody more senior to commit a particular crime and had no choice in the matter).<sup>47</sup> Although this defense is available only in limited circumstances, there is an argument that it should be used more broadly in Iraq precisely because of the nature of the criminality of the Iraqi regime. Most importantly in this context, governments such as the transitional authority in Iraq will have the obligation under international law of investigating international war crimes and crimes against humanity, and of pursuing and prosecuting those who have committed such crimes. This is a non-derogable duty, incumbent upon any future government in Iraq.<sup>48</sup> As to such crimes, the transitional government is, therefore, obligated as a matter of

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<sup>44</sup>See, e.g., Geneva Convention (IV), Article 148. Citations in this section are illustrative, not exhaustive.

<sup>45</sup>*Id.*, Article 86, § 2

<sup>46</sup>*Id.*, Article 87, § 3

<sup>47</sup> Starting with the International Military Tribunal in Nuremberg following the end of the second world war, the concept of absolute liability for international war crimes was established, thereby limiting the use of the defense of superior orders. This concept was followed in, for example, the prosecutions under U.S. martial law for the prosecution of those U.S. personnel who committed war crimes in Vietnam, and was subsequently followed in the ICTY and the ICTR. Article 33 of the Statute of the International Criminal Court, which is deemed to be the latest manifestation of international criminal law, provides that there is no defense of superior orders with respect to acts of genocide or crimes against humanity.

<sup>48</sup>*Id.*, Article 146.

international law not to make a political accommodation which fails to bring key individuals to justice.

### 3.3.2 *The International Legal Framework: Non-International Conflicts*

In a very real sense, the Iraqi government has been at war with its own people on a number of occasions since 1968. Though not nearly as well developed as in the case for international armed conflicts, international legal principles apply to such domestic conflicts as well. Article 3 which is common to the Four Geneva Conventions of 1949, establishes a minimum standard of conduct incumbent upon a government during non-international conflicts. A government, for instance, must treat its citizens humanely. The government must also refrain from using violence, in particular murder, mutilation, torture, the taking of hostages, outrages upon personal dignity, and the passing of sentences and carrying out of executions without previous judgment announced by a regularly constituted court. Protocol II of 1977 Additional to the 1949 Conventions provides some additional detail, adding collective punishment, acts of terrorism, rape and pillaging, or the threat to undertake these activities.<sup>49</sup> In addition, children are especially noted as in need of protection.<sup>50</sup> There is also a variety of other specific procedural protections for penal prosecutions, and other substantive protections.

Certainly the Convention on Genocide constitutes a basis for criminal liability of the Iraqi leadership under international norms. There is strong evidence that the leadership in Iraq over the last thirty-four years is guilty of the crime of genocide against Iraq's Kurdish citizens, and, arguably, against the Shiites and the Marsh Arabs, as well as others. Again, Article 4 rescinds any attempt at immunity for heads of state or others with respect to such crimes, and Article 5 requires countries to provide effective penalties for persons guilty of genocide. Once again, the duty to prosecute under this Convention is clear and absolute, and is incapable as a matter of law of resolution by reference to political expediency.

### 3.3.3 *Domestic Legal Considerations*

All those, whether in leadership positions or not, who willfully or knowingly carried out acts of genocide at places like Halabja or who participated in the Anfal campaign, or the suppression of the rebellion in Southern Iraq, or in the systematic rape of women, or who tortured and killed political prisoners, are liable under governing provisions of Iraq's Criminal Code. Saddam Hussein and his cronies and henchmen who are indictable under international law are obviously indictable under the provisions of domestic law for committing and conspiring to commit these various crimes. In the prosecution of Iraq's current ruling elite, consideration should be given to the use of

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<sup>49</sup>Protocol II (1977), Article 4.

<sup>50</sup>*Id.*, Article 5.

domestic criminal law. One important reason for incorporating domestic law in any indictment may be entirely symbolic: to demonstrate that laws against murder, rape, torture and the like have the *force* of law even in a country such as Iraq where the *rule* of law has been absent. Trying criminal defendants under domestic law not only sends a message establishing a break with Iraq's immediate lawless past; of equally importance, it sets a precedent for future leaders both at the national level as well as for leaders of provinces or federated states.

The question arises whether the current leadership should face charges of treason for its utter destruction of civil and civilized life in Iraq. No foreign enemy could have destroyed Iraq so thoroughly, as the government of Iraq has done over the past thirty-four years. It has spilt the blood of Iraq's citizens, dispersed its population, waged aggressive wars, subjected the nation to utter desolation in 1991, and is prepared to do so again now eleven years later. While women who have been raped as a matter of state policy will perhaps find a measure of vindication in seeing those who raped them, and those who set the policy, tried for crimes against humanity and rape and conspiracy to commit rape, an Iraqi who has suffered no particularly direct depredation (other than living in the Republic of Fear) might find that such trials have no direct bearing on him. Holding the leadership of Iraq liable on a charge of treason vindicates the nation as a whole; it acknowledges that even those who have not suffered physically from the regime have, nonetheless, been profoundly injured by a ruling class which has ruled too callously for too long.

An issue with which the transitional authority will have to deal in prosecuting Iraq's current leadership under domestic law, though not relevant to prosecuting lower-ranking defendants, is that of immunity. Iraq's interim constitution of 1970 contains an article immunizing all members of the RCC from prosecution.<sup>51</sup> But there is a strong argument (based on international precedents) that this immunity is invalid; in addition, the immunity is invalid with respect to any international crimes.<sup>52</sup> Accordingly, any attempt to immunize Iraq's leaders under domestic law is void as unconstitutional. Other obstacles to prosecution under domestic law (though not for international crimes) might include statutes of limitations. As a matter of legal theory, such statutes of limitation might be more difficult to invalidate, since there is nothing inherently unconstitutional or unlawful about such statutes. Blanket waivers of statutes of limitations might, therefore, appear arbitrary and capricious, and in violation of procedural due process right of potential defendants. Nonetheless, such waivers have been suggested. It is submitted that such waivers will have to be considered very carefully from a jurisprudential perspective.

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<sup>51</sup> Interim Constitution of 1970, Article 40. The Revolutionary Command Council may grant an *a priori* waiver of immunity. This provision was also included in the draft 1990 Constitution, which was not ratified or adopted.

<sup>52</sup> Iraq's only permanent constitution, the Constitution of 1925, is the only Constitution which has any colorable claim of legitimacy, adopted as it was by a duly-elected Constituent Assembly after significant debate. Significantly, the 1925 Constitution did not contain an immunity provision at all. Indeed, it contained a specific provision for the trial of cabinet ministers, parliamentarians, and judges. Const. (1925), Article 81.

### 3.4 Accountability

3.4.1 Accountability is an indispensable component of any effort to reconstruct Iraq. While some hold that making accountability a public phenomenon might inflame the passions of Iraq's citizenry, another view insists that holding the guilty accountable publicly appears to be the only hope of avoiding cycles of reprisal and revenge, thus making the task of rebuilding and reconstituting a civilized nation next to impossible. Indeed, it seems unlikely that telling the Iraqi people what they already know about the depredations of the regime will inflame their passions.<sup>53</sup> In keeping with the norms of civilized nations, trials must be open but not turned into a spectacle, as the Mahdawi Court in 1958 quickly became. The processes must be explained in the media so that ordinary citizens will understand what is unfolding. Whatever system of accountability and reconciliation ultimately unfolds in Iraq, it will only work if the population at large buys into the process.

3.4.2 The first step in designing the transitional justice process in Iraq is to ascertain the types of crimes committed. International precedents with respect to transitional justice place a priority on crimes of an international nature - that is genocide, crimes against humanity, war crimes and crimes against peace; the precedents require that those who committed these crimes must be held accountable in a criminal context. In examining the recent history of Iraq, there is strong evidence that these crimes have been committed, and, therefore, a process must be put in place to hold those who have committed them accountable.

The establishment of a special tribunal to try defendants for their crimes against international and/or domestic law can occur in one of three ways.

The first way is through the establishment of an *ad hoc* international tribunal (similar to the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") or the International Criminal Tribunal for Rwanda (the "ICTR")). The second possibility is the establishment of a mixed domestic-international tribunal (similar to that of Sierra Leone). The third option is the establishment of a special tribunal under domestic Iraqi law. The first and second options would, by their nature, require the input and approval of the United Nations Security Council. However, the future of Iraq must not become the object of political exigencies of the Security Council, and Iraqis must begin the process of healing their country by dealing with the accountability issues which inhere in any regime change. If the Security Council can reach a decision in a timely fashion and votes in favor of either an *ad hoc* tribunal or a mixed domestic-international tribunal, then the future Iraqi state can use either mechanism to implement the transitional justice mechanism. If the Security Council does not reach a decision in a timely fashion, then Iraq must go it alone and establish a domestic tribunal (one that, in light of the current state of the Iraqi judiciary, must have international assistance).

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<sup>53</sup> As stated earlier, many international experts on transitional justice have stated that the acknowledgement of crimes by society, which can be partially brought about in the context of trials, is in many ways the crucial component of transitional justice.

In this context, it is significant to note that the newly created International Criminal Court would have no jurisdiction over the crimes committed by the regime prior to September 2002. In respect to an *ad hoc* international tribunal, two potential difficulties could arise. First, the experience of the ICTY and the ICTR has demonstrated that they have proceeded extremely slowly and therefore resolution of key prosecutions may take substantial time (which would defeat the need for timeliness in the transitional justice program, to the extent that consideration is deemed important). Second, the *ad hoc* tribunals do not have the death penalty, which is inconsistent with Iraqi law. The transitional authority must seek to avoid the anomaly faced in Rwanda, where the ICTR, which is intended to prosecute the high level criminals, does not have the death penalty, whereas the domestic Rwandan tribunals, which are designed to try low level war criminals, does. There are two views with respect to the death penalty, both of which are held by a significant number of Iraqis. First, since the death penalty is incorporated in Iraqi criminal law, it goes to stand that it should be included in the transitional justice process. This view further holds that victims of the Iraqi regime may not feel vindicated if there is no death penalty for the most egregious crimes. The other view - noting the increasing frequency of abuse of the death penalty in Iraq's modern history - holds that the transitional authority should declare a moratorium on the use of the death penalty. This view further notes that any international assistance with respect to the transitional justice program (in the form of an *ad hoc* international tribunal or assistance in a special domestic tribunal) would require the abolishment of the death penalty, at least with respect to the transitional justice program being implemented.

The Sierra Leonean example of a mixed domestic-international tribunal may be useful for Iraq. Again, such a tribunal is contingent on the need for a Security Council resolution (similar to Resolution 1315 of 14 August 2000); however, although the Sierra Leonean example may prove useful, the approval of the Iraqi state would be required in this context and there may be resistance among Iraqis because of excessive foreign interference in Iraqi affairs.

A purely domestic court can be created that substantively encompasses the "Sierra Leonean" model. A special domestic court can be created by statute outside the current Iraqi judicial system, which can have substantial international involvement, though with Iraqis running the court. For example, one alternative would be a trial court having a panel of three judges, with one international judge acting in a supporting capacity. Moreover, each defendant, who would have similar rights to those in the ICTY, for example, and may have the right to appointed international counsel, in addition to international human rights observers reviewing the proceedings to ensure that they comply with international standards.

In light of the above, one of two alternatives would be the most appropriate alternatives for Iraq. The first alternative would be the establishment of two special tribunals - an *ad hoc* international tribunal (similar to the ICTY and the ICTR), which would try the key members of the current regime, as well as a special domestic Iraqi tribunal (with international legal assistance), which would try middle and lower ranking members of the current regime who have committed or participated in the commission of crimes,

including crimes of an international nature. The second alternative would be the establishment of only a special domestic Iraqi tribunal (again with international legal assistance and providing for rights of defendants), which would try all members of the regime who have committed or participated in the commission of crimes, includes crimes of an international nature.

3.4.3 There are four broad categories of crimes which should, to varying degrees, be subjected to the processes of accountability and transitional justice.

The first category of crimes are crimes that are of an international nature - namely crimes such as war crimes, crimes against peace, crimes against humanity and the crime of genocide. The key emphasis here is that culpability for these crimes is not dependent exclusively on title or rank but is dependent on the commission of these crimes from which no amnesty is available. In addition, this category of crimes should encompass crimes that are committed by the Ba'athist regime against its own people, which crimes would have been deemed crimes under international law had they been committed in the context of international armed conflict.

The perpetrators of the crimes in this category would clearly include decision-makers who enacted policies set by the government of Iraq which would violate international and domestic laws. This would include the President of the Republic of Iraq, members of the RCC, certain cabinet members and vice-presidents, senior armed forces commanders and senior security apparatus officials. Accordingly, these individuals must be investigated to ascertain whether prosecutions can be brought against them. These investigations, as well as others conducted, would likely also bring to light evidence of crimes perpetrated by members of the regime holding no official title or position, such as for example Oudai Saddam Hussein. Therefore, the criteria for prosecutions under this category is actual commission or participation in the commission of the specified first category crimes. The prosecutions of perpetrators of these first category crimes can take place in two distinct types of courts. As discussed elsewhere in this section of the report, the establishment of either an *ad hoc* international tribunal or a special domestic tribunal is recommended. In this context, one can try the leading members of the regime for these first category crimes in either the *ad hoc* international tribunal - if established - or the top-level special domestic tribunal (with international supervision). The trial of lower ranking members of the regime for these first category crimes would take place in a second level special domestic tribunal, which would operate the same appropriate levels of due process as the top level special domestic tribunal, as well as having international supervision.

The second category of crimes are crimes committed by members of the regime that do not rise to the level of international war crimes (or, with respect to international war crimes, are crimes of assisting in the perpetration of international crimes). In delineating the second category crimes, one must take into account current Iraqi law - that is one must not simply impose international precedents or practices with respect to this category. In this context, these second category crimes would include, for example:

- The premeditated murder of civilians whether or not in an international conflict, including those murdered following torture<sup>54</sup>;
- Assistance or participation, though not the commission, of international war crimes or crimes committed against Iraqi citizens that would otherwise be deemed international war crimes.

Trials of these second category crimes should take place in the second level special domestic tribunal. One key issue here in devising these crimes is that such special domestic tribunal cannot issue sentences for these crimes that are more severe than the top-level special domestic tribunal. One possibility would be that there would be no death penalty with respect to these second category crimes, as those who perpetrated them may number in the thousands. Here, it must be noted that this division of tribunals is consistent with precedents, such as the Nuremberg tribunal. In that precedent, the Nuremberg tribunal tried only a handful of senior Nazi officials, leaving the vast majority of those tried (around 5,000) to be tried by special German courts. More recently, both the Yugoslavian and Rwandan precedents have allowed for this bifurcated process.

The third category would be crimes and abuses that took place in an Iraqi context and that did not involved murder.<sup>55</sup> In this context, there may be a significant number of perpetrators of these crimes or abuses. It is the perpetrators of these crimes that would be subject to the Truth and Reconciliation Commission process and for whom amnesty is available (conditional on them fully participating in the process in accordance with the TRC process). Should the perpetrators of these crimes not participate in the TRC process, then victims and their families may bring cases in local Iraqi courts against these perpetrators.

The fourth category would be abuses that do not reach the level of criminality, but whose perpetrators were instrumental in the creation and continuation of the Ba'athist regime and its practices. This category would include the commission of economic crimes and property expropriations, and may include members of the Ba'ath Party and other professional organizations who have legitimized the regime. Perpetrators of these crimes are subject to the TRC process and its conditional amnesty. In these cases, one of the available penalties may be the lustration laws discussed elsewhere.

### **3.5 Truth and Reconciliation**

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<sup>54</sup>The issue arises as to whether this category would include the murder of at least one individual, or should there be a higher threshold. The problem with a low threshold (that is, murdering one person) is simply that there may be too many such perpetrators, and therefore trying this high number of people would be both inefficient and would diminish the move towards societal healing.

<sup>55</sup> Again, the question here is whether those, say, who have committed one murder would have committed a category two crime or a lesser crime.

The magnitude of the crimes committed in Iraq over thirty-four years is staggering. It is virtually impossible to begin to list the hundreds of thousands of Iraqis who have died under torture in an Iraqi jail or who have otherwise suffered or died at the hands of the regime. Moreover, it is in the very nature of the Ba'athist system to make as many Iraqis as possible complicit in the criminality of the regime. Therefore, it can be assumed that very large numbers of people in Iraq may have committed crimes of one sort or another. In fact, although the transitional justice program must clearly convey the fact that there is to be no collective guilt in the legal sense, as the heart of the truth and reconciliation process is the concept of collective moral responsibility.

The Rwandan example is a case in point. Prior to the establishment of the domestic tribunal, the Tutsi led Rwandan government arrested for trial approximately 400,000 Hutus for involvement in the genocide of 1994. It was estimated that the trial of this number of people would have taken over 300 years. Gradually, the vast majority of these people were released without trial, but only after a number of years. Iraq ought to steer a different course. On the other hand, if a large number of members of the Ba'athist regime are not held accountable in some form, the population at large would not feel vindicated, again, enhancing the likelihood of vigilantism (which in turn would lead to a breakdown of law and order). A mechanism other than trials would need to be created and the most appropriate method would be some sort of truth and reconciliation commission.

The basic premise of such a truth and reconciliation commission (the "TRC"), which is not available to those who have committed crimes that would be tried in the tribunals discussed above, is that individual perpetrators of specified crimes would apply for a hearing to tell the truth about the crimes in which they had been involved in exchange for an amnesty. After application, in which such individuals must truthfully give an account of all his or her abuses or crimes, the investigative arm of the TRC would investigate the crimes and if it concluded that the account told is accurate in all material ways, then a formal hearing would be held during which the individual would make a public statement regarding the crimes he committed in exchange for an amnesty. Should the crimes in question be sufficiently material, the TRC should retain the right to punish the individual through the use of non-criminal sanctions.

Truth, of course, is an essential component of accountability. The truth must be brought to light, not only for the sake of society, but also to allow individuals to take responsibility for what they have done. To that end there is no substitute for a truth commission.<sup>56</sup> The very concept itself will be a breath of fresh air in Iraq, a hitherto closed society, where the most obvious truth known by all must, nonetheless, be publicly denied.

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<sup>56</sup>It must be noted that precedents have demonstrated that truth commissions without some sort of "bribe" have failed because of the lack of an incentive for perpetrators of abuses to participate. Therefore, any truth commission must have that ability to grant amnesties or, if an individual who participates fails to give a truthful account of his abuses, to transfer the matter to a court for trial.

One dimension of the truth and reconciliation process relates to the need for various professional organizations to create a process to reflect on the contribution of Iraq's various professional groups to the atrocities committed by the regime. There is a need for holding the professionals accountable, such as for legitimizing the regime (in the case of judges or lawyers<sup>57</sup>), for assisting in the development of weapons of mass destruction (in the case of scientists) and for assisting in the development of the education system (in the case of teachers and professors). Again, this approach would again spell out the issue of collective moral responsibility for what happened.

At least insofar as the reconciliation aspect is concerned, there is an obvious value in attempting to calm outrage and ameliorate the desire for revenge. Protracted or prolonged prosecutions in public trials, likely as they are to garner tremendous media attention, have the potential for fanning the flames of outrage. The need for accountability, however, will act, it is to be hoped, as a counterweight to the desire for vengeance. During the period of transition especially, one view holds that the balance needs to be struck in favor of justice, rather than reconciliation. As the process unfolds, presumably starting with more highly ranked or more culpable individuals, it may be that at some point the population will think itself sufficiently vindicated to allow the process to stop naturally. In this view, only once a truly legitimate representative government is in place, should decisions be made about amnesty, pardons, clemency, and the like.

### **3.6 An Amnesty Law**

With the establishment of a TRC, there may or may not be a need for an amnesty law *per se*. Those who have committed a crime that is to be tried in the tribunal (i.e., category one and two in Section 3.4 above) would not have available to them the benefit of an amnesty law. Those who have committed a crime that would fall under the definition of the crimes subject to the TRC could have a conditional amnesty, provided that they go through the TRC processes<sup>58</sup>. On the whole, if societal healing and reconciliation is the overwhelming priority, as this report believes it should be, then the amnesty option is the preferable option. One of the factors in making this determination would be the level of evidence available. A broad amnesty (excepting out the crimes under the jurisdiction of the tribunal and the TRC) could encourage the destruction of evidence, something that must be avoided at all costs.

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<sup>57</sup>In South Africa, for example, there were hearings of the TRC in which the judicial system was held accountable for providing judicial legitimacy for the apartheid order.

<sup>58</sup>The amnesty granted is specific to crimes committed. Therefore, for all those who have committed a crime that is uncovered following the amnesty provided by the TRC (that is, a crime that they did not tell the TRC about), there would not be an amnesty for that specific crime.

But there is a different view on amnesty. This view, unlike the above, considers that both amnesty and accountability are legal processes to assuage the need for private vengeance and the outbreak of vigilantism. In Chile, where he still has a relatively wide following, former President Augusto Pinochet attempted to by-pass accountability, by issuing a blanket amnesty and attempting to immunize himself for life. In Argentina, very little, if any, attempt at accountability was pursued. This situation led to resentment on the part of both populations. Therefore, this point of view concludes that accountability is of greater importance than societal healing and reconciliation, particularly during the transition period.

The course proposed by this view is an announcement of *nolle prosequi* as to any individual who makes a full disclosure and accepts full responsibility for his own conduct. In *nolle prosequi*, the prosecution announces that it will not pursue the prosecution of the case, but reserves the right to do so at a later date. It is not an admission of insufficient evidence, nor a statement in the belief of the innocence of the defendant. It is simply a statement that no further proceedings at a certain stage will occur against the defendant. The distinction between that and an amnesty might appear, at first glance, to be one without a difference, but there is a subtle distinction between them. An amnesty implies forgiveness, required for societal healing.

It should be noted that both views agree that perpetrators of only category three and four crimes should be the object of either amnesty or *nolle prosequi*.

It has been suggested that an amnesty might well be available to those in the military and security infrastructures, now resident in Iraq, who materially aid in the processes of regime change. This is a difficult question, as a legitimate objection has been raised about why those who might have rebelled earlier would not be subject to amnesty, but those who change sides at the twenty-fifth hour should be allowed an amnesty<sup>59</sup>. The simple answer to this question is that those inside Iraq who are capable of reducing the extent of resistance to regime change and hence reducing the number of casualties must be encouraged to do so. The timing of a mutiny (or a simple refusal to transmit orders, for instance, on the use of weapons of mass destruction) justifies this suggestion, since it may be critical to the successful outcome of the regime-change process itself.

### **3.7 De-Ba'athification and Lustration Laws<sup>60</sup>**

The holding of individuals accountable, including trying them, would serve certain purposes, but would not demonstrate to the people at large that the existing Ba'athist system was at its roots responsible for many of the atrocities committed by the regime. That would leave some to argue as some do that the Ba'ath Party was not at fault for

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<sup>59</sup>This amnesty would be granted, provided that the individual would go through the TRC process or may otherwise be subject to certain lustration laws.

<sup>60</sup> Also see Section 4.3 for a discussion on the de-Ba'athification program.

what has befallen Iraq, because Ba'athist principles were not truly or correctly applied Iraq. (Similar arguments were made by Communist apologists in the Soviet Union before its collapse.) Furthermore, there are numbers of members of the Ba'ath Party who may not have committed the crimes subject to the tribunal and the TRC but who played a role in influencing the policies of the Ba'ath Party and putting into effect its policies. The point here therefore is that the Ba'ath Party apparatus would need to be dismantled (to remove one of the roots of the atrocities) and the members of the Ba'ath Party who put it in place would need to be held accountable, though not necessarily by being put through a tribunal or TRC process (because they may not have committed the crimes subject to those mechanisms).

The examples of the de-Nazification of members of the Nazi Party following the end of the second world war and the lustration laws implemented in the former Eastern European countries may prove helpful for purposes of de-Ba'athification. The penalties imposed on certain members of the Ba'ath Party (that is, members of a particular rank - not all members because there are a large number of members who just joined for social or economic advancement or out of fear) may not be of a criminal nature but could include penalties such as the removal from public office or the inability for certain members of the Ba'ath Party from entering public office. In addition, on a longer-term basis, the ideology of the Ba'ath Party would need to be eradicated from Iraqi education and culture, a process that may take substantial time but would need begin immediately<sup>61</sup>. Finally, in connection with the Ba'ath Party, and as part of the process of compensation of a large segment of the victims, the assets of the Ba'ath Party should be seized and placed in a fund to compensate victims of the regime.

One key determinant of the type of lustration laws to be implemented relates to the reform that the Ba'ath Party may undertake both during the regime change process that, is if it does not play a negative role in attempting to frustrate regime change and after the regime change. The case of the Communist Party in the former Czechoslovakia may be of use here. The Communist Party refused to reform itself until the very end and therefore was eliminated. After the formal split of Czechoslovakia into the Czech Republic and Slovakia, the Czech Parliament passed the "Law on the Illegality of the Communist Regime".

### **3.8 Compensation**

There have been and continue to be numerous victims of the regime, both alive and dead. Apart from securing law and order, an important task of a transitional government is to address the needs of the living victims of the regime, both internally and in refugee camps abroad. These victims have suffered tremendously and the viability and legitimacy of a future government will likely rest on how successful it is in addressing their immediate needs; however, on a longer-term basis, and in connection with a

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<sup>61</sup> See Section 4.4.

longer-term reconciliation, the live victims of the regime and the relatives of the dead have obviously serious grievances against the Ba'athist government. Addressing these concerns, on a longer-term basis, could well be the key determinant of the reconciliation process.

Clearly, the accountability process discussed above would go a certain way towards making individuals take responsibility for their actions and thereby demonstrating to the victims that the wrongs committed against them and their families are being addressed. But this is not enough. The transitional government must find ways to compensate these victims for the wrongs committed by the current regime. A newly installed government can take the position that the wrongs were committed by the previous regime and that laws are in place to ensure that the atrocities are not repeated; this response, however, is likely to be inadequate. It would do no more than demonstrate a break with the past.

If an aggressive compensation program is put in place, however, it may reduce the grievances of these victims and their families and further eliminate the desire to exact revenge and retaliation. After all, the wrongs committed cannot be reversed and the victims and their families know this. But if they feel that the transitional government has publicly assumed responsibility for the atrocities of and crimes committed by the Ba'athist regime, they may feel that this transitional government is attempting to do something for them, is attempting to help overcome at least a portion of their grievances. That is why one of the basic tenets of any transitional justice system in the context of a post-Ba'athist regime must be an aggressive and generous compensation program for the victims and families of victims of the regime. In this regard, particularly with regard to those who have been the victim only of property crimes (e.g., confiscation of property), an aggressive and successful compensation scheme might actually invest the population in the success of the transitional authority, thus promoting support for it.

The transitional government in Iraq could also provide a degree of legitimacy for informal methods of compensation and dispute resolution. Although a democratic government in Iraq should not encourage tribal law or religious practices, during the transitional phase and only in the context of compensation relating to the commission of certain crimes, certain Islamic legal practices, such as the practice of paying "blood money", could be adapted for this purpose. The idea would be that a perpetrator of certain crimes (not rising to the level of first category crimes<sup>62</sup>), as well as their tribes or families, would pay the victims "blood money" in exchange for the victims or their families not pursuing legal (or extra-legal) means against them. If this process is recorded as part of the truth and reconciliation process, then an amnesty with respect to the individual crime would be granted. Such informal methods of dispute resolution would also not hold up the truth and reconciliation process. They would essentially trump such processes. Again, the concept is for a limited use of this practice, which would only be legitimized if registered with a state body.

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<sup>62</sup> Argument has been made that second category crimes should also be subject to these processes.

### 3.9 Conclusions

*Prior to, and during, a change of government, and in light of the fact that a significant portion of the population are either victims or somehow related to the Ba'athist regime, it is important to emphasize four things repeatedly.*

*First any transitional program will not entail collective punishment.* This message must be made clear to the inside, otherwise those people connected with the regime would be manipulated to fight for the continuation of the regime, or at the very least will see a disincentive for a change. It should be emphasized that the fact that a person is a member of the Ba'ath party does not mean that such person will automatically be punished, or the fact that a person comes from Tikrit does not mean he will be held accountable. The message has to be sent that individuals will only be held accountable if they have committed a specific crime.

*Second, messages must be sent to those currently in positions of responsibility, such as officers or members of the security services holding key positions, that should they assist in deposing the regime, they would be free from prosecution under the tribunal.* But they will not be relieved of the obligation to tell the truth about the crimes they have committed over the years. Depending on the level of the crimes that they may have committed, they may have to undergo the truth and reconciliation process or be subject to other provisions of lustration laws (such as being prohibited against future service in government).

*Third, there is to be no vigilantism.* A message must be sent to the people inside Iraq who are victims or related to victims that there will be a transitional justice program, that those who have committed crimes will be held accountable and, above all, that vigilantism will in no way, shape or form be tolerated. The message must be made clear that anybody who takes justice into his or her own hand will be held accountable himself and will be also be subject to prosecution (and to whom no compensation scheme would be available). Any other message could be interpreted that a transitional government is endorsing individual pursuits of justice and therefore supporting an increasing cycle of violence.

*Fourth, all available methods ought to be used to inform the Iraqi population that a compensation system will be in place for wrongs done to them by the regime and its supporters.*

## 4.0 Democratization and Civil Society

In 1991, more than 400 Iraqis put their name to a document that opened with these words: "Civil society in Iraq has been continuously violated by the state in the name of ideology. As a consequence the networks through which civility is normally produced and reproduced have been destroyed. A collapse of values in Iraq has therefore coincided with the destruction of the public realm for uncoerced human association. In these conditions, the first task of a new politics is to reject barbarism and reconstitute civility."

How can the Transitional Authority go about reconstituting civility? Needless to say it should guarantee freedom of the press and encourage independent media vehicles at the expense of state outlets (as was done in parts of the autonomous Kurdish region). Political parties, independent non-governmental organizations and associations, including watchdog groups and independent polling groups, should not be discouraged in any way. Such groups should not require approval nor any kind of licensing from government authorities (with the exception of broadcasting licenses which are not to be unreasonably withheld). The right of peaceful advocacy and dissent, whether by groups or individuals, must be respected.

To promote civil society, the Transitional Government (which is the executive entity immediately after regime change) should immediately see that the restrictions on travel in and out of the country for Iraqis and non-Iraqis alike are lifted. The use of the internet, satellite dishes, and the import of foreign publications should be unfettered. A Democracy Fund as suggested in 2.6.2 should also be considered.

At the heart of responsible citizenship, however, lies societal respect for the rule of law, which begins with the promulgation of a permanent constitution (which would include a Bill of Rights), and continues through the de-militarization of a society abused by the culture of war and violence, and its de-ideologization in the shape of a comprehensive program of de-Ba'athification.<sup>63</sup>

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<sup>63</sup> Some members of the working group object to the use of the term "de-Ba'athification." They suggest instead replacing the terms "Ba'ath", "Ba'athism" and "de-Ba'athification," with "Saddam", "Saddamism" and "de-Saddamification", wherever these appear in the report.

## 4.1 Constitutionalism

4.1.1 Since 1958, as a result of the abuses of a succession of military regimes and the Ba'ath party, the very idea of a stable, if not inviolable, set of founding laws which stand over and above the political process as a beacon for citizens and as the guardian of their rights, has been discredited.

*The first task of politics is to restore the faith of the people of Iraq in the idea of a founding document, a Constitution, emanating from them and governing the rules of politics and the conduct of politicians in the new polity.*

The Transitional Government and the other transitional authorities must, within the first days of taking power in Iraq, announce the process for debating and eventual adoption of a new constitution and adhere to it. By channeling Iraqi political energies in such a positive direction the day after the fall of the regime, some of the negative excesses associated with all major transitions of power (revenge killings, public disorder, scapegoating, fear of the future), will be minimized.

4.1.2 A constitution that is rooted in the hopes and aspirations of the people of Iraq must arise out of a process of debate and discussion. Such a process may be initiated by individuals or groups in opposition or in exile, but it cannot be completed outside of an Iraq in which the conditions for having such a discussion have already been established.

With the exception of the first Iraqi Constitution of 1925, which followed a three-year process of discussion, no Iraqi constitution has ever been discussed and debated by Iraqis. The prospect of a change in regime in Iraq in the short term raises the issue of how to draft a new constitution and bring it to the forefront of Iraqi political debate and discussion. Or, *how to make constitutionalism the central focus of post-Ba'athist politics.*

Unfortunately, however, for reasons that have already been alluded to (Section 2.1), the Iraqi body politic outside the Kurdish regions will find itself the day after the fall of the regime formless and atomized.<sup>64</sup> Without structure, artificial though it may be at the outset, there can be no fruitful conclusion of a debate over the future. Very quickly people will tire of running around in circles and yearn for order and a strong hand at the helm of the state. Constitutionalism will have spent itself as a political force without coming to a conclusion. What can be done to remedy this likely outcome?

4.1.3 The Conference of the Iraqi opposition to be held in the fall of 2002 provides a vehicle for beginning such a debate. But the debate can only be concluded in a newly liberated Baghdad through the vehicle of a Constituent Assembly (see Section 2.0). At the first meeting of such a Constituent Assembly in liberated Baghdad a committee chaired by a highly respected Iraqi with no political ambitions must be appointed. The committee should be given a mandate to deliberate over the issues involved for the

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<sup>64</sup>Some members of the working group think that this paragraph does not give enough credence to the internal forces inside Iraq that can be involved in the process of change.

duration of the transitional period (the Committee of the Indian Constituent Assembly formed in just such a way took approximately three years to work out the terms of the Indian Constitution). Such a committee will have its own staff and the full authority to carry out its own research including all matters of oversight over a new impartial national Census in Iraq. The conclusion of this committee's efforts will be a Draft Constitution that it will make available to the public and present to the Constituent Assembly for debate and a vote.

*Upon being adopted by a Constituent Assembly, the draft Constitution should be put to a national referendum of the people of Iraq for ratification whereupon it becomes the highest authority of the land.*<sup>65</sup>

4.1.4 The governing idea behind any future Iraqi constitution should be that power is not to be trusted; it always needs to be checked. Left to its own resources, power corrupts. The sources and the symbols of authority, which are often spelled out in constitutional documents, are less important than these checks and balances on the exercise of power.

In the 1977 Legal Reform Law promulgated by the regime of the Ba'ath (cited in Section 1.1), the argument was made that because “authority in the State is one, ... this means the negation of the idea of ‘multiplicity of powers,’ legislative, executive and judicial.” As a matter of historical experience, the negation of multiple sources of power and authority in a state is always the thin end of the wedge in the creation of despotism.

The source of authority in politics, unlike its source in religion, is never “one.” Politics has multiple foci (local, regional, central) and various arenas of application (legislative, executive and judicial). The fundamental point of a constitution is to keep these levels of authority, or powers, separate, while ensuring that they coordinate smoothly in arriving at decisions.

A new Iraqi constitution, if it is to avoid the pitfalls of the post 1958 era, must rest on the concept of the separation of powers among the legislative, the judiciary and the executive, and it must set forth the relations of these three powers in practical ways.

4.1.5 To deter abuse, the guardian of the Constitution must not be the Executive or Legislative branches of the state. The only Guardian of the Constitution is the Supreme Court of Iraq, consisting of a Chief Justice and other judges. This court stands at the apex of a single integrated judicial system for the whole country (inclusive of all its regions, provinces and/or governorates). This Supreme Court is the final court of appeal in the land on all constitutional questions.

4.1.6 A Constitutionalist politics should demand of the Iraqi Transitional Authority that the day that Iraq’s new Constitution comes into force (not the day of Saddam’s overthrow) coincide with the day that the name of the new state of Iraq is announced,

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<sup>65</sup> Again, the issue must be pointed out that such a referendum should not be one of a simple yes/no vote, but should allow for more participation by the public.

and its flag and new symbols established. This day should be declared an annual day of celebration for the nation.

## **4.2 An Iraqi Bill of Individual Rights**

### *4.2.1 Introduction*

A permanent Iraqi Constitution must contain a bill of rights, the goal of which would be to define those inviolable individual human rights of all Iraqi citizens, irrespective of their sex, ethnic background, nationality, religion, sect and political beliefs. This bill must become the fundamental basis for the protection of individuals within Iraq. The point of a bill of rights is to guarantee the equal protection of all individuals, regardless of sex, ethnicity, nationality or religion. To a very large extent, once the rights of all individuals are protected, the fears of individuals arising from their belonging to a particular sex, nationality, ethnicity or religion will be abated, albeit gradually.

The members of the working group recognize that the most formidable barrier against the abuse of anyone's rights (including communal, religious or national rights) is always going to be the protection of individual human rights.

### 4.2.2 The protection of such rights entails:

- The inclusion of a bill of rights within the permanent constitution.
- Until a permanent constitution is passed, a bill of rights must be included as part of the governing law of the interim or transitional period.
- There must be laws passed that develop the bill of rights within Iraqi society. Laws must be passed during the transitional period, for instance, that would make it a crime to discriminate on the basis of sex, nationality, ethnicity or religion. It is not enough to wait for the inclusion of such rights in a permanent constitution.
- The separation of powers must be a fundamental constituent part of the new Iraqi state. It also cannot wait for a permanent constitution but should emerge in nuclear form at the earliest possible opportunity, namely at the forthcoming conference of the Iraqi opposition.
- A body, henceforth to be known as the permanent "Human Rights Commission of Iraq", should be created at the earliest possible opportunity to monitor the activities and practices of the executive, and to ensure that these practices conform to international human rights practices, as well as to ensure that its practices are non-discriminatory in nature.
- The institutions that have participated in the abuses of human rights, or that have created or protected the structure that enabled those abuses, must be dissolved. Others

need to be reformed. It is not enough to have a constitution or laws that protect human rights, if the institutions that enforce these laws are malfunctioning. The primary institutions that need reform are the military, the police, the security apparatuses and the judiciary.

#### 4.2.3 *The Bill of Rights*

The bill of rights of Iraqis must be the basis of the rights of all Iraqi individuals. It is a set of rights that must be incorporated into the permanent constitution, and be complied with on day one by the transitional authority. Indeed, if it is decided that the legal basis of the transitional authority is the 1925 Permanent Constitution, then Part I of such Constitution contains a number of rights that are entitled "The Rights of the People".

##### 4.2.3.1 *Rights Under the 1925 Constitution*

The rights enumerated in the 1925 Permanent Constitution address the following areas:

- *No discrimination among Iraqis:* Article 6 provides that there shall be no discrimination in the rights of Iraqis. In addition, article 18 provides that "Iraqis shall be equal in status as regards the enjoyment of their rights and the discharge of their obligations. Government appointments shall be bestowed upon them alone, to each one without discrimination, in accordance with his capacity and fitness";
- *No Interference among Iraqis without due process of law:* Article 7 provides that the state shall not violate or interfere with the personal liberty of any Iraqis, and provides that no Iraqis shall be arrested, detained or punished, except in accordance with Iraqi law.
- *No Torture:* Indeed, Article 7 specifically states that "torture and the deportation of Iraqis ... are specifically forbidden".
- *Right to Property and No Unreasonable search and seizure:* Article 8 guarantees that all places of residence are inviolable, and that they may not be entered or searched except in accordance with the manner prescribed by law. This article is in many ways similar to the Fourth Amendment to the U.S. Constitution. In addition, article 20 provides for the safeguarding of all rights of ownership of property. More specifically, it provides that there shall be no expropriation of the property of any Iraqi "except in the public interest, and in such circumstances and in such manner as may be prescribed by law, and on condition that just compensation be paid".<sup>66</sup> Moreover, article 15 provides that all "postal and telegraphic correspondence, and all

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<sup>66</sup>If the 1925 Permanent Constitution is to be adopted in the interim period, the rights provided for in Article 10 would constrain the rights of the Transitional Government to take the property of any member of the family of Saddam Hussein or those associated with him (after due judicial authorization). The handling of this matter must be carefully reviewed. In addition, if the 1925 Permanent Constitution is to be adopted in the interim period, the rights of those whose property was expropriated by the current Ba'athist regime must be reviewed - otherwise, there may be a large number of claims against the transitional authority.

telephonic communications shall be secret and free from censorship or detention, except in such circumstances and manner as may be prescribed by law."<sup>67</sup>

- *Freedom of expression:* Article 12 provides for the "freedom of expression of opinion, liberty of publication, of meeting together, and of forming and joining associations", but within such limits as may be prescribed by law.<sup>68</sup>
- *Community rights:* Article 16 provides that the "various communities shall have the right of establishing and maintaining schools for the instruction of their members in their own tongues", although in Article 17, Arabic is stated to be the official language.

#### 4.2.3.2 *Civil and Political Rights*

The 1925 Constitution was abrogated following the events of July 14, 1958. Various other interim constitutions were put in place by the military authorities (or the Ba'ath Party) that led the changes in the governments. These interim constitutions provided for the protections of certain rights. For example, the 1970 Interim Constitution includes certain rights that Iraqis shall have. Article 19 of such constitution provides that "citizens are equal before the law, without discrimination because of race, origin, language, social category or religion", and article 25 guarantees the freedom of religions, beliefs and exercise of religious ceremonies. However, other articles of the 1970 Interim Constitution (and the practices of the Ba'ath Government) abrogated many of these rights. For example, Article 36 provides that "any activity which contradicts the aims of the people ... and any act or conduct aiming at crumbling the national unity of the masses of the people, provoking racial or sectarian or regional bigotry among their ranks, or violating their progressive gains and achievements, shall be prohibited."

Since this is the case, and in order to expand on the basis of the protection of human rights provided in the 1925 Permanent Constitution (if it is decided to be adopted in the interim period), one would need to rely on international covenants and international practice with respect to the protection of civil and political rights.<sup>69</sup> As a basic matter, the following civil and political rights must be included in an Iraqi bill of rights:

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<sup>67</sup> The issue here is that if the transitional authority shall revoke most laws governing human rights prescribed by the Ba'athist government, then there would be no ability for the transitional authority to, for example, tap telephones after a judicial authorization. There could be security ramifications for this and therefore a more moderate law would need to be established, limiting the ability to tap telephones or perform other functions that have security consequences.

<sup>68</sup> In this instance, one would need to review the laws prescribed with respect to the freedom of association, which would tend to limit the applicability of Article 12. As a first step, however, the transitional authority must not recognize any such laws.

<sup>69</sup> In addition, there have been a number of Iraqi documents which relate to establishing a bill of rights in Iraq. In 1991, the "Charter 91" document provided for a large number of these rights. More recently, an article entitled the "Iraqi Bill of Rights", by Dr. Munther al-Fadhil, enumerated a large number of the rights of individuals that must be included in a bill of rights for Iraq.

- The right to life and be protected by law;
- The right to equality before the law (the courts and tribunals);
- The right to be presumed innocent until proven guilty according to law;
- The right to privacy and protection of that privacy by law;
- The right to freedom of thought, conscience and religion;
- The right to freedom of opinion and expression;
- The right to civil liberty, including: Freedom of speech and press; Freedom of peaceful assembly and association; Freedom of religion and belief; Freedom of movement within the country, foreign travel, emigration and repatriation.
- The right to freedom from: Political and extra judicial killing; Disappearance; Torture and other cruel or inhuman treatment or punishment; Arbitrary arrest, detention or exile; Denial of a fair public trial; Arbitrary interference with privacy, family and correspondence.
- The right of citizens to change their government by democratic means;
- The right to vote and to be elected at genuine periodic elections;
- The right, if qualified professionally, to fill in any post in the legislative, executive and judicial system of the country.
- The right not to have one's citizenship withdrawn for reasons of race, religion, origin or political belief.
- The right to naturalization and a passport and totally unfettered travelling privileges both within the country and abroad. The practice of obtaining an exit visa should be abolished.
- The right to appeal as prescribed by law.
- The right of refugees and deportees and their children to return to Iraq.

#### 4.2.3.3 *Economic, Social and Cultural Rights*

In addition to the civil and political rights, an Iraqi bill of rights must also contain certain economic, social and rights that all Iraqi citizens must have. These should include:

- The right of association and form trade unions;

- The right to work (which includes the right and opportunity of everyone to gain his living by work);
- The right to strike;
- The right to organize and bargain collectively;
- Prohibition of forced or compulsory labor;
- The right against slavery;
- Protection against discrimination based on sex, race, religion, political or other opinion, national origin or language;
- Elimination of the death penalty.<sup>70</sup>
- Acceptable conditions of work: Minimum wages; Safe and healthy working conditions; Minimum age for employment.
- Equal pay for equal work;
- Equal opportunity for advancement;
- The right to free education;
- The right to have access to public service;
- Copyright and trade work protection for intellectual property.
- The right to free medical cares.
- The right to social welfare.
- The right for inheritance according to the law and based on religious principles.
- The right to serve in the military and the police.

#### 4.2.3.4 *Communal and/or National Rights*

As discussed in the introductory paragraph to this section, the transition to democracy and the rule of law must above all be one in which the protection of individual rights

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<sup>70</sup>Opinion is divided on this matter. There are those, among whom are certain Islamist thinkers and Iraqi lawyers, who respectively believe that Islam and Iraqi law since the establishment of the Iraqi state have allowed and should continue to allow the death penalty. There are others who believe that it is vital as part of the process of moving away from Ba'athist excesses to abandon the death penalty.

stands above all else. However, the composition of Iraqi society is one in which significant members of the Iraqi population (between 20 and 30%) belong to different ethnic or religious groups. More importantly, because of the painful legacy of national and religious discrimination inside Iraq and in the region, many Iraqis have reacted by asserting their national, ethnic and religious identities. Accordingly, among the rights that need special consideration in Iraq, are those collective group rights of certain ethnic, national and religious groups. These include:

- the right to self-determination, autonomy and self-government, which does not necessarily extend to sovereignty or statehood.
- The right to freely determine their political status;
- The right to freely pursue their own economic, social, religious and cultural development.
- The right to establish and maintain their own associations.
- The same rights to freedom of peaceful assembly, expression, and freedom of thought, conscience and religion as is granted to individuals.
- The right to study and be educated in his/her native language;
- The right to full exercise of all other human rights and fundamental freedoms without national, ethnic or religious discrimination and in full equality before the law.
- The right to practice and revitalize all inoffensive cultural traditions and customs, including the development and transmission to future generations of national or religious interpretations of history and literature, and the right to retain traditional names for communities, places and persons.
- The right to all levels and forms of education provided by the state;
- The right to establish and control private educational systems and institutions which could provide education in local languages and specific religious traditions.
- The right to establish private media (publications, television, and radio) in local languages specific to some regions of the country and not others.
- The right to participate fully at all levels of decision-making in matters which may affect their rights, lives, and destinies through representatives chosen by themselves;
- The right to a local security and police service which reflect the ethnic composition of communities they are serving.

- The right to display cultural symbols as long as these are not offensive to other religions or national and ethnic groupings.<sup>71</sup>

#### 4.2.3.5 *The Rights of Women*

In general, the above group, communal or religious rights mentioned in Section 4.2.3.4, do not override individual human rights wherever these are abused. In particular when or if they come into conflict with the rights of women, they are always deemed subordinate to the rights of women as individuals and as a gender. No group, whether tribal, national or religious, can make a claim that its customs or traditions allow it to treat women in a way that is contrary to the spirit and letter of the Bill of Rights set out in Section 4.2. The motive of clearing one's family honor, for instance, as a pretext for committing murder against women, will not be permissible as a plea in any Iraqi court of law. Nor can any gender-related restrictions or qualifications be placed on the right to travel, inherit, marry or engage in any other pursuit allowed under the law.

Moreover, it should be remembered that the UN Declaration on the elimination of violence against women passed in 1993, (Declaration no. 48/04, 1993), and the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) passed in 1986, are to be considered unreservedly constituent parts of the Basic Law of Iraq as stipulated in Section 1 above.

#### 4.2.4 *The "Human Rights Commission" Law*

As stated elsewhere in this document and many places elsewhere, the practices of the Ba'athist Government (and previous governments to a lesser extent) have reflected three principles - abuses of human rights, sectarianism and chauvinism (that is, the practice of discriminating against non-Arab Iraqis). Over the last thirty years, these practices have become embedded in the way that the Iraqi Government operates. Accordingly, the eradication of these practices is a priority if Iraq is to be transferred to a democratic society.

Obviously, the first step would be to include in the constitution clauses that relate to the equality of all citizens and the respect of human rights. But this is not enough. Article 18 of the Iraqi Constitution of 1925 provided for the equality of all citizens, and yet discrimination on a sectarian basis was prevalent during the monarchical period (although on a far lesser scale than today). Indeed, the fact that a constitution may contain articles that protect against discrimination and yet discrimination would continue has been the norm in many societies.

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<sup>71</sup> In 2002, the Declaration of the Shia was published in which there were a number of additional civil rights were included which are not stipulated above. Although these were promulgated for the Shia community, one can equally include them for a broader group of minorities. These include: the right to administer their own religious shrines and institutions, ensuring that religious shrines and cities are entered into UNESCO's World Heritage Sites, full freedom to publish religious and ethnic tracts and books, introduction of elements of the beliefs of each of the communities in a national education curriculum, revising the elements of the history curriculum to remove all disparagement of particular ethnic or religious groups, and respect for the burial grounds of individual sects, religious or ethnic groups.

In Iraq, we do not need only constitutional protections against human rights abuses and discrimination, but a mechanism to protect against them. One of the principal mechanisms in the U.S. for these types of protection are the courts, but Iraqi society - unlike American society - is not so litigious. Therefore, the courts themselves would not be enough. This report proposes the establishment of a "Human Rights Commission". The role of this Commission is to provide a mechanism to protect against abuses of human rights and discrimination (such as in the form of sectarianism and chauvinism).

#### *4.2.5 The Legal Basis for Establishing the Human Rights Commission*

The first step towards establishing the Commission is the need to include an article relating to it in the Basic Laws, and subsequently in the Permanent Constitution. The principle of establishing a Human Rights Commission in a constitution has been used before. Chapter II.B of the Constitution of the Federation of Bosnia and Herzegovina, which is entitled "Human Rights and Fundamental Freedoms - Initial Appointment and Functions of the Ombudsmen", foresees the appointment of three Ombudsmen by the Bosnian Federation legislature - one Bosnia, one Croat and one other - within three years of the entry into force of the constitution. Based upon the above chapter of the constitution, the Ombudsman Institution of the Federation of Bosnia and Herzegovina was established and laid out its rules of procedure.

With respect to Iraq, the important issue is that the Basic Laws must include provisions relating to the establishment of a Human Rights Commission. In addition, any interim administration must establish this Commission immediately to send a message that it seeks to ensure that there would be no human rights abuses, and that its practices would not be sectarian or chauvinistic.

#### *4.2.6 The rights and duties of the Human Rights Commission*

Article 5 of Chapter II.B of the Bosnian Constitution provides that: "The Ombudsmen may examine the activities of any institution of the Federation, Canton, or Municipality, as well as any institution or person by whom human dignity, rights or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects." In addition, in carrying out his function, the Bosnian Ombudsman may "examine all official documents, including secret ones, as well as judicial and administrative files and require any person (including any official) to cooperate, in particular by providing relevant information, documents and files. Ombudsmen may also attend court and administrative hearings, as well as meetings of other organs, and may enter and inspect any place where persons deprived of their liberty are confined or work." Accordingly, the Bosnian Ombudsmen have wide ranging powers.

With respect to Iraq, the Human Rights Commission must also have very wide ranging powers, within a more general mandate to investigate every abuse brought to its attention. These powers must be given to it immediately (unlike in Bosnia, where it took some time for it to be established and to operate), as there is substantial scope for abuses of human rights by any new interim administration.

The Commission shall have the right to receive complaints from any persons or entity which alleges that one of the practices which the Commission is entitled to review (that is, human rights abuses and discrimination (or abuses of a sectarian or chauvinistic nature)). Upon receipt of a complaint, the Commission shall have the obligation to investigate the complaint, relying on its wide ranging powers of investigation. If the Commission determines that a particular action, law or regulation has led to an abuse of the human rights of an individual, or otherwise discriminates against such individual or group of individuals, then it shall contact the relevant authority or legislative or executive body, informing them of its conclusions and recommending to them to abolish, annul or delay the implementation of a particular action, law or regulation. If a complaint demonstrates elements of a violation of the ethnic or sectarian rights or any other discrimination, or serious violation of human rights, then the Commission may recommend to the responsible party to stay the proceeding or execution of the decision until the Commission investigates the case.

If the recommendation of the Human Rights Commission is ignored by the relevant governmental body, then the Commission shall have the right to bring a case in a court of law relating to the complaint. It is advisable that the law establishing the Human Rights Commission have a provision that provides that at any time Human Rights Commission brings a case in a court of law, then any administrative proceeding or any other action with respect to the complaint shall be stayed until such time as the court of law addresses the issue. Although this may provide the Commission with tremendous powers vis-à-vis the executive and the legislative powers, and therefore may slow down their activities, it is important that such a Commission have these wide ranging powers in order to monitor the activities of the executive or legislature, as the case may be. Ultimately, the powers of the Human Rights Commission would need to be balanced with the need for the executive to conduct its activities in an efficient manner.

One other duty that the Human Rights Commission should conduct is to draft an annual report outlining its activities and its outlook on how the executive and the legislative branches have performed in complying with the human and civil rights provisions of both the interim constitution and, when it is adopted, the permanent constitution. The report should be independently drafted and, in drafting the annual report, the Human Rights Commission should have complete access to the government's records. In many ways, this report would end up in recording the state of the evolution of the new Iraqi state.

Finally, the Human Rights Commission should have the duty of drafting a code of Good Administrative Behavior - that is a code that should govern the activities of all Iraqi government employees. In September 2001, the European Parliament adopted the European Code of Good Administrative Behavior (the "European Code"), which the Ombudsman of the European Community is required to monitor. This code lays out a code of conduct that the institutions of the European Union and its employees are required to comply with; they include requirements with respect to the absence of discrimination, the absence of the abuse of power, impartiality and independence, and fairness. The European Code also provides that all citizens of the European Union have

the right to complain to the European Ombudsman for the failure to be treated in accordance with this code. A similar code should be introduced in Iraq as it would demonstrate to the Iraqi civil service and the Iraqi government that they need to operate with their citizens in a new manner. In addition, Article 8 of the European Code provides that the conduct of all officials "shall never be guided by personal, family or national interest or by political pressure." The implementation of a procedure with respect to all federal Iraqi government officials would be especially crucial towards unifying the state in a federal state.

In many ways, this proposal, the implementation of which would be key to the transition of Iraq to a democracy and to a reconciliation, is revolutionary and any transitional government may not be in favor of establishing such an office immediately or, alternatively, assisting it. Therefore, initially, it would be extremely useful to allow the Human Rights Commission to obtain as much assistance (including financial assistance) from international bodies and international human rights organizations, such as The Organization of Security and Cooperation in Europe (which provided assistance to the Bosnian Ombudsmen) and The European Community's Ombudsman.

### **4.3 De-Ba'athification**

4.3.1 The liberation of Iraq from a regime which is totalitarian in its nature will not be complete or effective without dismantling the structures of control exercised by the Ba'ath Party, as an institution as well as an ideology, over Iraqi society. A program of de-Ba'athification of all facets of Iraqi life has therefore to be put into effect, aiming towards a disengagement of the party presence and control from all institutions of Iraqi society.

Such a de-Ba'athification program would not consist of the total abolition of the current administration, since, in addition to its role of social control, that structure does provide a framework for social order. However it would entail the outlawing of the Ba'ath party until such time as it undergoes thorough restructuring and revision of its program and behavior.<sup>72</sup>

De-Ba'athification should be thought of as a composite series of actions involving dissolution of some institutions, segmentation of others, and the de-ideologization of the Ba'athist legacy from the whole of Iraqi society .

4.3.2 The Transitional Government once it is established on Iraqi territory should begin an immediate assessment of which institutions of the Ba'athist regime must be dissolved, which can be reconstituted through major reorganization, and which can be gradually reformed from within. At a minimum, the authority must dissolve the RCC, the Ba'ath

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<sup>72</sup>Not all members of the working group thought that the Ba'ath Party needed to be outlawed, citing the argument of the freedom of association.

Regional Command, the National Assembly, the Special Republican Guard and Special Security, as well as the several militias and paramilitary organizations of the current regime.

The police force, and indeed all law enforcement agencies, must be removed from the jurisdiction of the Ministry of the Interior (until 1987, the Amn came under the authority of the ministry of the interior; after 1987 it reported directly to the presidency) and be placed under the jurisdiction of the Ministry of Justice. The separation of the investigative and prosecutorial function, however, should be kept separate from the judicial function. The challenge facing the Transitional Government will be to create an efficient police force that is also restrained and law-abiding, and rigorously trained (or re-trained) with international expert assistance.

A challenge facing the Transitional Government will be the absorption of the people who worked for the Security Apparatuses. Hundreds of thousands will receive amnesty but they may be socially ostracized and encounter discrimination in jobs and elsewhere. They may also present a destabilizing element, especially if they are left without work or ability to get work.

*4.3.3 De-Ba'athification cannot mean dismissing from their jobs all two million Iraqis who belong to the Ba'ath party, or conducting witch hunts based on rumors and allegations.* If nothing else, summary dismissals will deprive the Transitional Government, and the country, of valuable skills, historical knowledge, and experience. Because Ba'ath membership is highest among government employees, such a draconian measure will decimate the entire civil service, educational system, and other essential institutions.

While many of the top officials are easily identified, the exact role and status of the majority are less easy to discern. Seniority in the Ba'ath Party does not always translate into a position of power in government, and conversely, not all officials who are guilty of collusion in crimes are high in the Ba'ath Party hierarchy. The Transitional Government should carefully determine the layer of senior officials that need to be replaced according to a set of criteria to be developed in Section 5.0 of this report. In general, the Transitional Government must try to preserve as much as possible of the rank and file and "middle management" classes of government officials for the sake of continuity and efficiency while providing stages of oversight and avenues of appeal for abuses.

In Central European countries, there were no wholesale purges of communists, but several of them adopted lustration laws to identify and remove from office people accused of crimes during the communist era. The Transitional Government should look into these laws to assess their applicability in Iraq.

Despite its many political upheavals, Iraq is fortunate in having had a continuous history of government institutions and civil service. While these are undoubtedly affected by decades of Ba'athist control having been deformed to serve the regime's ends, they are

nevertheless a store of experience and knowledge of the intricate machinery of government and society in Iraq.

4.3.4 *De-Ba'athification also means a definition of victimhood at the hands of the Ba'ath.* A victim might be defined as one who was oppressed because of political opposition to the Saddam Hussein regime in Iraq, or because of race, religion, or ideology, and who suffered loss of life, damage to limb or health, loss of liberty, property or possession, or professional or vocational harm.

*Any definition of victimhood adopted should be broad enough to include members of the Ba'ath Party who were victimized by the regime.* All institutions should be separately classified and could be compensated with respect to damage to property and possessions.

Classification according to this definition, would provide a basis for compensation and laws should be drafted to regulate that process. These would have to cover:

- Restitution of despoiled property;
- Indemnification for material losses;
- Rehabilitation;
- Restoration of citizenship for those deprived of it;
- Restoration of educational or professional degrees to those deprived of them;
- Reversal of convictions or rehabilitation of those convicted of political crimes, or for other racial, ethnic, or religious reasons;
- Declaring null and void confiscatory acts of the Ba'ath regime, and the reversal of their effects wherever possible; and
- Restitution of identifiable property (this was the first step taken and was done by the military government in post-Nazi Germany which enacted legislation to effect this).<sup>73</sup>

4.4.5 Following the Second World War, Germany underwent a de-Nazification program which it behooves Iraqis to study and, perhaps, adapt to the circumstances of Ba'athist Iraq. In brief, German Nazi Party members were classified into one of five categories. These ranged from "Major Offender" at one end of the scale to "Exonerated" at the other end of the scale. An individual's ability to be employed in sensitive government positions, or to be able to recover any compensation at all, rested on exoneration. Criminal prosecution of offenses by the top categories was pursued by the state, federal,

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<sup>73</sup> See, 1949 "Decree on Restitution of Identifiable Property." Subsequently, the "Federal Restitution Law" which was passed in 1957 and which held the post-Nazi government liable for at least 50% of all claims. There was a deadline for filing of claims, but subsequent legislation softened the effects for those who missed this deadline.

and the International Military Tribunal at Nuremberg (in the case of the most egregious offenders).

The problem is that crimes under the Nazi regime were often committed under the cloak of legality so that reform of the judicial and legal system (which was imperfect following the Second World War) was critical to the success of subsequent criminal prosecutions and restitution efforts. This problem will also be faced in a country where all of Saddam Hussein's decrees have been carefully written so that they do in fact have the force of law.

*Under such circumstances, the Transitional Government is strongly advised to consider all forms of the involvement of international tribunals and courts, military or as authorized by the UN Security Council, to try former high ranking members of the Ba'ath regime.*

4.3.6 In addition to its own role in regimenting and organizing members, the Ba'ath Party serves as an umbrella control structure for organizations which in a free environment would be independent constituents of civil society, such as students' and women's associations and professional unions. In addition, the Ba'ath Party assumes a de facto parallel supervisory role vis-à-vis state organisms, including the armed forces and the security agencies. The North Iraq Dataset documents, which are being annotated and analyzed at Iraq Research and Documentation Project, reveal the depth of penetration of the Ba'ath Party into Iraqi institutions. However, the current state of this penetration requires a thorough survey, both de facto and de jure, as a preliminary step. Among the crucial issues that need to be addressed is the problem of making the names of the many tens of thousands of Iraqis identified in these documents public.

4.3.7 Since the decrees of the RCC have constituted the legal backbone for the Ba'ath Party incursion into Iraqi society, the de jure component of the survey should start by an assessment of the formal space accorded to the Ba'ath Party in these decrees. The de-Ba'athification of Iraqi society will initially be based on the abolition on all legal rights and privileges accorded to the Party through the decrees of the RCC. Careful consideration will also have to be given by the Transitional Government to the formal outlawing of the Ba'ath Party (the German constitution specifically outlaws the Nazi party).

#### *4.3.8 Reform of Education and the Media*

De-ideologization, while less measurable, is arguably the most important and the most difficult of the tasks of the de-Ba'athification program. Separate plans need to be prepared for a review and a reform of school and college curricula, the press and audio-visual media, the fine arts, as well as urban planning.

After the Second World War, in Germany, the Allies began by reviewing all old textbooks to determine which should be reprinted. They excluded textbooks that glorified war, endorsed war preparations, and contained propaganda promoting nazism, racism, and hostility towards international organizations (one would consider here

including condemnations of ethnic or religious minorities - or textbooks which contained propaganda directed at religious groups). A very few German-authored textbooks were in the beginning chosen for reprinting (rather than importing texts by foreign authors). In 1946 principles to guide the writing of history books were formulated and issued - giving priority to social and cultural history and emphasizing the promotion of international understanding. Teachers at all levels underwent screening and "de-Nazification."

We recommend a special task force of the Transitional Government be established immediately to develop guidelines and make recommendations of this type suitable to conditions in Iraq.

#### **4.4 Educational Reform**

4.4.1 Reforms to the educational system in Iraq needs to be considered within the program of De-Ba'athification, as stated in point 4.3.8 above. It needs to be addressed immediately after the collapse of the regime by the Transitional Government. The following issues need to be considered.

- *Contingency Plan for mid-year change*

How do deal with a situation where the regime collapses in the middle of an academic school year? Time obviously does not allow for a thorough rewriting of the curriculum, it is necessary to distill basic subjects that can be followed from the existing curriculum such as Arabic grammar, language, Mathematics and Science. Consideration should be given to short term remedial action in the case of subjects such as history, and political geography that are far more ideologically loaded. The national education, *al-tarbiyyah al-wataniyyah*, course should be abolished entirely. It is useful to learn from the Kurdish experience with these matters in northern Iraq.

- *Illiteracy*

Since the Gulf War, an entire generation of Iraqi children, particularly in the southern provinces, have received little if no education. This is true at all levels, but particularly at the elementary level. Immediate remedial action needs to be taken. Therefore, a different educational program has to be adopted to apply to all ages. Again in the absence of time, it is possible to revert to general Arabic textbooks for teaching Arabic as a start. In sum, a different philosophy of teaching could start to be applied to treat illiteracy for young adults.<sup>74</sup> For the Kurdish language, there are already textbooks in

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<sup>74</sup> If existing elementary Iraqi Arabic language textbooks are not considered acceptable, then language books from other countries such as Lebanon could be imported for example.

circulation in northern Iraq for this purpose, although the problem of illiteracy does not seem to be as prevalent with the existence of a civil society there.<sup>75</sup>

- *Language*

In accordance with whatever official language Iraq adopts, national or provincial, it is necessary to address whether many languages will be taught nationwide or only in those provinces with a dominant ethnic majority. This will depend on the federal formula that is eventually adopted.

#### 4.4.2 *The Committee for Educational Reform*

In the interim period, even prior, there is a need to set up a Committee for Educational Reform that will:

- *Survey the present educational curriculum*

Access the current status of education (from grade one through to grade twelve)<sup>76</sup> as well as the national education course, *al-tarbiyyah al-wataniyyah*, that is taught as an independent subject in secondary school and university. Although the entire curriculum is affected with Ba'ath ideology, this course is the ideological fodder given to students, therefore its close examination, perhaps even its immediate abolition, is essential to address the means to De-Ba'athizing education. Extra-curricular activities such as the Ba'ath military summer camps need to be abolished. An examination of youth organizations and training needs to take place with a view to abolishing all military-related activities.

- *Determine Teaching and Educational Standards*

The Committee will need to examine all literature, training courses and guidelines given to school teachers through teachers' training colleges, *Ma'had al-Mu'alimin*, and the Ministry of Education, because these have been subverted over the years to act as an arm of surveillance for the regime. The incentive for good teaching in Iraq, even at an elementary level, has been corrupted. Teachers' organizations have become interlinked with the state security system and the problem is how to rid teaching and the curricula of all form of Ba'athist ideological indoctrination.

#### 4.4.3 *Towards an Inclusive all-Iraqi Educational System*

For the longer term, a different set of educational objectives should be established in line with Iraq's new political system where the emphasis is on Iraqi patriotism not Arab nationalism. This is essential in the undermining of the leadership cult surrounding the

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<sup>75</sup>These also need to be revised as there is evidence of the emergence of a hyper Kurdish nationalism in recent years.

<sup>76</sup>University education needs to be addressed separately with specialized committees within each field. However in the interim, all ideological education should be discontinued.

figure of Saddam Hussein. Nevertheless, it is a delicate matter in the wake of the tragedy that Iraq has been living and the destruction of self-esteem suffered at the national level. The major elements of such an education are:

- *Citizenship and Human Rights*

Creating a subject addressing issues of citizenship, human rights, and the concept and good practices of a democratic culture.

- *History*

How to write history for textbooks that incorporates Iraq's contemporary history and acknowledges its totalitarian nature without over-burdening students with it, but without dismissing it either. Here examples of German de-Nazification education are useful as are the examples of certain post-Soviet East European countries (such as Romania), Chile and Japan after the Second World War (as examples of non-Western/1<sup>st</sup> world nations).

Moreover as mentioned elsewhere in this report, it is important to begin the introduction of the history of religious creeds and rites into the national curriculum of Iraq in a way that celebrates the religious diversity and pluralism of Iraq. This point is of special relevance to integrating non-Muslim minorities within an all-Iraqi, as opposed to exclusively Arab, narrative. There is a need to incorporate the history of Iraq's non-Arab ethnicities as well as to reconsider the purely Arab nationalist narrative that has been so distorted.

- *Archeology*

There is a need to reconcile Iraq's modern history with its ancient pre-Islamic one, without producing a new form of Iraqi fascism and myth of identity. This applies to architectural and archeological sites whose meaning has been deformed and twisted to suit Ba'athist purposes.

- *Sciences*

Total update of all scientific subjects to become on par with the rest of the world. This also requires a revision of teaching methods in science, where the general trend is to teach the history of science rather than the application of science.

- *Technology*

Integration of new computer technology and the internet within the curriculum. These efforts can be coordinated with international education organizations and consultants. Furthermore, all independent education institutions that had previously existed in Iraq, such as the British Council, American Jesuits, Alliance Française should be encouraged to resume their activities.

## **5.0 The Armed Forces**

### **5.1 Introduction**

The Iraqi army has played a very controversial role in the history of Iraq, a role that was politicized from the outset. This is the army that pioneered the first coup d'etat in the Arab world in 1936 led by Bakr Sidqi, the Iraqi officer who had instigated and directed the massacre of the Assyrian community in 1933. It is an army whose contribution to Arab-Israeli wars has been nil (1956) or purely token (1948, 1967 and 1973) and whose only successes have been against tribesmen, defenseless civilians, and in tearing down the parliamentary system set up in Iraq during the period of the British mandate. The legacy of these abuses, and of the hundreds of thousands of Iraqis who have died violently and in wars since 1980, have deeply tarnished the image of the Iraqi army. Anecdotal evidence from inside Iraq strongly suggests that young men no longer look upon this army with any kind of respect and pride; on the contrary they regard it with contempt and disrespect, and would choose to have nothing to do with it if it were not forced upon them. The endeavor to bring about constitutional and representative government in Iraq, must therefore address the contribution of the Iraqi armed forces to the evolution of the current situation in Iraq and draw up an alternative vision for the future of the armed forces in Iraq than the one that prevailed between 1958 and 1968, and, in a different form, between 1968 and 2002.

### **5.2 The Militarization of Society**

In 1980, on the eve of the Iran-Iraq war, the army numbered around 242,000 men. Among Arab countries, this number of military personnel was at the time second only to Egypt (a country three times the population of Iraq), and twice the size of Algeria (a comparable country to Iraq in many ways). By 1984, there were 42 military personnel to every one thousand civilians in Iraq as contrasted to 4 in 1933 and 11 in 1941, the highpoint of pan-Arabism in pre-Republican Iraq. During the 1980s, and until the end of the 1991 Gulf war, the Iraqi army grew at an even more accelerated pace reaching the size of approximately one million men (less conservative estimates have put the size of the Iraqi army at 1.5 million). The militarization of society in Iraq was now clearly in a league of its own. Today the best estimates available suggest a size of 400,000-500,000.

One of the consequences of the growth of the Iraqi armed forces and the role they have played in Iraqi politics and society is the growing militarization of society. A whole generation of men have wasted their lives fighting wars of aggression and expansion. This militarization has brought about an abnormal increase in the relative number of military compared to civilian personnel, and it has been so structured by the Ba'athist regime as to increase sectarian and ethnic tensions between the different communities of Iraq. The phenomenon is also coupled with declining societal productivity and

creativity in both the economic and cultural spheres. In Iraq, furthermore, it has led to an increase in the privileges of the members of the military and the armed forces, including the increasing powers and scope of special, extra-judicial courts be they of the army or the intelligence services.

Since the beginning of the Iran-Iraq war, the powers of these extra-judicial courts grew until they began to take over many of the functions of the judicial system. In addition, the various extra-judicial organizations, such as the various security apparatuses took to establishing their own courts. These in effect trumped the courts of the civil judicial system. Accordingly, not only did the power and jurisdiction of these courts expand, but their number expanded - all at the expense of the civil judicial system and the civilian government.

*Conclusion: The far-reaching militarization of society that has been going on in Iraq since 1958, requires carefully considered and yet ultimately sweeping reform of the armed forces during the transitional period.*

### **5.3 The Reform of the Iraqi Armed Forces**

The first step in the reform of the Iraqi Armed Forces is to ensure that in the uncertainty and turmoil that is bound to follow in the wake of the fall of the Ba'ath regime, the subordination of the military to the elected civilian powers is guaranteed and Iraq does not return to the cycles of military ruled that plagued it between 1958 and 1968.

*If Iraq is to become a country with an elected, democratic government, its armed forces must be made totally and absolutely subservient to the elected civilian administration. Accordingly, there must be an immediate and early emphasis by the transitional authority on ensuring this subservience of the armed forces, especially of the officer corps.*

It is not only the mode of thinking that must be changed but the administration of the armed forces and the laws governing the armed forces. The paramount permanent legal framework governing the country in the future must be the permanent constitution, and it is here that the reform of civil-military relations must start.

#### *5.3.1 De-Militarization*

*One approach to reform is to de-militarize Iraq, following the Japanese experience after the Second World War, which entailed abolishing forced conscription and the imposition of a constitutionally prescribed limit on all allowable military expenditure and a renunciation of the right of the Iraqi state to wage war.<sup>77</sup>*

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<sup>77</sup> Some members of the Democratic Principles Working Group think this idea was unworkable and should not be adopted. Their views on the army are appended to this report.

Ideas along these lines were first articulated in a historic Iraqi document called Charter 1991 signed by more than 400 Iraqis of every ethnic and religious group and from all walks of life. This is what the relevant passages of that document had to say on the question of de-militarization:

"The notion that strength resides in large standing armies and up-to-date weapons of destruction has proved bankrupt.

Real strength is always internal--in the creative, cultural and wealth-producing capabilities of a people. It is found in civil society, not in the army or in the state. Armies often threaten democracy; the larger they grow the more they weaken civil society. This is what happened in Iraq. Therefore, conditional upon international and regional guarantees which secure the territorial integrity of Iraq, preferably within the framework of an overall reduction in the levels of militarization of the whole Middle East, a new Iraqi constitution should:

- Abolish conscription and reorganize the army into a professional, small and purely defensive force which will never be used for internal repression.
- Set an absolute upper limit on expenditure on this new force equal to 2% of Iraqi National Income.
- Have as its first article the following: "Aspiring sincerely to an international peace based on justice and order, the Iraqi people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. The right of belligerency of the Iraqi state will not be recognized."

The approach of Charter 1991 has the great advantage of ensuring that expenditure on the Iraqi military, and consequently its relative power in society at large, will always be contained and that these limits are permanent, or, rather, subject only to amendments in the Permanent Constitution. To effect such a radical transformation of the armed forces it will in all likelihood be necessary to honorably discharge military personnel in large numbers and proceed simultaneously with the reassembly of a new military force largely headed by senior officers who have been decommissioned or previously sent into retirement by the regime. This new force should be carefully designed from the outset to break down the confessional and ethnic faultlines created by the outgoing regime and it should be officered by men who are unambiguously loyal to the new Transitional Government.

The de-commissioning of hundreds of thousands of trained military personnel that this implies could create social problems. Consideration therefore should be given to handling this problem by creating, among other alternatives, something like a new *Public Reconstruction Authority* made up of de-commissioned officers and soldiers that would undertake large-scale reconstruction projects in north and south of Iraq, specifically in areas devastated by the army during the Anfal operations and in the marshes region. This Public Reconstruction Authority could devote itself to rebuilding destroyed villages and associated infrastructure and reforestation and environmental work.

5.3.2 Even de-militarization, it is important to note, is premised on there being an Iraqi military of some sort, and the necessity of providing for the protection of the territorial integrity of Iraq from foreign interference. Accordingly, in devising a plan to reform

the armed forces in such a way, strategic defense planning must take into account that a reformed, smaller Iraqi armed forces can still defend Iraq. Two complementary approaches suggest themselves:

1. Following the Swiss model, to recreate a small core Iraqi army, supported by a larger number of reservists, who are continuously trained and therefore could play an effective role in the defense of Iraq.
2. The other approach, which is complementary rather than mutually exclusive, is to hold an international conference under the auspices of, say, the UN, which should deal, among other things with guaranteeing the territorial integrity and sovereignty of a country (Iraq) which wants to de-militarize itself.

5.3.3 Control over military expenditure, whether by constitutional means or otherwise, is central as a check on the military. In the United States, control over military expenditure resides with Congress, and not the executive. This provides a key limitation on the President, who is the commander-in-chief of the armed forces, from being able to increase expenditures on the armed forces. Therefore, with respect to realigning civil-military relations in Iraq, the ultimate objective should be to check the powers of the executive (by means of the legislature), which nonetheless still ultimately remains in control of the military.

The realignment of civil-military relations therefore contains an aspect of realigning executive-legislative relations. Since the executive should control the military, then the legislature would need to be granted powers to create a check on the powers of the executive with respect to the military. Financial control is one aspect of it. The power to declare war is another. Since the general idea is that Iraq should not be able to enter into wars with its neighbors, then the only party that should be able to declare war in an emergency situation should be a broad body and the legislature is the only such body.<sup>78</sup>

## 5.4 Practical Steps to Institute the Reform

### 5.4.1 *The Committee for Military Reform*

The reform program for the Iraqi military needs to be implemented under the supervision of civilians; however, the assistance of certain key officers of each branch of the military is needed. Accordingly, in an effort to implement these reforms, a Committee for Military Reform (the "CMR") needs to be established. The goal of the CMR would be the recommendation of the practical steps needed to implement the reform program, and to overview the implementation of the plan. The majority of the

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<sup>78</sup> This factor is premised on the fact that a permanent constitution would not have renounced war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes. If such principles are embodied in the permanent constitution, then legislative control on the executive with respect to the declaration of war becomes less of an issue.

CMR must consist of civilians, but there must be a representative group of senior military officers on the CMR.

#### *5.4.2 Reduction of Military Personnel*

In an effort to implement a smaller, more strategic army, the CMR must begin the process of reducing the number of military personnel. This process has a number of key facets that need to be considered. First, the social and economic basis of the reduction in the number of personnel must be considered. The main issue here is that there could be substantial social and economic chaos created if a large number of military personnel are immediately released. Second, one needs to consider what these personnel would do once they are released. As happened in a number of Central and Eastern European countries following the collapse of the communist regimes, the haphazard reduction or laying-off of security personnel in those countries led to a rise in organized crime syndicates. We need to consider the effect of this in the context of Iraq.

The first step to be implemented here would be to cancel military conscription and offer any current members of the armed forces the right to leave the service; in this regard, therefore, canceling conscription and honorably discharging personnel does not automatically lead to expulsion from the army.

#### *5.4.3 Training and Educational Programs*

In the regular army units, even among the officer class, there are two types of individuals - educated and non-educated. Obviously, there are substantially more officers that are educated than non-commissioned officers and the rank and file. Therefore, prior to taking any further steps to reduce the number of military personnel (other than allowing those who want to resign leave to do so), a number of steps should be taken. These include:

1. Educational programs should be established for the non-educated members of the armed forces - including technical and vocational training programs. Generally, these educational programs would be introductory in nature and should include a relatively broad spectrum of classes;
2. With respect to those educated members of the armed forces, training programs should be established to develop their skills in order for them to catch up in their specialized education levels; and
3. As for those personnel with specialized skills, such as engineers, a building authority would be established to utilize their skills to rebuild the country. These people should be accordingly compensated (as a higher level than other members of the armed forces) and, over time, their employment would be taken over by the building authority.

#### *5.4.4 Demobilization*

In an effort to compensate the members of the armed forces and not to upset them for their release from their functions, a developed pension scheme should be established. Although a pension scheme already exists, this scheme is inadequate and has not kept in place with inflation and the reduction in the value of the Iraqi dinar. The goal of the reformed scheme would be to reward those members who are in the armed services, taking into account (through a matrix) their years of service and their rank. In addition, the pension scheme would have - as a key component - incentives to leave the service early. Another incentive is for the pension scheme to be paid earlier than normal - that is, for example, at a younger age. Once these members of the armed forces are trained or re-trained, they would be encouraged financially to leave the service, or alternatively will be asked to leave the service. The new government would also play a role in assisting these members of the armed forces to find jobs or making low interest loans to them to create new businesses.

#### *5.4.5 The Reduction in the Scope of Martial Law*

Although in theory the jurisdiction of the military courts and the application of martial law is limited in Iraq, in practice military and extra-judicial courts are extremely widespread. Accordingly, military personnel, to whom these courts and this law apply, have substantial privileges that the population at large do not have. For example, a murder committed on a civilian by a member of the armed forces, in practice could not be tried by the Iraqi judicial system without the prior approval of the Ministry of Defense, which is rarely granted because such ministry wants to protect its own and wants to keep the privileges among its personnel. Should there be a realignment of the civil-military relations, this realignment must also be expanded into the judicial sphere by a dramatic reduction in the jurisdiction of all extra-judicial or “special” courts.

#### *5.4.6 Compliance with the Transitional Justice Programs*

The MRC must ensure that the armed forces comply with the transitional justice programs laid out in Section 3 above.

## **6.0 Reform of the Law and Order Structure**

### **6.1 Introduction**

The current law enforcement apparatuses in Iraq have the goal of protecting the regime and the political system, rather than protecting the citizens of Iraq. Indeed, since the law enforcement apparatuses were designed on an Eastern European model, they primarily perform security, surveillance and social control functions rather than law enforcement functions. Indeed, the vast majority of the human rights abuses within Iraq have been committed by the various security apparatuses.

Iraq did have an active police force, which continues to exist, but this police force has become marginalized and no longer plays an effective role in law enforcement. In fact, the concept of law enforcement in Iraq - as it is commonly understood in countries with more developed police forces (protecting citizens from crimes) - is almost non-existent. To the extent that certain legitimate law enforcement functions exist, they are principally carried out by the security apparatuses. Oddly, in many instances in which ordinary crimes are committed, they are done so by paramilitary organizations or the security forces themselves.

The transition to a democratic Iraq must have, as one of its most important tasks, the role of transforming the various law enforcement and security mechanisms into a coherent law enforcement agency and a coherent, integrated intelligence agency. The new law enforcement agency, which must be reincorporated into a civilian body possibly under the tutelage of the Ministry of Justice, must somehow incorporate the legitimate law enforcement activities of the existing police and the security apparatuses. In addition, the legitimate existing intelligence activities of the security apparatuses would need to be integrated into one new apparatus, whose activities must above all be brought within the purview of the judiciary (that is, their activities must be subject to the law and its legitimate enforcement agencies) and under the tutelage of the cabinet. Potentially, this is the most delicate part of the whole program.

### **6.2 The Militarization and Marginalization of the Police Force**

The Iraqi police force, which was created with the assistance of British advisers following the establishment of the State of Iraq, was a civilian police force that was under the jurisdiction of the Ministry of the Interior. As with other police forces in other countries, the basic role of the police force, in addition to keeping peace and order, was to implement the orders of the judiciary. The police force was composed of all the different elements of Iraqi society and therefore, with the exception of concentrations from certain areas, was representative of all such elements. There were police academies established in the 1960's

that ensured training of the police cadres. Accordingly, with certain exceptions<sup>79</sup>, the relations between the police force and the population at large was generally one of mutual respect.

After 1968, the Ba'ath Party enacted certain laws and promulgated decrees that had the effect of converting the police force into a quasi-military force governed by internal laws (*Qanun Usul Uqubat al-Qiwa al-Amniyyeh*) that are very similar to military laws. Service in the police force became intermingled with service in the military, which led to the further militarization of the police force. It seems that the purpose of these laws and decrees was, in effect, to make the police force a more brutal and oppressive force..

The role of the police was further marginalized by the emergence, and subsequent dominance, of the security apparatuses created by the regime. The overarching supremacy of these security apparatuses ensured that the powers of the police force, and therefore also the judiciary, were made even more limited. There were many instances in which the police force was prohibited from investigating crimes as a result of orders from the security apparatuses.

### **6.3 The Security Apparatuses**

The first thing to understand about the current structure of the security apparatuses is that it is not a law enforcement structure *per se* but rather a surveillance and social control apparatus whose goal is to ensure that neither the population nor the military are ever in a position to question the policies and security of the regime.

There are a large number of security apparatuses currently in Iraq, each with overlapping powers (which enables each such apparatus to check on the activities of the other apparatuses, and therefore act as a cross-checking mechanism). One mechanism that Saddam Hussein has employed is that, with the exception of his son Qusai, he has frequently rotated the directors of the various security directorates to ensure that none of them is able to develop a base of supporters within any one directorate. In addition to the state apparatus, there are Ba'ath Party apparatuses, and apparatuses designed to protect the ruling family. Overall, and this is a rough estimate, there may be up to 200,000 people involved in the various structures.

#### *6.3.1 The Structure of the Security Apparatuses.*

The following is a brief overview of the structure<sup>80</sup>. At the top of the structure lies the National Security Council, on which sits Saddam Hussein, his son Qusai, Abd Hmood Hmeid (the president's private secretary) and the heads of the General Intelligence

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<sup>79</sup>One notable exception was *al-Tahqeeqat al-Jinai'iyah*, which was run by Bahjat al-Atiyya, which due to the excesses it carried out, was despised.

<sup>80</sup>For a more detailed analysis of the structure, see the chart in Appendix 1.

Directorate (*Jihaz al-Mukhabarat*), the General Security Directorate (*Mudirriyat al-Amn Al-Ammeh*) and the Military Intelligence Directorate (*Mudirriyat al-Istikhbarat al-Askariyyah*); in addition, the deputy chief of the Special Security Directorate (*Mudirriyat al-Amn al-Khass*), which is presided by Qusai, sits on the National Security Council. These various directorates are tied directly to the presidential palace through the National Security Council, which performs a co-ordinating function, though allowing a significant amount of autonomy for each of the various directorates. Each of the directorates has special roles, although as mentioned above there are overlapping activities.

### 6.3.2 *The General Security Directorate*

The General Security Directorate is the oldest of the Iraqi security services, having emerged from the remnants of the Aref era security operations and the Jihaz Haneen of the Ba'ath Party (overviewed by Saddam Hussein in the 1960's). In many ways, its evolution demonstrates the regime's thinking with respect to its security apparatuses. Its first head was General Nadhim Kzar, who rebelled against the regime in 1973. As a result of this action and its suppression, the regime first "cleansed" the directorate of those who had questionable ties to Kzar or questionable allegiance, and then established the General Intelligence Directorate to act as somewhat of a check on this directorate and to which was given substantially added responsibilities.<sup>81</sup> One other aspect of the development of the General Security Directorate is that in the late 1970's it was established as an independent agency and removed from the jurisdiction of the Ministry of Interior, reporting directly to the Office of the President. In many ways, within Iraq, this directorate has been the principal security interface of the regime and as a result it has been more widely detested than other security directorates among the population at large.

The General Security Directorate has tasks that relate to the internal security of the state, that is, it is a political security police. Its main activities are:

- Detecting dissent among the general public and reacting to political "criminal" behavior;
- Monitoring the day-to-day lives of the population (by creating an invasive local presence), especially the activities of well-known Iraqis, including retired army officers;
- Ensuring the internal security of certain regions, vis-à-vis disturbances;
- Maintaining an extensive system of personal files of Iraqi citizens;
- Operating an extensive network of informers;

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<sup>81</sup> For a general overview of the activities and functions of the various security directorates, see Ibrahim al-Marashi, *Iraq's Security and Intelligence Network: A Guide and Analysis*, in Volume 6, No. 3 of *Middle East Review of International Affairs*.

- Controlling the social and political awareness of the population at large;
- Containing any rumor-mongering inside Iraq; and
- Containing economic disturbances and monitoring the Iraqi local markets.

The General Security Directorate is divided into a number of departments - the political affairs department (which monitors opposition activities within Iraq), the administrative affairs department (which carries out the administrative and legal dimension of the directorate's work, as well as maintaining the archives), the technical affairs department (which carries out surveillance and other specialized technical tasks), the directorate security affairs department (which maintains the security of the directorate's offices and overviews the prison system of the regime, including the Abu Ghraib prison), the general security department (which maintains the security of the government departments and offices), the investigative department (which maintains a large network of informants), the security offices (which is responsible for surveillance of other members of the directorate and countering any dissent within the organization), the passport department (issuing passports) and the mechanized department (which overviews any mechanized carriers of the directorate, as well as carrying out assassinations and other similar tasks). In addition, after the 1991 Gulf War, it was provided with a special armed wing, known as *Quwat al-Tawari'* or the Emergency Response Forces. These forces also had a responsibility of hiding Iraqi ballistic missile components.

### 6.3.3 *The General Intelligence Directorate - Jihaz al-Mukhabarat*

The General Intelligence Directorate<sup>82</sup> essentially emerged from the Special Apparatus of the Ba'ath Party (*Al-Jihaz al-Khas*)<sup>83</sup>. At the time, the Special Apparatus had the responsibility of assassinating members of other political groups as well as Ba'ath Party members suspected of disloyalty. In 1973, following the failed coup attempt of Nazim Kzar, the Special Apparatus was transformed officially into the General Intelligence Department and formed the nucleus of the General Intelligence Directorate. Between 1979 and 1983, it was led by Barazan al-Tikriti, Saddam Hussein's brother, and accordingly its powers were increased substantially. However, following the Gulf War of 1990-91 and the rise of the Special Security Directorate (partially due to the fact that it was headed by Qusai Saddam Hussein), the General Intelligence Directorate's powers and responsibilities were reduced. Moreover, many of the more loyal or better quality personnel of the General Intelligence Directorate were recruited by the Special Security Directorate, which thus slightly demoralized staff of the General Intelligence Directorate.

Generally speaking, the General Intelligence Directorate has tasks such as the collection of information on outside countries and opposition forces, as well as carrying out

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<sup>82</sup>Has been previously known as *Ri'asat al-Mukhabarat* or *Dai'rat al Mukhabarat al-'Amma*.

<sup>83</sup>This is not to be confused with *Jihaz al-Haneen*, which was another Ba'ath Party apparatus created during the 1960's.

assassinations overseas. Its responsibilities can be divided into internal responsibilities and external responsibilities.

Its internal activities can be divided into the following:

- Suppression of an Shi'ite, Kurdish or other internal opposition;
- Monitoring the Ba'ath Party, other allied political parties and grass roots organizations (such as youth groups and unions);
- Counter-espionage;
- Targeting threatening groups or individuals inside Iraq;
- Co-ordinating activities with Palestinians in Iraq and the *Mujahideen Khalq* organization;
- Monitoring foreign embassies and other foreigners in Iraq; and
- Maintaining an internal network of informants.

Its external activities include:

- Monitoring the personnel of Iraqi embassies abroad;
- Spying on other countries;
- Aiding opposition groups in hostile countries, conducting sabotage, subversion and terrorist operations in such countries;
- Assassination of Iraqi opposition groups outside Iraq and infiltration of opposition groups outside Iraq;
- Providing misinformation; and
- Maintaining an international network of informants.

The General Intelligence Directorate is headed by a Director, who is assisted by the Special Assistant for Political Operations, the Special Assistant for General Operations, the Office of the Technical Advisor and the Office of the Security Advisor. In addition, there is the Special Office of the Director (*al-Maktab al-Khass*), which essentially functions as the Secretariat for the Director. The Special Assistant for Political Operations, who essentially functions as the chief operating officer of the directorate, oversees the activities of the following departments through his own deputies - information collection, overseas operations, counter-intelligence, the security of the directorate, investigations, operations

(including assassinations), scientific and technical operations and surveillance. The Special Assistant for General Operations essentially performs administrative functions for the directorate.

#### 6.3.4 *The Directorate of Military Intelligence - Mudirriyat al-Istikhbarat al-Askariyyah*

This directorate in many ways is the oldest of the intelligence directorates, having been established in 1932. It was originally part of the Ministry of Defense, although in the 1980's it was reorganized to report directly to the Office of the President. Although established as a special agency in 1992, the Directorate of Military Security (*Al-Amn al-Askari*) was integrated into the Directorate of Military Intelligence in the late 1990's.

The Military Intelligence Directorate has the tasks of the collection of information on the military of neighboring countries and gathering intelligence on the activities of the officers in the Iraqi military. In particular, the Directorate of Military Intelligence's duties include:

- Tactical and strategic reconnaissance of the military capabilities of neighboring countries and of regimes hostile to Iraq;
- Assessing threats of a military nature to Iraq;
- Monitoring the Iraqi military and ensuring the loyalty of the officer corps (including counter-intelligence activities within the Iraqi military);
- Investigating corruption and embezzlement within the armed services;
- Monitoring all formations and units in the armed forces (by infiltrating loyal officers and informants within every military unit);
- Maintaining a military brigade for a quick response to any disloyal acts;
- Establishing and maintaining a psychological warfare program in the military;
- Maintaining a network of informants in Iraq and abroad; and
- Protection of military and military-industrial facilities.

The Directorate of Military Intelligence is run by a director general, who is assisted by four assistants, who have the following functions - information collection, security within the military (counter-intelligence in the military and investigations), special activities (technical information collection) and administrative. In addition, the Directorate of Military Intelligence maintains four regional headquarters throughout the country, in areas known as *mandhumat*, to gather intelligence. The areas of jurisdiction for the *mandhumat* are Kirkuk (responsible for Northern Iran border region and Kurdistan), Mosul (responsible for Syria and Turkey), Basra (responsible for the Gulf states and the southern Iranian

border region) and Baghdad (monitoring Iraqi opposition groups, the central Iranian border region and Jordan, among others).

### 6.3.5 *The Special Security Directorate - Al-Amn al-Khass*

The Special Security Directorate has evolved into becoming the most senior security service, primarily because it was until recently run by Qusai Saddam Hussein, and was therefore deemed to be the most authoritative of the security services. In addition, it carried out some of the most sensitive tasks of the regime, such as the concealment mechanisms of the weapons of mass destruction, certain embargo busting activities and counter-intelligence against the other security directorates. Because of its sensitive tasks, the selection of the personnel of the Special Security Directorate has been critically important; and therefore its personnel are primarily composed of members of Tikriti clans, or other Sunni clans. Upon its initial establishment, its personnel were hand picked for their loyalty or perceived loyalty from the other security apparatuses.

Its principal activities include:

- Overseeing the security of the President and his family<sup>84</sup>;
- Securing all presidential and sensitive facilities, such as presidential palaces;
- Supervising other security apparatuses and intelligence services, especially their security functions;
- Monitoring government ministries and the leadership of the armed forces;
- Supervising internal security operations against the Kurdish and Shi'ite opposition;
- Purchasing foreign arms and technology, as well as other embargo busting activities;
- Overall responsibility for Iraq's critical military industries;
- Directing efforts to conceal Iraq's weapons of mass destruction program;
- Overseeing the activities of the Special Republican Guard and the Republican Guard; and
- Managing the directorate's own military brigade.

Broadly speaking, the Special Security Directorate is composed of three wings, or bureaus - the Security Bureau (monitoring the directorate's security itself, as well as the security of

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<sup>84</sup>The actual bodyguard contingent of the President, which is responsible for the immediate protection of the President and whose personnel accompany the President, is the *Jihaz al-Himaya al-Khasa*, which reports directly to the President and his secretary, Abd Hmood Hmeid. In his capacity as head of the Special Security Directorate, Qusai, oversees the activities of this group.

presidential and other key sites), the Political Bureau (which collects and analyses information, as well as preparing operations against "enemies of the state" through its operations office) and the Administration Bureau (which maintains the archives and conducts other administrative activities). The Security Bureau is also responsible for overseeing the movements of the Republican Guard and the Special Republican Guard, as well as operating the directorate's military brigade.

### 6.3.6 Other Non-Governmental Security Apparatuses

Somewhat unconnected to the above mentioned entities are certain non-governmental security apparatuses. These include the machinery of the Ba'ath Party and the non-official groups, such as the "888 Brigade" and the Martyrs of Saddam (*Fedayin Saddam*).

- **The Ba'ath Party Apparatuses:** Part of the role of the Ba'ath Party machinery is the spying on the activities of the various organizations of the state (such as universities and unions). There is a paramilitary organization within the Ba'ath Party, headed by Taha Yasseen Ramadhan, which is known as the Popular Army (*Al-Jaish al-Sha'abi*). In addition, there is an apparatus known as *Amn al-Hizb*, or the Party Security Agency, which is responsible for maintaining the security of Ba'ath Party offices and conducting other security activities that are not directly related to the state;
- **Other Apparatuses:** There are other paramilitary and security apparatuses, such as those connected to Uday Saddam Hussein, that are unconnected to the above, the goal of which is the protection of the ruling family or of specific persons. These include the *Fedayin Saddam* and the "888 Brigade", each with specific defensive or counter-insurgency tasks.

## 6.4 Structural Reform of the Law Enforcement and Security Apparatuses

The main thrust of the transition to democracy from the viewpoint of the law enforcement and security apparatuses is the transformation of law enforcement and security agencies into a legitimate police force and a legitimate intelligence agency. Broadly, this would entail the "elimination" of the various overlapping existing security forces and law enforcement apparatuses and the incorporation of their legitimate activities, such as counter-intelligence, into a newly created police force and a newly created intelligence agency. Of most importance in the long-term, however, is that (i) the finances of these two new agencies must be controlled by the legislature, (ii) the newly created police force must be incorporated under the Ministry of Justice and (iii) the newly created intelligence agency would operate within the law and not have an extra-judicial basis.<sup>85</sup> By placing the police

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<sup>85</sup> There are a number of views as to whom should the intelligence security agency report to. One view provides that it should report to the Ministry of Interior, to whom for example the General Security Directorate (*Mudirriyat al-Amn al-Ammeh*) used to report to. Another view holds that there should be a merger between the General Intelligence Directorate

force, or the law enforcement agency, under the control of the Ministry of Justice, the idea is to ensure that such police force is kept under control and does not indulge in any form of human rights abuses. The philosophy is that the police force is there to protect the citizenry and not to be a method of oppressing the civilians. Currently, the security agencies report directly to the President and not to any other entity and therefore strengthen the presidency at the expense of the other parts of the government. As for the financing of the law enforcement and intelligence apparatuses being under the control of the legislature, the idea is that it is the legislature which must have some strong oversight of these apparatuses and the most important way is to control their finances.

## 6.5 Practical Steps During the Transition Period

Iraq does not exist in a vacuum. It is situated in a troubled and unstable neighborhood. Therefore, the existence of effective counter-intelligence measures are needed to protect the state, not the leadership of the state or a particular group in charge of the state, but the state itself. Therefore, the philosophy of the security apparatuses needs to be changed - they are not there to protect Saddam Hussein or his regime. Moreover, during any transition, the security apparatuses could become a threat and therefore they need to be contained very early in the transition.

The following is a summary of the steps needed to be taken early on with respect to the security and law enforcement apparatuses:

- The establishment of a Transition Police Task Force, led by individuals outside the current structure (with experience in intelligence) and who are not tainted by the abusive, oppressive activities of the current security and police apparatuses.<sup>86</sup> The Transition Police Task Force must be headed by an individual with legal experience and who is similarly untainted by past abuses. The Transition Police Task Force must report directly to the Transitional Government;
- The Transition Police Task Force must take active steps to control all the archives and documentation of the existing security apparatuses<sup>87</sup> and the existing police force. Once it obtains control of them, the Transition Police Task Force must assess the available documentation and provide a report to the transitional government as to the key contents of such documents. The purpose here is that this documentation is

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and the Directorate of Military Intelligence, with the merged entity reporting - at least initially - to the head of the Transitional Government.

<sup>86</sup> In this regard, steps must be taken to ensure that no member of the Transition Police Task Force has been implicated in serious violations of human rights and international humanitarian law.

<sup>87</sup> In gaining control of the archives, the Transitional Police Task Force must focus on simultaneously gain the archives of the Special Security Directorate, the General Intelligence Directorate and the General Security Directorate.

extremely sensitive and, if it fell into the wrong hands, can prove to be tremendously destabilizing for society at large and the Transitional Government in particular<sup>88</sup>;

- In order to neutralize the negative impact of the security apparatuses on the transition, members of the Transition Police Task Force must be placed in each of the sensitive positions of each of the security apparatuses (head of each of the security apparatuses, and deputies to the heads of such apparatuses). The idea here would be to ensure that there is no gaping vacuum in the security apparatuses or that the security apparatuses are brought quickly within the control of the Transitional Government, especially during the very sensitive early part of the transition period;
- The members of the Transition Police Task Force that are placed in the Special Security Directorate (*Al-Amn al-Khass*) and the General Intelligence Directorate (*Mudiriyat al-Mukhabarrat*) must take immediate steps to control the foreign activities of these organizations, especially the commercial activities of these apparatuses to ensure that public money is not squandered or embezzled;
- The Transition Police Task Force must ensure the co-operation of the existing and reformed security and law enforcement apparatuses with the transitional justice mechanisms that would be established (see Section 3);
- The Transition Police Task Force must then draw up the organization of the new law enforcement agency, as well as its procedures of operation (the "Police Reorganization Plan"). In drawing up the Police Reorganization Plan, the Transition Police Task Force must consult with international experts in policing and law enforcement forces with a view of incorporating operational procedures that focus on individual rights. The goal is that there will be a newly reconstituted police force that would be responsible for all law enforcement functions (which would incorporate the border police, traffic police and the national passport department);
- Simultaneously, the Transition Police Task Force must begin to assess the genuine and potential internal and external threats to the security of the new government (such as the existence and spread of arms among the population at large) in order to ensure (i) that there is no vacuum as a result of oversight and (ii) there is no danger on the viability of the government (internally or externally). The Transition Police Task Force must then draw up a reorganization plan with respect to the security apparatuses (the "Security Services Reorganization Plan"), in which the genuine law enforcement functions that are currently carried out by the security apparatuses are transferred to a newly reactivated police force, and the intelligence activities are separated between military counterintelligence (which would be incorporated in a separate department within the Ministry of Defense) and other counterintelligence (which would be brought under the purview of the cabinet). In devising the Security Services Reorganization

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<sup>88</sup>There could be tremendous social upheaval and steps away from reconciliation if the archives are made available to the people at large, because, for example, people could learn that next door neighbors have informed on them etc.

Plan, the Transition Police Task Force must assess the need to maintain the Special Security Directorate, as there are arguments that its activities duplicate those of the other security apparatuses and, since it is staffed primarily by members loyal to the regime of Saddam Hussein, its loyalty is questionable<sup>89</sup>;

- The Transition Police Task Force must then devise appropriate selection procedures in accordance with the de-Ba'athification proposals made in Section 4.0 for future law enforcement officials, considering issues of loyalty to the existing (Ba'athist) regime versus loyalty to the newly established Transitional Government. This is a key issue because the selection of people with questionable loyalty or a questionable past would undermine the legitimacy of the new law enforcement agency;
- The Transition Police Task Force must eliminate the current law enforcement and security court structures (*Mahakem Qi'wa al-Amn al-Dakhili*) and incorporate their activities into the restructured judicial system. In addition, the security apparatuses must be immediately made subject to the jurisdiction of the judicial system;
- The Transition Police Task Force should appoint a representative who should be responsible for all the prison systems in Iraq, and whose duty it is to transfer jurisdiction over the prison systems to the judiciary. In turn, the judiciary should establish a mechanism to administer the prison system, including the implementation of the Prison Reform Law of 1969, and ensure that only prisoners subject to the criminal laws are imprisoned and that there are no political prisoners;
- The Transition Police Task Force must immediately (after the change of regime) disband the existing paramilitary organizations, such as the existing security apparatuses of the Ba'ath Party, the various Palestinian paramilitary organizations operating in Baghdad, the Mujahideen Khalq Organization and those apparatuses connected to Uday or other members of Saddam Hussein's family, such as Fedaiyeen Saddam. If not disbanded immediately, these organizations can play a destabilizing role for the Transitional Government;
- After completing the Police Reorganization Plan and the Security Services Reorganization Plan, and after obtaining the approval for the implementation of the plan from the Transitional Government, the Transition Police Task Force would then begin the process of implementing the reorganization plans, and disbanding the existing security apparatuses;
- The Transition Police Task Force should then begin, in co-operation with international experts in policing and law enforcement, of training programs for the newly reconstituted police force and the newly reconstituted intelligence forces, focusing on protecting individual rights and then on modern non-lethal intelligence activities, both in accordance with the UN Code of Conduct for Law Enforcement Officials; and

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<sup>89</sup> One key dimension of the activities of the Special Security Directorate are the activities related to the concealment of weapons of mass destruction.

- With respect to disbanding the personnel of the existing official security apparatuses, that is the personnel whose activities have not been incorporated elsewhere or whose activities have been eliminated, the Transition Police Task Force must begin the process of training such personnel in civilian activities or police related activities (in a manner similar to those of the members of the armed forces).

## 7.0 The Judicial System

### 7.1 Overview

Upon coming to power in 1968, the Ba'ath Party in Iraq (the "Ba'ath Party") introduced a new constitution, and introduced changes to the existing judicial, legal and policing structures. The effect of these changes, which will be discussed in detail below, was to eliminate the concept of the separation of powers among the executive, legislative and judicial authorities, and to make the civil court system subservient to the military court systems and extrajudicial authorities, thereby marginalizing it.

The overriding theme of this paper with respect to the judiciary is that the judiciary needs to be reformed in order to become more independent; the establishment of such an independent judiciary is one of the key prerequisites of the creation of the separation of powers. Indeed, it is the judiciary which will become the key arbiter with respect to human rights abuses.

### 7.2 The Current Structure of the Iraqi Judicial System

There are separate courts in Iraq for civil, criminal and religious matters. In addition, there is a military legal system that only addresses offences committed by military personnel.

#### 7.2.1 *The Court of Cassation*

The highest court in Iraq is the Court of Cassation (*Mahkamat al-Tamyeez*), which has jurisdiction over the civil and criminal court structure. The Court of Cassation is headed by the President of the Court of Cassation and usually has between 25 and 40 members. The Court of Cassation's functions are divided into a number of bodies - civil, criminal, trade, tax, administrative, religious and others. Members of the Court of Cassation, as well as other lower court judges, are appointed by the Justice Council, whose chairperson is the Minister of Justice.

#### 7.2.2 *Civil Courts*

The lowest civil court in Iraq is the Civil Court of First Instance (*Mahkamat al-Bidaya*), which addresses civil disputes among individuals. The Civil Court of First Instance also addresses disputes between individuals or corporations, on the one hand, and certain administrative bodies of the Iraqi state. With the exception of administrative disputes, decisions of the Civil Court of First Instance are appealed to the Court of Appeals, each of which covers a number of districts (*Muhafadha*), of which there are eighteen in Iraq. Decisions of the Court of Appeals (*Mahkamat al-Isti'naf*) are appealed to the Court of Cassation. In addition, certain decisions of the Civil Court of First Instance (addressing

disputes involving small sums and administrative disputes) are appealed directly to the Court of Cassation.

### 7.2.3 *Criminal Courts and the Prosecutorial System*

Criminal courts in Iraq are arranged according to the type of offence and the ultimate sentence requested with respect to a particular offence. Generally, misdemeanors and certain felonies are tried in the Criminal Court of First Instance (*Mahkamat al-Junah*). Its decisions are appealed to the Court of Cassation. More serious felonies are tried in the Higher Criminal Court (*Mahkamat al-Jinayat*), whose decisions are also appealed to the Court of Cassation.

The functions of the prosecutorial system are divided among three parties - the judicial investigator, the investigative judge and the prosecutor. Upon the committing of a crime, in co-operation with the police, the judicial investigator questions witnesses and visits the scene of the crime, following which, such judicial investigator sends a report to the investigative judge, who decides whether to prosecute the case. If the investigative judge does decide to do so, the prosecutor tries such case. Other than acting in his advocacy role on behalf of the state, the prosecutor's only other real power is to appeal the decisions of the investigative judge, should he believe that the investigative judge acted improperly or reached an inappropriate decision. The investigative judge is the only party who has the power to issue arrest warrants or keep individuals in custody.

### 7.2.4 *Religious Courts*

Although Iraq is nominally a secular state, religious law does play an important role in regulating matters of a personal nature. There are special religious courts that adjudicate disputes for matters such as inheritance, marriage, divorce and alimony between Muslims; these courts are for all Muslims regardless of sect. Decisions of these religious courts are appealable to the Court of Cassation. As for non-Muslims, disputes over the above matters are adjudicated by the Civil Court of First Instance, which obtains the advice of the relevant religious authorities in reaching decisions.

### 7.2.5 *Military Courts*

Military courts have their own codes of procedure, which are substantially different to those of civil and criminal courts. Military courts are under the jurisdiction of the Ministry of Defense and are staffed by military personnel who are lawyers. The organization of the military courts is somewhat similar to the civilian criminal court system. Misdemeanors and certain lesser felonies are tried by the Special Military Courts (*Al-mahkama al-Khasa*), whereas more serious crimes are tried by the Permanent Military Court (*Al-mahkama al-da'imiyah*). The decisions of both courts are appealed to the Military Court of Cassation. The jurisdiction of the Military Courts is over all military personnel (including members of the Popular Army), even if they commit civilian crimes. Therefore, a member of the Iraqi military who commits a murder unrelated to his duties cannot be tried in a civilian court without the approval of the legal department of the Ministry of Defense (which generally protects those members of the military who have committed crimes by not giving its

consent). There is one exception, which occurs if there is a witness who personally witnessed the crime.

After the Ba'ath Party's take-over of power in 1968, the RCC also created military courts for law enforcement officials (*Mahakem Qi'wa al-Amn al-Dakhili*). These courts were organized in a very similar manner to the military courts and similar laws and procedures (*Qanun Usul al-Uqubat al-Askariyyah*) were applied to them. The jurisdiction of the Law Enforcement Courts is over all personnel of the police force, staff of the General Security Directorate (*Mudirriyat al-Amn al-Dakhili*) and staff of the Intelligence Directorate (*Mudirriyat al-Mukhabarat al-Amma*). Decisions of these courts are appealed to the Law Enforcement Court of Cassation. In addition, there is a Joint Military Courts/Law Enforcement Courts of Cassation, which serves as a court of appeal in cases where members of the military and law enforcement officials are involved.

The general practice of the Military Courts and the Law Enforcement Courts is to be protective of the members of the armed forces and the law enforcement services, respectively. Since the Military Courts have jurisdiction over military personnel (who are estimated to be approximately 1 million people) and the members of the Popular Army (who are estimated to be approximately 1.5 million people), and since the Law Enforcement Courts have jurisdiction over all law enforcement officials, the jurisdiction of the civilian criminal courts has become very limited. (See "*The Iraqi Judiciary in Practice*").

#### 7.2.6 *The Revolutionary Court and Special Courts*

After 1968, a special revolutionary court (the "Revolutionary Court"), which existed outside the judicial system, was put in place. Its powers superseded those of any other courts and it acted independently of them. In practice, the Revolutionary Court addressed only matters that related to the security of the state, although its powers were broader; for example, pursuant to certain RCC Resolutions, its powers were broadened to address all matters relating to official corruption and to forfeiting. Although occasionally staffed by lawyers and judges, it is more common for it to be staffed by loyal party members without legal training. The procedures of the Revolutionary Court were different to those of the other courts, as it had the power to ignore habeas corpus and frequently did not allow defendants fair hearings at trials, having decided the guilt of defendants prior to the trials. Its decisions are not appealable, and, especially with respect to death sentences, are carried out immediately. In addition to the Revolutionary Court, there are a number of special *ad hoc* courts, sometimes composed of RCC members, established to prosecute special cases, as well as other *ad hoc* courts, such as the economic security courts (*mahakim al-amn al-iqtisadi*).

### 6.3 **The Iraqi Judiciary in Practice**

The policies of the Ba'ath Party relating to the judiciary has been to marginalize its role in society, replacing it with more loyal and flexible bodies. The result has been that the

judicial system currently in place in Iraq has become totally subservient to the military and other courts, as well as to the extrajudicial practices of the executive and its branches, mainly the security apparatuses.

The basis of the policies of the Ba'ath Party are embodied in the Provisional Constitution. Article 37 of the Provisional Constitution eliminated the concept of the separation of powers in Iraq by centralizing the legislative, executive and judicial powers in one entity - the RCC. The Provisional Constitution also has other provisions cementing the centralization of powers in the RCC; for example, Article 47 provides that the RCC is the only power that can determine when the National Assembly can meet. In practice, the RCC does not function as an independent body and is dominated by its chairman, President Saddam Hussein, who is the only person who enacts laws and pronounces decrees in the name of the RCC.

Prior to 1968, the Iraqi Judiciary had a certain level of independence and was governed by the High Judicial Council, whose head was the President of the Court of Cassation; the High Judicial Council ensured, at least *de jure*, the independence of the judiciary from the executive. After the Ba'ath Party came to power, pursuant to Law Number 160/1979 (The Law for the Organization of the Judicial System) and Decree Number 101/1977 of the Ministry of Justice, the High Judicial Council was dismissed and replaced with the Justice Council, which was chaired by the Minister of Justice and not by the President of the Court of Cassation. Thus, the *de jure* independence of the judiciary was eliminated. In addition, at a *de facto* level, the Ba'ath Party passed laws and implemented policies which ensured that the judiciary was made subservient to the executive and simply took orders from the executive. One example demonstrates the level of the control over the judiciary that the Iraqi state currently has. In the 1980's, the Minister of Justice Mundhir Al-Shawi (who is the current Minister of Justice) attended a meeting of the Court of Cassation, sitting *en banc*. Upon being informed by Abdul Qadir al-Janabi, a senior judge, that, since he was not a judge and member of the Court of Cassation he could not stay, the Minister of Justice immediately dismissed the justice in question, demoted him and then forcibly retired him. There are many other examples in which judges are forcibly taken to the offices of one of the security apparatuses, threatened with torture or even tortured and are forcibly "ordered" to issue a decision in favor of a particular party to a suit. This lack of immunity of the judges has resulted in the subservience of the civil courts to the military courts and the security apparatuses. This in turn has led individuals in disputes to conclude that they would get more favorable results if they take their dispute to the corruptible security apparatuses.

Another policy of the Ba'ath Party with respect to the judiciary has been to expand the scope of the jurisdiction of the Military Courts and the Law Enforcement Courts at the expense of the civilian criminal courts. Since the procedures of the Military Courts and the Law Enforcement Courts are more indiscriminate and their sentences are more severe, the effect has been to militarize the role of justice and law in Iraqi society, rendering the civilian law courts relatively ineffectual.

Overall, the effect of the Ba'ath Party's laws and policies was not only to marginalize the role of the judicial system and judges in Iraqi society, but also to transform the legal system

into another part of the Ba'ath Party machinery, assisting it in its plans of controlling Iraqi society.

#### **6.4 A Brief Description of the Iraqi Judiciary Prior to 1968**

In order to better understand the current Iraqi judiciary, it will be helpful to obtain an overview of the Iraqi judiciary prior to 1968. In addition, an understanding of the Iraqi judiciary prior to 1968 would demonstrate that there is a basis therein that could be used to implement a new Iraqi judicial system.

The modern, post-Ottoman Iraqi judicial system was established and initially staffed by the British mandatory authorities, who continued to overview the system well into the 1940's. As a result, the Iraqi judiciary was somewhat independent of the executive. In fact, there were a large number of instances where Iraqi judges made decisions against the Iraqi government. Since judges were appointed by the Judicial Council, which was headed by the President of the Court of Cassation, the executive could not exert control over the judges. In fact, in the 1950's the majority of Iraqi judges were not sympathetic to the Iraqi government, which such judges viewed as reactionary. Accordingly, judges released a number of detainees whose arrests did not follow appropriate procedures or who were not arrested for good cause.

The relative independence of the judiciary continued after the Iraqi revolution of 1958. In fact, the judiciary decided a number of important cases that were fundamental to the revolutionary authorities in the early 1960's. For example, the regime of Abdul Karim Qassem introduced an agricultural reform plan that provided for limited compensation to landowners whose lands were confiscated pursuant to the agricultural reform program. However, the Iraqi constitution introduced after the revolution provided that in cases of eminent domain, compensation must be fair and appropriate and must be decided in accordance with established procedures. One of the landowners brought a case against the government for not being given appropriate compensation and the Court of Cassation decided in his favor, stating that the laws governing the agricultural reform program were unconstitutional because they did not provide for appropriate compensation. The Iraqi judiciary did however lose a certain amount of its independence following the 1958 revolution in disputes that related to security matters.

#### **6.5 Reform of the Judiciary**

The establishment of an independent judiciary and the development of Iraqi society's respect for the judiciary are key goals in the transition towards a democratic regime. Prior to the advent of the military regimes in Iraq, Iraq had a relatively respected and independent judiciary, which as described above is not the case now. The goal should be to re-establish an independent judiciary that is self-governing. Again, Iraqi jurists can review the experiences of other countries that underwent similar transitions and the training of

such jurists and judges can begin immediately (especially for judges in the Liberated Areas of Northern Iraq). One of the areas to concentrate on would be to train Iraqi judges to be more positivist in their approach to interpreting laws and not solely to interpret laws narrowly and literally. The goal of these programs would be to establish a core group of jurists whose role, following a change of government, would be to set out a series of principles relating to a transition to a more independent judiciary. This core group could be transformed into a new judicial council that could include a number of existing members of the Iraqi judiciary. Such council would implement the plans established for an independent judiciary and would create bodies (much like those that existed in South Africa after 1994) to ensure that existing judges who - through their decisions - legitimized the current regime and its practices would be dismissed after fair hearings.<sup>90</sup>

The reform of the Iraqi judicial system should include the following key components:

1. Legislation relating to the Judiciary and the Judicial System, which would include developing a new organizational structure for a future Iraqi judiciary, must be drafted, prior to the adoption of a new permanent constitution (which should cement the separation of powers that would have begun during the transition period). Methods of such transitions to independent judiciaries that were used in other countries that underwent similar processes can be emulated.
2. The reform of the prosecutorial system in Iraq, the goal of which should be to put in place an independent prosecutorial system whose duties would be expanded to unify the powers of investigative judges and those of prosecutors. The prosecutorial system in Iraq has historically been one in which investigations are conducted by investigative judges and court proceedings are carried out by prosecutors. In revamping and overhauling the prosecutorial systems, potential prosecutors can be trained in the prosecutorial methods of other countries and the unification of the roles of the prosecutors can be examined (possibly eliminating the role of the investigative judge).
3. All Iraqi judges would be required, at the expense of the state, to take relevant courses concerning basic substantive and procedural areas of the law, the role of judges in a democratic society and cultural sensitivity. In this regard, the Judicial Institute (*Al-Ma'ahad al-Qadha'i*) would need to be reconstituted and revamped to reflect more advanced, ethical and effective methods of education.
4. The selection process of Iraqi judges would need to be reviewed to ensure that all newly appointed judges would be appointed based on objective criteria, and all transfers would be conducted in accordance with appropriate standards. In an effort to ensure that there is no discrimination in appointments at all levels of the Iraqi state, ethnic and religious minorities, as well as women, should be considered in the pool of nominees and in the judiciary generally.

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<sup>90</sup> On October 27 - 29, 1997, the South African Truth and Reconciliation Commission held a Legal Hearing. The Legal Hearing examined the role that the judicial and legal systems played in the Apartheid order, especially as law had been used as a fundamental instrument of apartheid, providing authority and legitimacy for many of the activities of the Apartheid order - especially the human rights abuses of the security forces.

5. A system of legal review should be introduced. The judiciary - either in the form of the supreme court or through establishing a separate constitutional court<sup>91</sup> - should have the power to determine the ultimate constitutionality of legislation and official acts, as well as to review administrative acts and to compel the government to act where a legal duty to act exists.
6. Subject to the powers of the Human Rights Commission discussed elsewhere, the judiciary should have the exclusive, ultimate jurisdiction over all cases concerning civil rights and liberties.
7. The judiciary must have adequate subpoena, contempt, and/or enforcement powers, which are utilized, and these powers should be respected and supported by other branches of government, especially the law enforcement powers.
8. The judiciary must have a meaningful opportunity to influence the amount of money allocated to it by the legislative and/or executive branches. Once funds are allocated to the judiciary, the judiciary - through a newly constituted Higher Judicial Council - must have the control over its own budget and how such funds are expended.

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<sup>91</sup> There is a proposal that there would be a special constitutional court, whose members are approved following an open debate by a justice subcommittee of the legislative branch. This special constitutional court would have ultimate power to adjudicate any matters that are deemed constitutional and would supercede any decisions made by the other courts, including the Court of Cassation, with respect to constitutional matters.

## 8.0 Vision of an Iraqi Constitutional State

### 8.1 Federalism

8.1.1 In 1992, the Kurdish Parliament voted in favor of a federal Iraqi structure. The National Assembly of the INC adopted this policy in its conference in Salahuddin in 1992 and reaffirmed it at its 1999 conference in New York. These votes were the first of their kind in the modern history of Iraq. Taken together they broke the mold of Iraqi politics. Today, most Iraqi organizations that oppose the regime in Baghdad, whether they are in the INC or not, advocate one interpretation or another of federalism. No Iraqi political organization can afford not to support federalism today, especially not one that calls itself democratic. That should be considered an immense gain for the people of Iraq, one that should not be frittered away by the differences, which have also broken out over what federalism means.

*Two features unite all definitions in play in the Iraqi political arena at the moment:*

- *the idea that federalism, whatever else it might mean, is the permanent and constitutionally prescribed allocation of certain powers to the provinces (regions or governorates). These powers cannot then be taken away or diminished once they have been constitutionally established (following a national referendum that ratifies the new permanent constitution of Iraq, i.e., following the transitional period).*
- *no future state in Iraq will be democratic if it is not at the same time federal in structure.*

Federalism is a new word and practice in Arab politics. Its novelty is a reflection of that of the whole phenomenon of the post 1991 Iraqi opposition, an opposition grounded not in issues of “national-liberation,” but hostility to home-grown dictatorship. This opposition, which encompasses diverse traditional and modern elements of Iraqi society, has not always been easy to deal with; it is fractious, and prone to in-fighting. Nonetheless it is remarkable that virtually all groups in opposition to the Ba'athist regime agree on the need for representative democracy, the rule of law, a pluralist system of government and federalism. Federalism should therefore become in some form or another a corner stone of the new Iraqi body politic.

However, neither the Kurdish Parliament nor the INC have clarified what they mean by this new idea, nor have they worked out the practical implications of it with regards to the mechanics of power-sharing and resource distribution (most importantly oil revenues). It is in the interests of contributing to such a clarification that section 8.1 has been written.

8.1.2 The driving force behind the injection of this new idea, federalism, has been the Kurdish experience in northern Iraq. For the Kurdish political parties, federalism has become the *sine qua non* for staying inside a new Iraq, and not trying to secede from it. Without a federal system of government, in which real power is divided, in a constitutionally prescribed and non-negotiable way, the currently autonomous northern region which is populated largely by Kurds will still yearn, and perhaps even one day opt, for separation. After all that has been done to the Kurds in the name of Arabism, no Iraqi should expect otherwise. And certainly no one who calls him or herself a democrat.

As a result there has arisen a purely utilitarian argument for federalism, one derived from a pragmatic calculus of what the balance of power in the immediate aftermath of Saddam's overthrow is going to look like. One must concede federalism, the argument goes among some Arabs, in the interest of getting rid of Saddam and because the Kurds are today in a position to force it upon the rest of Iraq.

The Kurdish corollary of this utilitarian argument goes: we must accept federalism, not because we really want it, but because the regional situation does not allow for us to secede and have our own separate state in northern Iraq.

We do not think that a project as big as restructuring the state of Iraq on a federal basis should be undertaken on the grounds of this kind of utilitarian calculus. No ordinary Iraqi citizen can be expected to opt for federalism on grounds of expediency. Federalism, if it is to become the founding principle of a new beginning in Iraq, must derive from a position of principle. What might that be?

The Coordinating Committee of the Democratic Principles Workshop proposes that federalism in Iraq be understood in the first place as an extension of the principle of the separation of powers, only this time power is being divided instead of separated out into its different branches. Without the separation of powers, there can be no federalism worthy of the name. Because the regime of Saddam Hussein was never willing to relinquish real power except under duress (for example in 1970 when it negotiated the March 11, 1970 Kurdish autonomy accords), none of its "concessions" to the Kurds could ever be taken seriously. They were here one day and gone the next. By contrast a truly federal system of government is a structurally new system in which power itself is from the outset divided.

*Federalism is from this point of view the thin end of the wedge of democracy in Iraq. It is the first step towards a state system resting on the principle that the rights of the part, or the minority, should never be sacrificed to the will of the majority. The fundamental principle of human rights is that the rights of the part--be that part defined as a single individual or a whole collectivity of individuals who speak another language and have their own culture—are inviolable by the state. Federalism is about the rights of those collective parts of the mosaic that is Iraqi society. Majority rule is not the essence of a federal democracy; minority rights, or the rights of the part (including ultimately individual human rights), are.*

8.1.3 How should the different parts of the new Iraqi federation be defined? One important definition rests on a national definition of the constituent parts of the federation. The idea is to have Iraq composed of two regions, the first Arab, the second Kurdish. The two largest national groups in Iraq, ought to be, according to this point of view, the basis for federalism in Iraq.

#### 8.1.4 *Problems With National Federalisms*

Many Iraqis have raised objections to the formulation in Section 8.1.3. If a federation is defined as being about two national groups, the other smaller national groups argue, then clearly they, who do not have a share in the federation, are being to one degree or another discriminated against. Why should an Armenian or an Assyrian or a Turkmen citizen of Iraq have any less rights as an individual than an Arab or a Kurd in post-Saddam Iraq? Such discrimination in favor of the largest national groups in Iraq is inherently undemocratic.

It is difficult, if not impossible, to refute this argument.

This brings us to another variant of the national or ethnic definition of federalism, namely the idea that a federal system in Iraq should be devised which maps out geographic regions for all the different national and religious communities in Iraq. Many such maps are in fact circulating among Iraqis.

The problem with this approach is that the demographics in Iraq are such that a mapping exercise of this nature cannot ever be fair to everyone. The communities of Iraq are not all territorially concentrated. There are Kurds in Baghdad and Arabs in Sulaymaniya, and there are Turkmens and Armenians and Assyrians everywhere. Moreover, people have been forcibly deported, and ethnically cleansed, in many parts of Iraq. They may or may not want to move back to their original towns and villages. What mapmaking skills can ever deal with such a situation?

To even attempt to map such a division of Iraq will turn nationality and/or ethnicity into the basis for making territorial claims and counterclaims, especially with regards to high profit resources located in one region and not another. The fight over Kirkuk is already going in this direction, with Arab, Kurdish and Turkmen claims competing with one another over this oil-rich city. Moreover, the Anfal operations of 1987 and 1988 destroyed Assyrian villages as well as Kurdish villages.

*Conclusion: it is extremely unlikely that a federation of many national and ethnic groups would be any kind of an improvement on a federation made up of only two large groups.*

#### 8.1.5 *Territorial/Administrative Federalism*

The alternative to nationality is territoriality in which each separate region receives its share of national resources (including oil revenues) according to the relative size of its population. That is what is in effect going on in northern Iraq at the moment through the offices of the UN's oil-for-food program. The idea would be to extend that formula to

the whole of Iraq. The future all-Iraqi federation should not be one of competing nationalities but one of different geographically defined territories within which different national groups may form a majority. The point is not to diminish or dilute the Kurdishness of a Kurd, or the Arabness of an Arab; it is to put a premium on the equality of citizenship for all.

8.1.6 Realizing that territorial/administrative criteria have greater credibility among Iraqis and the international community, and that national/ethnic divisions have acquired a bad name since the civil wars of Lebanon and the former Yugoslavia, there is a temptation already manifest among some Iraqi nationalities to cloak nationalist arrangements in territorial garb. This must be resisted at all costs. For in the end, it is worse than an open declaration of federalism on purely or openly national criteria.

*A federal arrangement on a territorial or administrative basis actively seeks in the drawing up of boundaries a mixture of national, ethnicities and religions in each region, not their separation one from the other. The idea must be to have complete freedom of movement, of property rights, and all other rights cited in the permanent constitution regardless of which region one chooses to settle in. Any other basis would severely undermine intra-regional competition and the economic development of the country as a whole.*

8.1.7 There remains an important question. How many regions/ provinces/governorates should such a federation include? Different members of the working group have come up with ideas for: 2-region, 5-region, 7-region, 14-region (based on the 1924 constitution) and, finally, staying, at least temporarily, with the existing administrative division of Iraq into eighteen governorates. The latter is a sensible, if temporary, solution for the short term, at least until this question is resolved during the transitional period by a Constituent Assembly after a proper discussion, and following a national referendum on the permanent constitution of Iraq.

Given the variety of proposed solutions, and given the gravity of the issues concerned, the Coordinating Committee would like to propose that the Conference of the Iraqi Opposition focus its deliberations on the more fundamental question of nationality versus territoriality as a basis of federalism, leaving aside the matter of mapping out Iraq into this or that number of regions. This is not the proper time or forum for such an exercise.

*The proper forum for debating and deciding upon the precise shape of the federal system in Iraq is the Constituent Assembly. The debate should go on for the duration of the transition period, and it should be concluded in the shape of the permanent constitution that is put to a national referendum at the end of that period.*

## **8.2 Nationality and the Future State of Iraq**

8.2.1 The logical corollary of territoriality as a basis for federalism is to consider what effect this has on the nature of the new Iraqi state which hitherto has been thought of by all and sundry as an Arab state, led by the Arab Ba'ath Socialist Party and part of the Arab League. Can the new federal state of Iraq be an Arab state in the same sense in which Iraq has been thought of as being an Arab state in the past? This is an important question, which goes to the roots of the problem that the idea of federalism was intended to solve.

Israel is today a Jewish state in which a substantial number of Arab Palestinians—more than a million—have Israeli citizenship but are not and cannot in principle ever be full-fledged citizens of the state of Israel. The fact that they live in better conditions than their brethren in the West Bank and Gaza, or those in refugee camps all over the Arab world, is not an argument for second-class citizenship. In principle, because they are in a religiously or ethnically defined state, they are second class citizens and one day in the future the two principles upon which the state of Israel was created—ethnicity and democracy—are bound to come into conflict with one another.

Do the peoples of Iraq want such a formula for their country? Is the future federal state of Iraq going to be one in which a Kurd or an Assyrian or a Turkmen or an Armenian, be they male or female, can all in principle be elected to the highest offices of the land? If the answer to this is yes, then that means that even though the Arabs form a majority in the country, and that Arab culture and Muslim history will always be cherished in Iraq, the majority status of the Arabs should not put them in a position to exclude any non-Arab Iraqi from positions of power and influence, as has been the case in the past.

*A future democratic Iraq, has to be an Iraq that elevates the Iraqi character of the state above all considerations of race, ethnicity and religion.*

### **8.3 Religion and Statehood**

8.3.1 The cumulative effect of decades of abuse of Islam by politicians has served ultimately to conceal from Arab Muslims in particular the immense and still unexamined terrain of their own great contribution to human civilization. When Saddam Hussein hails the “martyrdom” of Palestinian suicide bombers and distributes large sums of money to their families, or when he uses the resources of the Iraqi people to build mosques as propaganda during the Iraq-Iran war, he is degrading Islam by using it to further a political agenda. Culture and the life of the spirit have been under attack in Iraq. Iraqi citizens must guard against the recurrence of such abuse. They must invent a concept of statehood that will give Islam and all other religions in the country the opportunity to flourish once again. Christianity and Judaism have very deep roots in Iraqi history. The Babylonian Talmud was written just south of Baghdad, and the many branches of the Eastern Church which flourished in Iraq predate Islam and are among the very earliest churches in the history of Christianity.

*A Constitution that celebrates Iraq's religious diversity and that treats the members of all religious faiths strictly on grounds of equality is a way of beginning the slow process of rectifying this state of affairs.*

8.3.2 What, if any, is the relationship which ought to exist between the new Iraqi state and religion, specifically the religion of the overwhelming majority of Iraqis, Islam? This is an important question which ultimately only the people of Iraq can decide upon in the course of their deliberations during the transitional period.

Such a discussion is already underway among Iraqis in exile. One way of thinking about the issues involved is to pose them to each individual Iraqi as a set of questions:

- Do you want your future state of Iraq to be involved in any way in your religious beliefs, either by way of compelling or persuading you towards a particular belief?
- Do you want your future state of Iraq to define individual Iraqi citizens as members of different religious groups (as is the case with the confessional system in Lebanon)? Do you think, in other words, that an individual's religious beliefs are relevant to his or her rights and obligations as a citizen?
- Do you want your future state of Iraq to promote, regulate, direct, or otherwise interfere in matters of religion (through the Ministry of Awqaf, for instance, or through its control over educational programs)?
- Do you trust Iraqi politicians enough to give them any kind of influence or control over your religious affairs?
- Finally, do you think religious scholars, or ulama, (in their religious capacity not as private citizens), have the knowledge and experience required to decide upon your political affairs?

If the answer that Iraqis give to all of these questions is “no,” then that means that the people of Iraq have in effect chosen to keep matters of politics and matters of religion separate from one another in order to live truly satisfying and complementary spiritual and political lives. It means that the people of Iraq, precisely out of a sense of their devotion to the life of the spirit, have chosen to keep matters of religion separate from matters of politics. This will have assisted in realizing the creative and spiritual potential present in religious faith when it is not shackled to the ebb and flow of politics.

8.3.3 The key civil rights that have the capability of liberating religious cultural and institutional life in Iraq, and that must become enshrined in a future permanent Iraqi Constitution, include:

- The right to practice one's own rites and rituals and to autonomously administer one's own shrines and institutions, through legitimate religious authorities whose appointment has nothing whatsoever to do with the state.

- The right to teach and conduct religious affairs in mosques, churches, synagogues, meeting halls, religious universities and other institutions without interference by central or provincial authorities.
- The right of movement, travel and assembly for all religious authorities, or speakers on religious affairs, including the right of religious teaching circles to conduct their affairs in whatever manner that they see fit.
- The right to have all religious shrines and cities entered into UNESCO's World Heritage Sites and be thus protected from arbitrary acts of change and destruction.
- The right to publish religious tracts and books and to establish new religious institutions and assemblies.
- The right to establish independent religious schools, universities and other teaching establishments and academies, within the framework of a broad and consensual national education policy.
- To introduce the main elements of all Iraqi religious creeds and rites into the national educational curriculum, in a way that celebrates the religious diversity and pluralism of Iraq.
- To revise the elements of school curricula to remove all disparagement of any religious grouping in Iraq, and the writing of a history that avoids bias towards any religion or creed.
- The right to establish mosques, churches, synagogues, religious meeting halls and libraries.
- To respect the burial grounds of all religions in Iraq.
- To recognize the key dates of the religious calendar of all the religions of Iraq.
- To work to repatriate all Iraqis who were forcibly expelled from Iraq for religious reasons (largely Shi'is, Fayli Kurds and Jews), or who felt obliged to leave under duress, and to set in motion a full restitution of their constitutional and civil rights, including the establishment of a compensation fund for confiscated property.

8.3.4 The above civil rights were put forward as a demand of the Shia of Iraq in an important document published after two years of discussion in 2002 entitled "The Declaration of the Shia of Iraq." This Declaration, signed by some 200 Iraqi dignitaries spells out what discrimination by the state has meant for the Shia of Iraq in particular. It calls for inclusion of the rights of the Shia "in any plan or program that tries to tackle the reconstruction of the Iraqi state."

This is best achieved, we would argue, by generalizing the demands of the signatories of the Declaration, making them applicable to all religious communities in Iraq, whether these have been discriminated against in the past or not. This is in the spirit of the Declaration itself, which carefully distinguishes between “legitimate sectarian differences due to doctrinal and other factors,” which are a feature of the Iraqi social and cultural landscape, and a state-driven “policy of officially sanctioned sectarian advantage and discrimination.”

The Declaration represents an enormous step forward in the thinking of Iraq’s Shia on regime change in that it totally repudiates sectarianism and rejects all policies that would divide power in a future Iraq on the basis of overt sectarian percentages (such as is the situation in Lebanon, or such as has been the practice in the Iraqi opposition to Saddam Hussein during the 1990s).

“It is quite probable that [communal powersharing] may well result in further problems, dilemmas and crises being laid in store for the country. The only way out of this conundrum is the total rejection of the anti-Shia practices of the state, and the adoption of an inclusive and equitable system of rule that would define the political direction of the future Iraq. This is what the Shia want and not some bogus solution based on the division of the spoils according to demographic formulae, a condition that would very probably result in communal sectarianism becoming a social and political reality rather than a manifestation of an unscrupulous state authority.”

#### **7.4 National Fund for the Support of Religions and Cultures**

As part of the drive to re-invigorate the wellsprings of Iraq’s religious life, the new Iraq should establish a nationally endowed but non state-managed fund for the purpose of supporting institutions, programs and projects that strengthen all the spiritual and religious traditions of the country. The purpose of the fund would not be to displace and overshadow the efforts of the communities themselves in autonomously organizing their spiritual and religious affairs, but rather to provide financial and technical assistance to worthy projects and programs as part of Iraq’s commitment to religious diversity.

The fund should be organized on a non-sectarian and non-political basis, perhaps in the form of a public corporation or "National Endowment for the Support of Religion and Culture," whose statutes will be governed by a special law. Appointment to the fund could be on the basis of community representations and civic and religious groups, as well as a limited number of appointments proposed by the government and approved by parliament. The key is to ensure that the board of the fund would not be either politically slanted or over-represented or under-represented in terms of community weightings. In addition, it should be made clear that the fund should have a strictly defined non-political mandate of supporting religious diversity by providing funds and expertise to projects of a spiritual dimension within all of Iraq’s cultural and religious traditions. It should not stray into the administration and management of these projects and institutions relying, as much as possible, on the flow of proposals from the communities and concerned individuals and groups themselves. By expecting the active involvement of civil and religious groups in the generation of proposals, the fund would encourage the strengthening of the institutions and

mechanisms of civil society in an area of great symbolic and actual significance to a huge number of Iraqis.