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ABOUT PILPG

The Public International Law & Policy Group (PILPG) is a 501(c)(3) non-profit organization, which operates as a global *pro bono* law firm providing free legal assistance to developing states and states in transition involved in conflicts. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution. To date, PILPG has advised over a dozen countries on the legal aspects of peace negotiations and constitution drafting, and over fifteen countries in Europe, Asia and Africa concerning the protection of human rights, self-determination, and the prosecution of war crimes.

The Iraq negotiation simulation was prepared by the PILPG in cooperation with American University and was made possible by a grant from the Carnegie Corporation of New York.

IRAQ: NEGOTIATING A NEW CONSTITUTION

A Review of Lessons Learned From a Negotiation Simulation held at American University, Washington, D.C.

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With the transfer of power from the Coalition Provisional Authority to the Iraqi Interim Government, the final phase of reconstituting Iraq's sovereignty has begun. While rebuilding a country is always a difficult and contentious process, the challenges are magnified substantially for Iraq given its complex mosaic of ethnic and religious identities, the history of repression under Saddam Hussein, the continuation of an American military presence, and Iraq's complex relations with its neighboring states.

As a part of its Iraq Project, the Public International Law & Policy Group (PILPG) is undertaking a program of negotiation simulations to identify and analyze the key issues likely to surface in Iraq's constitution-making process. This report is the first in the series of special reports, summing up the results of these simulations. The simulation material is available at

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Iraq>

PILPG is also preparing a series of legal memoranda to be used by the various Iraqi parties as they negotiate a new constitution. The memorandum will cover the following topics: refugee return, property restitution, the equitable allocation of oil resources, transforming the peshmerga into a regional guard, asymmetrical federalism, and establishing an independent judiciary.

The report has been prepared on behalf of the Public International Law & Policy Group in cooperation with American University. The views in this report do not necessarily reflect the views of the PILPG, which does not advocate specific policy positions, nor do they reflect the views of American University.

CONCLUSIONS IN BRIEF

- The process of choosing the delegates to the constitutional convention will likely have a substantial impact on the negotiations. The Shi'a were especially concerned with the legitimacy of the process and the involvement of the Iraqi people. Measures to ensure the delegates are legitimate and representative may take this issue out of contention.
- The Kurds view themselves as distinct from the rest of Iraq, but seem willing to be a part of Iraq's future. How this will translate into future politics remains to be seen. Despite differences between the two Kurdish factions, they will likely present a unified front to the rest of Iraq.
- The facilitators, especially the U.S. Embassy, were focused on tangible issues, such as devolution of power to federal units. The intangible issues, such as Iraqi identity and Kurdish mistrust of the other parties, were very important to the parties, and influenced their view of the more tangible issues. This suggests that the negotiations should devote substantial time to these issues to help the parties develop sufficient mutual trust and understanding to fully address the more substantive issues.
- The issues involved in the negotiations are very complex and interwoven. For example, the question of drawing sub-state boundaries ties into the power sharing struggles among sub state units, the issue of the return of internally displaced persons (IDPs), and most importantly, the control of oil and other natural resources. The status of Kirkuk arose as central to many of the discussions, such as oil, regional autonomy, internal boundaries and the return of IDPs.
- Although the parties recognized the complexity of the constitutional issues, they demonstrated a minimal understanding of the technical knowledge of the issues or of comparative models. The already complex issues will likely be further complicated if the parties come to the table without such an understanding.
- The minority groups, especially the Turkmen, are a minority within a minority, as they are concentrated in land held by the Kurds. However, the Turkmen have the potential to exercise a disproportionate influence on the negotiations. They can take their grievances to Turkey, who in turn can pressure the United States to address them. The CPA has already addressed Turkish concerns over Kurdish autonomy and echoed Turkey's insistence on the territorial integrity of Iraq.
- Ethnicity was a central aspect of the negotiations. Each party held different notions of what it means to be Iraqi. The parties were very protective of their group identity, and demonstrated little empathy, trust or willingness to compromise. The parties are still carrying their own individual histories of repression, and feel entitled to political credit for it. Attempts to get the parties to resolve issues in the national interest created a tension between national identity and ethnic identities.
- The UN will likely be pulled in to the negotiations—even if solely for symbolic value—regardless of its desire or the U.S. Embassy's willingness to cede political authority. One likely scenario is that the UN will act as the mediator and facilitator at the center of the negotiations to bring the parties together, while the United States will act in a more passive role to keep the parties from walking out or abandoning the negotiations.
- One pattern in particular repeated itself throughout the negotiations. During the sessions on specific issues, the facilitators allowed each of the parties to start with a declaration of their positions. This encouraged the parties to react and attack each other's positions. Little attempt was made to try to bridge the differences, and the sessions often ended in gridlock. The longer the parties argued over the issues, the more hard-line they became, and the less willing they were to compromise. The negotiations will likely proceed more smoothly if they begin from a pre-prepared draft of positions the parties can work from. The first round of preliminary measures will likely have a significant influence on the starting points for negotiation.



INTRODUCTION

Now that Iraq's Interim Government has assumed sovereignty, the people of Iraq and their political representatives will soon find themselves deeply involved in the negotiation of a new constitution. Drafting a new constitution is a difficult and contentious process for any country. However, the challenges are magnified substantially for Iraq, given its mosaic of ethnic and religious identities, the history of repression under Saddam Hussein, the continuation of an American military presence, and Iraq's complex relations with its neighboring states. The overriding tension faced by the drafters of the new constitution will be the need to create a representative form of government that adequately protects the rights and interests of all individuals within the various groups comprising the Iraqi nation, while also preserving internal and external stability.

The process of reconstituting Iraq's sovereignty will be highly complex and face many hurdles. The eclectic ethnic and religious make-up of Iraq will require the drafters to develop a sufficiently decentralized unitary state or federal structure that will secure Kurdish participation in the Iraqi state, without undermining the functional integrity of Iraq or encouraging further secessionist tendencies. The Kurdish/Arab bargain must be accomplished while accounting for the Sunni/Shi'a split within the Arab community, and without neglecting the needs and aspirations of Iraq's minorities, such as the Turkmen, Chaldeans, Yezidi and Assyrians. Some of Iraq's neighbors will need to be assured of Iraq's territorial integrity, while others must be prevented from actively undermining its integrity or attempting to radicalize its politics. All this must be accomplished while dealing with flashpoints such as Faluja, Mosul, Karbala, Nasiriyah, and Kirkuk, and integrating into the process a politically resurgent Shi'a community.



In an effort to shed new light on how the parties can successfully negotiate these contentious issues, the Public International Law & Policy Group held a one-day negotiation simulation at American University's Washington College of Law. Participants included unofficial representatives of the various Iraqi interests, former diplomats, regional experts, former peace negotiators and international lawyers. The negotiation simulation was designed according to the methodology used by the United States Department of State's National Foreign Affairs Training Center.

This simulation exercise was not intended to be a comprehensive review of all the issues involved, nor was it intended to endorse one view over the other. The participants in the simulation naturally possessed varying levels of substantive or area expertise and were encouraged to draw upon their individual experiences as they deemed appropriate. The "Lessons Learned" from this simulation are presented in this report.

SIMULATION EXERCISE HIGHLIGHTS

The objective of the Iraq Negotiation Simulation was to stimulate debate, raise points of impasse and identify potential solutions for addressing points of contention in the upcoming constitutional convention. In facilitating discussion among the participants and exposing them to the perspectives of all parties, the aim was to more accurately anticipate the dynamics of negotiation strategies, identify problematic issues and propose viable solutions.

Individuals from several different backgrounds took part in the negotiation simulation, including academicians, policy experts, diplomats and peace and conflict professionals. This was a gaming exercise, not actual negotiations. All participants played the role of an assigned party. In addition to background information on the conflict, each member of the various delegations received a "scene setter" explaining their party's perspective on the issues. The exercise allowed for both plenary and individual/small group negotiations. Special sessions with members of each delegation were held to address specific issues, and shuttle diplomacy was allowed as needed. At the end, the participants were brought together to share lessons gleaned from the simulation.

For the purpose of this exercise, the parties to the constitutional negotiation were the Iraqi Shi'a, Iraqi Sunni, Iraqi Kurds, and a coalition representing the various Iraqi minority groups. The U.S. Embassy and the United Nations served as facilitators in the negotiations. The exercise did not intend to be a comprehen-

sive review of all the issues involved, but rather focused on the key issues, including the structure for a new Iraqi state, the position of the Kurdish region in relation to the central government, the composition of a new parliament and electoral system, and the installation of mechanisms to safeguard the rights of minorities as well as the basic human rights of all Iraqis.

LESSONS LEARNED: BEHAVIOR OF PARTIES

Sunni Delegation

The Sunni delegation greatly opposed any plan to split Iraq into regions, and especially opposed the idea of a separate Kurdistan. On more than one occasion, they remarked that the nations of the world are constructing larger economic and political units—like the European Union and the North American Free Trade Agreement—and to consider breaking Iraq into smaller units would be a step backwards.

The Sunni were fearful they would be blamed for the actions of Saddam Hussein, and repeatedly mentioned that Sunni had also suffered under his rule. They attempted to universalize the oppression suffered under Saddam Hussein as a shared experience common to all Iraqis, but the other parties were much less willing to forget the past and start over.

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Shi’a Delegation

The Shi’a delegation focused on regaining the political power that they had been denied under Saddam Hussein’s rule. Attempting to use their numerical superiority to take control of the negotiations, the Shi’a repeatedly tried to turn the discussion away from substantive issues and toward procedural issues. They questioned the legitimacy of the negotiations and made repeated calls for the delegates to be replaced with delegates chosen by a popular vote. They also argued that the constitution should only address broad principles which future legislation would be based upon. They insisted that the specific details of contentious issues, such as control over natural resources and the return of

IDPs, should be decided by a democratically elected parliament. Their main concern was how to include all Iraqis in the constitutional process.

Kurdish Delegation

The majority of the negotiations were spent arguing over the acceptability of and alternatives to the Kurdish proposals on regional autonomy, the federal nature of the state and the ownership of natural resources. However, the Kurdish delegation seemed unaware of the strength of their position. Rather than attempting to control the negotiations, they spent much of their time explaining and defending their actions and policies.

The Kurdish delegation argued that the Kurdish people had suffered more than any of the other groups, and that this provided ample justification to retain their autonomous institutions. The Kurds feel that their problems began with the creation of Iraq, and Saddam Hussein’s overthrow failed to renew their trust in the rest of Iraq. However, they were not very effective in making the other parties understand their motivations. The other parties seemed to discount the Kurds’ experiences under Saddam Hussein and did not understand their insistence on holding on to their institutions or their trust issues with the rest of Iraq.

The Kurds’ general mistrust of the other parties manifested itself in a desire for the United Nations, the United States, and various NGOs, such as Human Rights Watch, to be involved in both the repatriation process and the securing of their civil, political, linguistic and cultural rights under the new constitution, as well as the Kurds’ strong wish to retain their militia forces. They expressed willingness to give up their militia at a later date, once they see signs that their rights will be secure without it. However, they were unwilling to enumerate specific measures the rest of Iraq could take to develop that trust. They suggested that it would develop naturally over time, and could not be created artificially by fulfilling a checklist.

Minority Delegation

The minority delegation held many of the same views as the Kurds with regard to protection of linguistic and cultural rights, but seemed anxious that their concerns were being forgotten amidst all the attention focused on the Kurds. They differed significantly with the Kurds over the repatriation of IDPs (the so-called “de-Arabization” of Northern Iraq). They repeatedly called for a census to be taken as soon as possible, and argued that their numbers were much larger than current

estimates suggest. The minorities assumed that they will enjoy linguistic and cultural rights and freedoms, and did not believe they should be compelled to compromise their positions on issues such as natural resources and repatriation in order to secure these rights.

U.S. Embassy

The U.S. Embassy struggled in deciding exactly what its role should be now that sovereignty had been formally transferred to the Iraqi Interim Government. While some members of the U.S. delegation tried to steer the discussion toward listing objectives and the defining “red lines,” or the acceptable limits to its influence, this early identity crisis made it difficult for the U.S. Embassy to take initiative, and it ended up ceding the role of lead mediator to the UN. Had this issue not come up, it is likely that the U.S. Embassy would still have been forced to give up some of their authority over the negotiations to the UN. All of the Iraqi parties questioned the U.S. delegation’s authority, and asked that the UN play the central role in facilitating the negotiations.

United Nations

The other parties insisted the UN be involved in running the negotiations. As a result, the U.S. Embassy was sidelined, and the UN assumed the primary role of facilitator and mediator. There was an attempt by the U.S. delegation to come together with the UN and list areas of commonality, where both parties share the same goals. The UN abandoned this, and suggested that it would be immaterial, as the parties to the negotiation were unlikely to respond to ultimatums by either the UN or the U.S. Embassy.

The UN and the U.S. Embassy both possessed persuasive power over the parties to the negotiations, but for different reasons. The UN’s persuasive power stemmed from the fact that the other parties wanted the UN’s involvement, while the U.S. Embassy’s power stemmed from the fact it maintains troops on the ground and can provide economic assistance.



LESSONS LEARNED: THE SUBSTANTIVE ISSUES

This negotiation simulation addressed several major issues. One session addressed the structure of the state, and the nature of the legislature and the executive. A concurrent session was held to address the issues of control over natural resources, the role of Islam in government, and human and minority rights. Additionally, discussion of these issues illuminated other sub issues discussed by the parties.

The main issues were the control and distribution of oil revenue, and the nature of Kurdistan. In the actual negotiations, such a focus on Kurdistan’s status would put the Kurds at the center of negotiations.

State Structure and System of Government

The discussion over state structure and system of government focused almost entirely on the issue of Kurdish regional autonomy. While there was discussion over whether Iraq should have a unitary or federal government, it was in the context of regional autonomy and the nature and powers of constituent units. Only limited attention was paid to the issues of the legislature, role of the executive, and judiciary.

Federalism and Autonomy

The parties agreed in principle to a federal state. However, they seemed to conflate two similar but distinct issues: 1) what powers were to be kept by the central government and delegated to the constituent units; and 2) the number and definition of the constituent units. The parties had a genuine understanding of the complexity and depth involved in constitutional negotiations, but they did not seem to have a firm grasp of the technical aspects or language, never going beyond standard talking points. The parties had only a limited understanding of comparative models; Bosnia and Lebanon were repeatedly brought up as models of multi-ethnic federal states on which to base Iraq’s system of government.

The Kurdish delegation insisted on retaining the autonomy they already possess, and were unwilling to trade the system they have developed over the past

twelve years for the unknown. Little mention was made of Kurdish independence and the Kurds never spoke of secession. However, the Kurds spoke in terms of delegating their power to the central government, rather than the central government delegating power to them and of sharing a percentage of the revenue from the oil in their region with the rest of the country. This created the impression that the Kurds assumed they will be able to keep the structures and institutions they have developed over the years.

Structural Protections for Minority Rights

The Sunni proposed that the Kurds be allowed to run their own educational and legal systems and use their own language for official business in their region. However, they rejected the idea that the Kurds should have any individual control over economic policy or foreign affairs or maintain their own parliament or military. The Kurds were willing to give up control of foreign affairs and customs and border control to a national government, but insisted on keeping their own military and parliament, as they believe that this is the only way for them to protect their rights.

The other parties to the negotiation repeatedly tried to reassure the Kurds that their rights would be protected with something short of full regional autonomy. Both the Sunni and the Shi'a asserted that Kurdish rights would be adequately protected by their participation in the central government. The Kurdish delegation responded that the rest of Iraq is still too fragmented to give them credible guarantees, and that the Kurds have not forgotten the times Iraq failed to keep its promises to the Kurdish people. The Kurds insisted on firm constitutional guarantees and on retaining their regional institutions.

Parliament

There was general agreement that Iraq should have a bi-cameral parliament and that the lower house should represent the population. However, there was disagreement over the structure of the upper house and how it could be used to both represent and protect the interests of Iraq's various ethnic and sectarian groups.

The Shi'a proposed representation along the lines of Iraq's tribal structure. The Sunni proposed regional representation as a means to protect ethnic rights. The minority groups were concerned their interests would not be protected under either system. They proposed proportional representation, to allow political parties to protect the interests of the various

groups. Both the minority groups and the Kurds were opposed to any form of quota system for the legislature, fearing it could actually weaken their influence in the government, as non-minority legislators may not see them as their constituents.

Judiciary

The Shi'a introduced the issue of an independent judiciary. They argued that a truly independent judiciary would give the Iraqi people confidence in the rule of law and in the new government. They also stated that historically, constitutional interpretation has been a much neglected area in the Middle East, and that Iraq will need specialized constitutional courts to help resolve the conflicts that cannot be resolved in negotiations. The Shi'a proposed that the judiciary have members from each of the major ethnic and sectarian groups. The Kurds and the minorities were opposed to a judiciary quota, declaring that if judges had an ethnic or sectarian constituency, they could not truly be independent.

“The discussion of oil colored many of the other issues.”

Natural Resources

Control over Iraq's natural resources—especially oil and gas reserves—was a central issue. The discussion of oil colored many of the other issues. The minority delegation attempted to initiate discussion over the issue of water rights, but it was quickly overshadowed by the discussion over ownership of and revenue from oil and gas resources.

Territorial Control

The Kurdish delegation unequivocally stated its belief that Iraq's oil and gas resources belong to those living on the land where the resources are physically located. Their desire is to have control over the resources located within their region, as well as the resources in Kirkuk. The Kurds came to the table with a specific proposal: to maintain control over the oil fields located in their region producing less than 20,000 barrels per day, with the central government controlling the remaining fields.

The minority delegation were in agreement with the Kurds, in that they too believed that the oil and gas resources should belong to those who live in the land on top of them. However, the Turkmen in particular insisted that much of the oil producing land claimed

by the Kurds in fact belongs to them. They called for a census to be taken, arguing that the ownership of oil resources could not be determined until after the census.

Revenue Sharing

The Kurdish delegation was also willing to share revenue with the central government. Both the Sunni and Shi'a delegations were in disagreement with the Kurdish position. They were adamant the oil and gas belong to all Iraqis and rejected the Kurdish proposal as based on an arbitrary number. The Sunni proposed the oil revenue be distributed regionally according to population, as a way to ensure that each group receives its fair share.

The Shi'a took the position that the distribution of oil revenue is a matter for future negotiation by an established parliament, not a matter to be set down in the constitution. They believed that the constitution should only guarantee the basic principles by which the oil revenue is distributed. They wanted to postpone discussion of the details until after legislative elections, when the Iraqi people as a whole can be involved in the debate. The Kurds, on the other hand, insisted that the specifics of revenue sharing be guaranteed by the constitution.



Role of Islam

While the parties came to a relatively quick agreement that Islam would be a source of law rather than the source of law, they were unable to come to agreement on the larger question of whether Iraq should be a secular state.

Secularism

The main discussion concerning the role of Islam centered around whether Iraq should be a secular state, and to what extent Islam should be recognized in

the constitution. The minority delegation and the Kurdish delegation insisted that Iraq should be a secular state. While the minority delegation was willing to recognize Islam in the constitution, they insisted all other religions be equally recognized and freedom of worship be guaranteed.

The Kurdish delegation also asked for recognition of other religions, and expressed concern that, if Islam plays a role in the government and institutions, there will be conflict over which interpretation of Islam is to be followed. The Sunni noted that ninety eight percent of Iraqis are Muslims, and suggested that the state should acknowledge this reality. The Shi'a were concerned that a secular state would be a threat to the free practice of Islam. The UN representative tried unsuccessfully to explain that a secular state would ideally respect all religions. The parties were unable to agree to what extent Iraq should be constitutionally described as a secular nation and the issue of secularism was ultimately left to be decided at a later date.

Human Rights

The discussion of human rights concerned three main issues: constitutional guarantees for the protection of human rights, the rights of minorities and linguistic rights, and de-Arabization.

Constitutional Protections

The Sunni delegation proposed that Iraq adopt the Universal Declaration of Human Rights into its constitution. This was seconded by the Shi'a, who endorsed all international conventions and human rights norms. Both the Kurds and the minority groups asked for the UN to adopt resolutions to guarantee their rights. They expressed fear that, judging by past experience, constitutional guarantees alone would not be enough to protect their rights. The Kurds' fundamental mistrust of central government institutions was further reflected in their desire for guarantees for their rights beyond constitutional language, and their insistence that the only way their rights would truly be protected would be through maintaining their military and governmental institutions.

The minority delegation also expressed fear that their rights would not be protected. However, in addition to insisting on guarantees from the majority, they asked the Kurds what guarantees they would give to the minorities within Iraqi Kurdistan, and whether groups such as the Turkmen could have their own autonomous regions within Kurdistan. The Kurds expressed willingness to do everything necessary to protect minority

rights, including granting the minorities within their region the right to their own civil court system, educational institutions and the use of their own languages, but they would not accept the possibility of autonomous regions for minorities within Iraqi Kurdistan.

Linguistic Rights

A major human rights issue was the issue of language. There was debate over both what Iraq's official language would be, or whether it would even have one, and what protections or guarantees there would be for minority languages. The Kurdish delegation called for two official languages, Arabic and Kurdish. The minority delegation proposed there be no official language so that all languages would be protected and supported, citing the United States as an example of a country without an official language. The Sunni responded that Iraq could have multiple official languages, citing South Africa, which has eleven official languages. The Shi'a rejected the idea of multiple official languages, citing costs and logistical difficulties. They proclaimed that Arabic was and would be Iraq's official language, but agreed that minorities should have the right to use and teach their own languages. As with the role of Islam, the parties were able to come to general agreement that all languages should be respected and protected but could not agree on specific constitutional provisions.

De-Arabization

The discussion of human rights led into discussion over the return of internally displaced people and current "de-Arabization," the process of reversing the forced demographic changes in Northern Iraq currently being carried out by the Kurds. This was a contentious issue which none of the parties could agree on.

The Kurds asked that the constitution address the issue of repatriation and insisted the process should be voluntary. There was also a call for the UN to help supervise the process and ensure that the rights of those involved were protected. The Kurds repeatedly asked the U.S. Embassy and the UN for funding from the international community to help ease the process. The Sunni expressed concern over this process, noting that the name itself was provocative. Their concern was that this process would create a new refugee problem in other areas of Iraq. The Shi'a had a similar position on the issue of repatriation. They agreed that the principles of repatriation should be laid out in the constitution but insisted that the specifics wait until a democratically elected legislature assumes office so that all of the Iraqi people could participate in resolution of the issue.

The minority delegation called for an immediate halt to the process, so that a census could be taken. The census is a major issue for the minority groups, especially the Turkmen, who believe that a census will allow them to gain back their rights to their land, especially Kirkuk. The Kurdish delegation, however, would not accept an election or census that takes place before the de-Arabization process is complete, arguing that such a census or election would produce an inaccurate and distorted result and effectively disenfranchise a large section of the population.

Additional Resources on Iraq:

PIIPG Iraq Project:

Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations:

<http://www.publicinternationallaw.org/programs/peace/>

PILPG Negotiation Simulations:

Indonesia/Aceh:

<http://www.publicinternationallaw.org/programs/peace/diplomacy/#Aceh>

Democratic Republic of Congo:

<http://www.publicinternationallaw.org/programs/peace/diplomacy/#Congo>

Georgia/Abkhazia:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Georgia>

Kashmir:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Kashmir>

Kosovo Final Status:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Kosovo>

Nepal:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Nepal>

Sri Lanka:

http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Sri_Lanka

Sudan:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Sudan>

Tigris/Euphrates River Basin:

<http://www.publicinternationallaw.org/programs/sovereignty/diplomacy/#Tigris>