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NEXT STEPS FOR IMPLEMENTING THE IRAQ CONSTITUTION

PILPG Roundtable Series Report

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**PILPG ROUNDTABLE SERIES REPORT:
NEXT STEPS FOR IMPLEMENTING THE IRAQ CONSTITUTION**

Executive Summary

Iraq's first permanent legislature will soon be faced with the challenge of building a national dialogue and creating a stable and functioning federal structure. To assist the process of constitutional amendment and implementation, the Public International Law & Policy Group (PILPG) has developed the report that follows, as well as legislative guides and other resources that can facilitate and enhance the constitutional process.

It is essential for implementers to understand how to achieve specific constitutional goals – through constitutional amendment, implementing legislation, or other measures – and to define the legislature's work in the near and long term. The Constitution itself calls for implementing legislation in at least 54 articles, in areas ranging from designating a flag and national anthem to establishing the Federal Judiciary. Meanwhile, a committee within the Council of Representatives will be charged with developing a package of constitutional amendments to be presented to the full Council within 120 days of the Parliament commencing work.

As a complement to strategic planning for a new government of national unity, Iraq's legislators should develop a strategy – both substantive and procedural – that can steer this complicated process forward for the next six months and onward. The Parliament should also consider building institutions that can assist this process and have access to Iraqi and international expertise, such as a secretariat or Constitutional Implementation Commission.

Meanwhile, this report identifies key priorities and challenges and makes recommendations for all implementers, including, among others:

- Making the Judiciary a legislative priority;
- Utilizing innovative solutions and options for Iraqi federalism (including consideration of postponing decisions on the amendment process and legislation governing the formation of regions);
- Developing transparent oil and revenue distribution policies that ensure the fiscal integrity of all orders of government, build integrity, and combat corruption;
- Building a national framework for human rights, including establishing a High Commission on Human Rights; and
- Taking special efforts to increase the participation of women and minorities.

Foreword

Iraq's post-Saddam nationhood continues to unfold. A new Constitution has been ratified and a new Parliament will soon take up work. Iraq's democratic development represents a chance to build a future for the country, and the Constitution represents the keys to building a federal Iraq that can thrive over the long term.

Soon Iraq's first permanent legislature will be faced with the challenge of building a national dialogue and ensuring the creation of a stable and functioning federal structure. Iraq's new legislators will come together to implement the Constitution, define the executive procedures for the formation of regions, address resource allocation matters, and further clarify and coordinate the powers pertaining to each order of government in Iraq. In doing so, these articles and others will be interpreted in the context of the affirmation of the Constitution's supremacy, the authority of the Federal Supreme Court to settle disputes between and among the various levels of governments, the tensions among the key political actors regarding the necessary strength of the central government, the continued unity of the nation, and the call of the periphery for more autonomy.

To assist the process of constitutional implementation, the Public International Law & Policy Group (PILPG), along with nine co-sponsoring organizations, hosted a series of roundtable discussions and conducted a negotiation simulation in Washington, D.C., to address the key issues related to the constitutional process. The roundtables focused on the issues of federalism in Iraq, human rights, the administration of justice, the electoral system, the rights of women and minorities, and the impact of Islam in the Constitution of Iraq.

The roundtables and the negotiation simulation brought together over 50 international and Iraqi experts involved with post-conflict development and constitutional law to identify the core elements of implementing legislation, potential constitutional amendments, and best-practices from other nations. The participants included experts from prominent non-governmental organizations, academics, law firm associates, and Iraqi representatives.¹ The roundtables and negotiation simulation were designed to assist Iraqis and the international community in developing strong and enduring government institutions in Iraq.

This report is designed to gather diverse opinions, analysis, and recommendations on the implementation and amendment process and put them in one place. It has been developed to provide a systematic and comprehensive approach to

¹ A list of the participants is provided in the Annex.

constitutional implementation in the hopes of clarifying outstanding issues and helping to prioritize the daunting task that Iraq's Council of Representatives will face in the months to come. The report seeks to identify issues that can build a Constitution that is acceptable to all of Iraq's citizens, and proposes possible constitutional amendments, implementing legislation, and political solutions on a vast spectrum of issues. It is based on the premise that one way a viable federal, inclusive Iraq can be achieved is through methodical, systematic amendment and implementation of the Constitution.

This document also is designed to provide points of departure for further investigation into specific constitutional issues. As part of the roundtable process, PILPG developed a range of specific research papers containing analysis, recommendations, and model legislation on discrete topics. These memos are available through PILPG's website (www.pilpg.org) or CD-ROM, and include:

1. Federation Council Legislative Drafting Guide,
2. Federal Supreme Court Legislative Drafting Guide,
3. Higher Juridical Council Legislative Drafting Guide,
4. Judiciary Oversight Commission Legislative Drafting Guide,
5. Federal Court of Cassation Legislative Drafting Guide,
6. Public Prosecution Department Legislative Drafting Guide,
7. Independent Electoral High Commission Legislative Drafting Guide,
8. Central Bank Legislative Drafting Guide,
9. Commission to Protect the Rights of Regions and Governorates Not Organized in a Region Legislative Drafting Guide,
10. Women's Rights and Personal Status Law in Iraq Legal Memorandum,
11. Minority Rights in Iraq Legal Memorandum,
12. Human Rights Commission Legislative Drafting Guide,
13. Documentation and Accountability for Human Rights Abuses in Iraq Legal Memorandum,
14. Federal Structure and the Formation of Regions in Iraq Legal Memorandum,
15. Oil and Gas Resources in Iraq Memorandum, and
16. Security Sector Reform in Iraq Memorandum.

Additional PILPG legal memoranda on Iraq beyond the above list can also be found on the PILPG website.

The American University Center for Global Peace, American Society of International Law, Chemonics International, Creative Associates International, DLA Piper Rudnick Gray Cary LLP, IFES, Shearman & Sterling LLP, Sullivan & Cromwell LLP, and the United States Institute of Peace co-sponsored this program.

The co-sponsors do not necessarily endorse any statements made in this report. This report is solely the work product of PILPG. The Carnegie Corporation of New York, the Compton Foundation, and the Ploughshares Fund provided support to make this program possible.

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1. General Recommendations

1.1 Better understanding of the tools to change the Constitution

Most contentious issues can be addressed through enabling legislation, rather than amendments, as the language of the Constitution permits a great many interpretations and implementation mechanisms. This effort must overcome historic distrust and requires political will.

Some provisions may be so fatally flawed or politically charged that amendment will be the only way to ensure a functioning government structure. To name a few examples, the provision that calls for all residual powers (not stipulated to the exclusive authority) to belong to both the regions and the governorates, and the provision on personal status. The former is an example of an amendment that is needed to rectify an inconsistency and potentially unworkable arrangement that could topple the federal structure. The question of personal status, as written could be rectified through clarifying enabling legislation, however, understandably, interest groups might be so entrenched that anything less than an amendment may not be sufficient to appease these constituencies. *PILPG recommends that the host of implementation issues under the review of the Iraqi government be scrutinized as to whether amendment, implementing legislation, or administrative action can be used.*

1.2 Developing a Strategy for Constitutional Review

There are clear resource and time limitations for the amendment process. The more coherent strategies that are adopted, the more effective the process will be. This includes prioritizing concerns. For example, a law on judicial appointments to the Federal Supreme Court could be more important than central bank legislation. This prioritization should also be accompanied by the identification of appropriate mechanisms to affect change. Civil society groups and other interest groups should be brought into the process at its inception. *PILPG recommends that all parties involved in the constitutional review process prioritize issues, match these issues with the appropriate mechanisms, and build outreach to other interest groups.*

1.3 Composition and Management of Constitutional Review

Constitutional expertise among Iraqis must be built if constitutional processes are to be sustained over the coming years. The international community must provide support for the review process, and assistance must be provided to ministry staff,

new legislators, political leaders, and civil society members to assist them in the amendment and legislative process. *PILPG recommends that a Constitutional Implementation Commission or Constitutional Review Secretariat be created.*

1.4 Make the Judiciary a Priority

The judiciary is the foundation of Iraq's constitutional and federal system, and the independence, composition and authorities of the federal, regional and local judiciary are not sufficiently provided for in the Constitution. If Iraq can establish a judiciary that promotes confidence and has the support of its citizens, this can help to bring greater legitimacy to the overall governing structure and perhaps even ease the tension among the different parties that surrounds controversial issues that are likely to come before the country's courts in the near future.

This makes the composition and work methods of the Federal Supreme Court even more of a priority. Professional standards for judges and the process for the appointment of judges will be critical; for example, the Council of Representatives may wish to ensure that all judges have civil law training, including those which may also be experts in Islamic jurisprudence. *PILPG recommends that the Council of Representatives take up work on filling out Iraq's justice system as a high priority.*

1.5 Ensure the Fiscal Integrity of All Orders of Government

All orders of federal, regional, governorate, and local governments must be able to effectively carry out their functions and serve their constituency. Absent this capacity, a federal structure will never be stable and effective. As such, ambiguities and concerns relating to the following issues must be addressed: equitable distribution of natural resources, the authority to tax, the institution of transparent mechanisms related to budget and revenue distribution, as well as the authority of each government to raise financial resources independent of the other orders. *PILPG recommends that the Council of Representatives take steps to ensure the fiscal integrity of the Iraqi government at all levels.*

1.6 Build Capacity and Institutions

Iraqi legislators and the International Community have the responsibility to establish the institutions called for in the Constitution, such as the High Commission on Human Rights and the Commission on the Rights of Regions and Governorates Not Organized in a Region. *PILPG recommends that the Council of Representatives and the International Community ensure that these institutions are*

adequately resourced, can develop sustainable capacity, and are matched with appropriate financial resources and technical support.

1.7 Manage Decentralization

Decentralization is not just about decentralizing power from the center to the periphery, but also about ensuring that both the federal government and the regional, governorate, and local governments are accessible to all Iraqis – ensuring mechanisms such that individuals in a village in Basra have the ability, like individuals in Ramadi, to access both their local government representatives as well as their federal representatives. *As the Constitution is implemented, PILPG urges the Iraqi Government to ensure access for Iraqi citizens that is as broad as possible.*

1.8 Build a National Framework for Human Rights

There is broad disagreement over the authority that each order of government has over the protection and enforcement of human rights. In Iraq's federal system, can the South enact human rights protections that are lesser than those enacted in Baghdad or Kurdistan, and must both be consistent with the Constitution? Does the Constitution just establish a minimum, or can individual regions provide even greater protections? What is the level of diversity that is permitted in Iraq's federal system? What is the legal authority *and* practical ability of the federal government to assert its supreme authority over matters of human rights and ensure consistent minimum protections throughout the entire nation.

Additionally, Iraq should continue and broaden its focus on documentation and reconciliation for past abuses, as well as address the mechanisms that will be put in place to ensure against future abuses and ensure growing faith in the rule of law. *PILPG recommends that the Council of Representatives clarify Iraq's human rights framework, and accelerate work to document past abuses.*

1.9 Census and Voter Registration: Make all Iraqis Count

Voter lists and clarification of Iraq's population are activities as that can bestow or limit the political power of individuals and groups. Going forward, measured steps will need to be taken and provided for in legislation to instill confidence in the Iraqi people. Iraqi citizens must understand that everyone's vote will be equal in power to his neighbor's and that where population and demographics weigh into particular issues (such as natural resource distributions or redistricting and referenda on the establishment of regions), no individual or group will be

discounted or over counted. *PILPG recommends that the Government of Iraq take steps for a full voter registration and census as soon as practicable.*

1.10 Make Sure that Iraq's Institutions Represent all of Iraq

Mechanisms must be put in place by legislation and implementing procedures to ensure that key institutions, Iraqi ministries, executive, legislative and judicial positions are fully representative of all the citizens of Iraq. Early on in the process, this consideration will be particularly important in the establishment of the new Executive, the Ministerial Cabinet, the legislative committee that will review the Constitution for amendments, any advisory committee(s) established to deal with the establishment of executive procedures for the formation of regions, and, of course, the composition of the Federal Supreme Court. *PILPG recommends that legislators carefully configure all government institutions to represent all Iraqis, not just a majority.*

1.11 Strike a Balance between Principles of Islam, Democracy, and Human Rights

Article Two of the Constitution seeks to build a process of adaptation that can be the basis for a stable Iraq and help Iraq to become a model for the region. As the Constitution is reviewed, this combination of principles should guide the process and not tilt in favor of one or another. *PILPG urges the Council of Representatives to recall and act on all three principles during the review process.*

2. Clarifying the Amendment and Implementation Process

The procedures for amending and implementing the Constitution itself can be just as controversial as the debates surrounding the substance of the Constitution. Some have urged changes to Article 142, which outlines the special constitutional review process, arguing that “federalism” is a fundamentally divisive discussion that can and should be deferred for the time being. Others note that the issues that the review processes are meant to address are so titanic that the work of the special review committee cannot be completed in the allotted four months. Some observers note that a referendum calling for an extension of the time for review should be the first order of business for the Council of Representatives and could be incorporated into the upcoming elections for local governments.

By clarifying and prioritizing its work, Iraq's leaders can accomplish more. The substantive and procedural differences between the formal amendment process as

called for in the Constitution and the ordinary processes of legislative drafting and implementation can and should be clarified. Many international and Iraqi participants remain unaware of the differences in both approaches. Clarifying the process itself can make both processes more effective.

Meanwhile, legal “triage” should be performed to develop an amendment and implementation strategy. Clearly, some issues will be more critical than others. At least 54 of the articles in the Constitution – more than one third of the document – indicate that their implementation will be “determined” or “regulated” by to-be-written laws. There are dozens of additional articles that are so vague they also require clarification. The Iraqi Council of Representatives leadership should work to develop a strategy – both substantive and procedural – that can steer the process forward, and maximize results during the four-month constitutional amendment process.

<i>ISSUES TO BE REGULATED BY LAW UNDER THE IRAQ CONSTITUTION</i>		
NO.	ARTICLE	ISSUE
1	9(2)	Military service
2	12(1)	Flag, national anthem and emblem
3	12(2)	Honors, official holidays, occasions, and calendar
4	18	Citizenship (entitlement, withdrawal, reinstatement, multiple nationalities)
5	22(2)	Relationship between employees and employers
6	22(3)	Forming and joining trade unions
7	23(2)	Expropriation
8	24	Freedom of movement of manpower, goods and capital
9	26	Encouraging investment in various sectors
10	27(2)	Preservation, management and disposal of State property
11	28(1)	Taxes and fees
12	28(2)	Exemption from taxes for low income earners
13	30(2)	Social and health security to old, sick, disabled, unemployed, homeless and orphaned.
14	31(2)	State Supervision and building of hospitals and clinics
15	32	Care for the handicapped
16	34(4)	Public and private education
17	38(C)	Assembly and peaceful demonstration
18	39(1)	Forming and joining political parties
19	41	Personal status
20	43(1)	Management of religious endowments

21	45(1)	Strengthening/developing civil society institutions
22	49(3)	Election of Council of Representatives
23	49(5)	Replacing members of the Council of Representatives
24	63	Rights and privileges of the Speaker, two deputy speakers, and members of the Council of Representatives
25	65 ⁺	Formation, conditions and competencies of the Federation Council
26	69(1)	Nomination of President of the Republic
27	69(2)	Nomination of Vice Presidents of the Republic
28	74	Salary of the President
29	82	Salaries of the Prime Minister and Ministers
30	84(1)	Duties and authorities of the security institutions and National Intelligence Service
31	86	Formation and authorities of the ministries
32	89	Regulation of federal courts
33	90	Establishment, authorities and rules of the Higher Juridical Council
34	92 ⁺	Number, member of selection and work of the Federal Supreme Court
35	93(6)	Settling accusations against the President, Prime Minister and Ministers
36	96	Establishment of courts, appointment of judges and prosecutors and their terms of service and discipline
37	97	Discipline and removal of judges
38	99	Regulating military judiciary and jurisdiction
39	102	Functions of the High Commission for Human Rights, the Independent Electoral Commission and the Commission on Public Integrity
40	103(1)	Work of the Central Bank, Board of Supreme Audit, Communication and Media Commission and the Endowment Commissions
41	104	Functions and competencies of the Foundation of Martyrs
42	105	Establishing a commission to guarantee the rights of regions and governorates not organized into regions
43	106	Establishing a commission to audit and appropriate federal revenues
44	107	Establishing the Federal Public Service Council
45	112(1)	Management of oil and gas from current fields and

⁺ Requires 2/3 majority to pass

⁺ Requires 2/3 majority to pass

		distribution of revenue
46	109	Oil and gas revenue distribution and regulation
47	114(7)	Water policy
48	118*	Procedures to form regions
49	122(2)	Authorities of governorates not organized into a region
50	122(4)	Election and powers of Governorate Councils and Governors
51	123	Regulation of power delegated to the regions
52	124(2)	Status of Baghdad
53	125	Administration, political, cultural and educational rights for minorities
54	132(3)	Care and compensation for families of martyrs, political prisoners, victims of previous regime, and those injured by terrorist attacks

3. A Constitutional Implementation Commission

Building Iraqi capacity is also essential to developing a coherent approach to both processes. Legislators will come and go, but many participants to the roundtable series noted that constitutional expertise among Iraqis must be built if constitutional processes are to be sustained over the coming years. A Constitutional Implementation Commission should be created. To use examples from the United States, this commission could be created by the Iraqi Council of Representatives and be a government agency similar to the U.S. Government Accounting Office. Alternately, the commission could be independent, yet financed by the Iraqi government, similar to the United States Institute of Peace. Still further, a commission could take the form of a private think-tank and be privately funded. In any of the three possible incarnations of the commission, the body would serve as a repository for Iraqi constitutional expertise and would be an independent voice for smooth implementation and functioning of a constitutional Iraq.

Such a commission could be the foundation for sustainable constitutional expertise, and could bring in civil society and other actors who may not be affiliated with those parties with seats in the Iraqi Council of Representatives. Even without establishing a commission, participants strongly recommended that the legislative branch develop specific mechanisms (such as committees and consultative groups)

* Requires “simple majority of members present” to pass

to increase civil society involvement in the constitutional review, amendment, and legislative process.

International support and development assistance in the areas of the amendment and implementation process will also shape the tenor and focus of Iraqi efforts. The international community could assist by partnering with local NGOs and Iraqi experts in order to provide each with the financial and technical support needed to facilitate their effective involvement in drafting of amendments and legislation related to the Constitution. Given the comparatively narrow timeframe for the amendment process (as well as the six-month time to develop a law on the formation of Iraqi regions and the four-month constitutional review limitation), this international assistance should be executed as soon as possible.

4. Building Iraqi Federalism

Some argue that the term “federalism” represents the entire organizing principle for last summer’s constitutional negotiations and the Constitution itself. The Iraq Constitution declares the country as a federal state made up of “a decentralized capital, regions and governorates, and local administrations” (Arts. 1 and 116). The Constitution goes on to identify the exclusive powers of the federal government (Arts. 109-113) and those powers shared between the federal government and the regions (Art. 114), and establishes that the regions have the authority to exercise “executive, legislative, and judicial authority” in accordance with the regional Constitutions (Art. 121). Additional articles aid in defining the powers of the governorates not organized into regions (Art. 122-23).

The Constitution also provides that all powers not stipulated in the exclusive powers of the federal government are deemed as belonging to the regional *and* governorate governments (Art. 115). This dual repository for residual powers may require a competition for power that was not anticipated by the Iraqi legislature. Additionally, where there is a contradiction between regional and national legislation, the region is authorized to amend the latter and where shared powers are concerned, priority will be given to the laws of the regions and governorates not organized into regions. (Art. 115 & 121(2)).

Some have argued that the early chapters of the Constitution, which give the federal government substantial responsibilities, including in the area of human rights, could be read as augmenting the provisions of Section Four, which details the powers of the federal government. Such an interpretation would be consistent with state practice around the world where states often exercise implied powers

necessary to carry out those duties and responsibilities expressly assigned in their constitutions (i.e. implying a power to tax in order to carry out the regulation of commercial policy).

4.1 Division of Powers between Federal, Regional and Governorate Authorities

Iraq's Constitution leaves several important issues open; these issues are critical to the functioning of the new Iraqi state. It will be essential for Iraq's parliament to define and develop mechanisms to facilitate cooperation rather than competition between respective levels of governments with respect to carrying out their respective and shared powers. This includes items ranging from commerce to the jurisdiction of Iraqi courts to even elections administration. Almost any state-level institution (for example, a national human rights commission) will need to clarify its relationship with regions, governorates, and municipalities. Similarly, provisions addressing a region's right to amend federal laws should be scrutinized.

Similarly, the powers granted to the governorates organized into regions and those not organized into regions should be clarified as part of legislation that could be presented as constitutional amendments or part of implementing legislation for the formation of regions. This issue was addressed during the roundtables and negotiation simulation. The Council of Representatives and its leaders may wish to consider these matters as implementing legislation and amendments are developed.

4.2 Establishment of New Regions

Article 118 calls for the Council of Representatives to enact a law that defines the executive procedures to form regions, "in a period not to exceed six months from the date of its first session." Participants noted that gradual devolution of power to regions would be preferable to immediate action, and that complying with the six-month deadline is problematic. The government of Iraq may wish to consider extending the deadline.

Key issues that could arise include:

- The timeframe for when governorates can begin to petition the federal government for the creation of new regions;
- The limitations, if any, on the number of regions that will be sustained by the new federal Iraq;

- Who would vote in referenda on formation of regions and whether a vote would occur only on a governorate level, or also at the regional or national level;
- Whether assumptions of regional powers are automatic or phased in over time pending a demonstration of capacity or fulfillment of certain conditions;
- Who would manage, supervise, and certify referenda; and
- When and how new boundary demarcations may take place.

The establishment of new regions was the subject of the negotiation simulation held as part of the roundtables, and is more fully discussed in Section Six of this report.

4.3 Making Sure Key Institutions Can Function

Participants stressed that key institutions created by the Constitution must have appropriate roles and responsibilities in order to be viable. This especially applies to the Federal Supreme Court and the extended national court system. This is discussed in greater detail in Section Nine, however key clarifying steps with respect to the courts would include:

- Defining the Federal Supreme Court's jurisdiction, structure and composition;
- Clarifying the court(s) structures and competencies at the federal, regional, governorate and local levels;
- Establishing a selection method for members of respective courts and judicial bodies that will help increase their legitimacy in the eyes of the public;
- Determining the competencies of various courts to settle/mediate disputes between regions and governorates;
- Defining the power of the federal government to designate federal crimes and develop criminal codes;
- Determining the respective federal and regional jurisdiction over inter-regional and intra-regional crimes; and
- Clarifying which, if any, courts have appellate review over regional and governorate court decisions.

The government of Iraq may wish to clarify these questions relating to the judiciary through implementing legislation, rather than through the constitutional amendment process.

4.4 Human Rights Protections

In order to ensure consistent protection and application by regions and governorates of the human rights protections provided by the Constitution, Iraq's Council of Representatives may wish to confirm the applicability of the Constitution's human rights provisions to the regions, governorates and local governments through the legislative process. It will also be necessary to clarify not only the role that each order of government plays in the promotion and enforcement of human rights protections, but also the manner in which violations are adjudicated and remedied at the local, governorate, regional, and national levels. Additionally, as discussed in greater detail below, it will also be necessary to ensure that sufficient technical and financial resources are provided to the High Commission on Human Rights, the Ministry of Human Rights, the Interior Ministry, and other commissions, departments and agencies that play a role in law enforcement and the rule of law in general.

4.5 Taxation

Many concerns were raised about the ability of the federal government, and for that matter, all orders of government within Iraq's new federal system, to adequately fund their activities. Further concern was expressed regarding the need to establish a viable revenue and taxation regime which ensures that all governments in Iraq have the necessary resources to carry out their assigned functions. The Council of Representatives may wish to develop procedures for taxation by the central government that both ensure its operating capacity and that are comparatively easy to implement across Iraq and complement any independent taxation power exercised by the regions and governorates, including:

- *The possible use of a standardized value added tax (VAT):* A VAT is similar to a sales tax in that it is levied at the time of the sale of goods and services. A VAT is an indirect tax, in that the tax is collected from someone other than the person who actually bears the cost of the tax (namely the seller rather than the consumer).

Personal end-consumers of products, consumers, and services cannot recover VAT on purchases, but businesses are able to recover VAT on the materials and services that they buy to make further supplies or services directly or indirectly sold to end-users. In this way, the total tax levied at each stage in the economic chain of supply is a constant fraction of the value added by a business to its products, and most of the cost of collecting the tax

is borne by business, rather than by the state. The VAT was invented because the alternatives – very high sales taxes and tariffs – encourage cheating and smuggling.

- *Development of consumption tax schemes:* While a VAT is a tax on consumption, a consumption tax is a tax on what people spend rather than what they earn. Opponents of consumption taxes note their regressive nature.

Lastly, participants of the roundtable series noted that while the express power of the federal government to tax may not appear in Iraq's new Constitution, as evidenced by other state practice around the world, the Iraqi legislature is far from limited in its ability to recognize such a power. An implied power to tax can easily arise from any number of authorities already stipulated as within the jurisdiction of the central government including, but not limited to, its power to regulate "commerce policy across regional and governorate boundaries in Iraq," (Art. 110(3)), formulate "fiscal and customs policy" (Art. 110(3)), or ensure "balanced development in different areas of the country" (Art. 112(1)).

4.6 Other Federalism Issues

Defining the relationship between the center, regions, and governorates is an overarching issue that cuts across several topics addressed elsewhere in this document, including:

- *Personal Status Law:* The government of Iraq may wish to define the jurisdiction of family law between federal government, regions, and governorates; and clarify how personal status might be addressed in the Kurdish region or any new region that is formed.
- *Determining the Status of Contested Areas:* Participants recommended further clarifying processes for establishing the status of contested areas as required by the Constitution other than just Kirkuk.
- *Education:* Confirming division-of-labor between governorates, regions, and central government concerning issues relating to education, including curriculum development and the role of national and religious minorities in the development of any educational agenda.

4.7 Additional Information

For more information, please see the following PILPG legislative guides and memoranda:

- Federal Council Legislative Drafting Guide
- Central Bank Legislative Drafting Guide
- Commission to Protect the Rights of Regions and Governorates Not Organized in a Region Legislative Drafting Guide
- Federal Structure and the Formation of Regions in Iraq Memorandum
- Oil and Gas Resources in Iraq Memorandum
- Security Sector Reform in Iraq Memorandum

5. Oil and Revenue Distribution

Many participants stressed that agreement on oil and other revenues is in many ways a prerequisite for movement on most other issues in the Constitution, including the formation of regions and the clarification of government powers.

Some NGO representatives argued, citing the opinions of oil industry experts inside and outside Iraq, that the constitutional provisions for oil revenue allocation are inadequate, and that Articles such as 111, 112, 115 and 121(2) may have negative repercussions on both resource management and development. Meanwhile, others noted that federal exclusive powers in the areas of trade and customs policy could be used by the federal government to assume management control of petroleum resources, and that the federal government could augment its powers by using its power to enter into international agreements, including agreements with the International Monetary Fund.

According to the Constitution, the federal government, along with the producing governorates and regional governments, manage oil and gas extracted from present fields (Art. 112(1)). Participants recommended that this cooperation and shared responsibility be further clarified, perhaps allowing Baghdad to specialize in policy making and strategy (albeit in consultation with the regions and governorates), while allowing the regions and governorates to focus more specifically on operations.

Some interpret Article 112 as assigning management of new fields to regions and producing provinces, thus making the role of the central government temporary as

existing fields fall out of production. Such an interpretation limits Baghdad to merely working with producing regions and governorates to formulate “strategic policies” to develop *future* oil and gas wealth. The lack of express language in the Constitution on this issue has prompted significant tension and speculation. The Council of Representatives may wish to address the permanent role of the Federal government in future oil policy.

Participants observed that the current distribution of tasks and responsibilities could lead to the fragmentation of the natural resource sector. Some participants claimed that this fragmentation will delay necessary legislation, rules, and regulations; weaken Iraq’s bargaining position compared to other oil producers, and impede foreign investment and contracting with the private sector. The overlap of authorities between the state, regional, and provincial authorities could threaten federal, regional, and governorate budgets and reduce oversight of the legislature and executive at all levels, thereby opening the door for manipulation and abuse of resources.

The Iraqi Council of Representatives may wish to consider an amendment to the Constitution, calling for a revised oil law that could clarify roles and responsibilities. This legislation could give the Federal government authority over design of policies and planning, legislation and the supervision of its implementation, and authority for signing strategic agreements and contracts. Regions and oil-producing governorates would be responsible for operational management and project implementation, thereby reducing overlap between the center and periphery. A new oil law could include creating an oil trust fund to manage revenue and increase accountability and transparency.

5.1 Regional Solutions

A potential regional solution for the sharing of oil revenues could be for the new Iraq Parliament to establish legislation clarifying that the producing regions and governorates must allocate an agreed-upon percentage of oil revenue to the federal government for national use and facilitate the federal collection of an agreed upon tax on certain oil revenues.

Participants noted that if properly established, the Public Commission to Audit and Appropriate Federal Revenues (called for in Article 106) could exercise effective control and oversight of oil revenue if it places a priority on transparency, accountability, and a representative membership.

5.2 Transparency and Accountability

Even if this Commission is not empowered for this task, there is a critical need for transparency and accountability. The government of Iraq may wish to draw on principles established by the Extractive Industries Transparency Initiative (EITI). This new international system for accountability and transparency in resource-rich nations would require the publication of payments to the government for extraction of natural resources. The Initiative would involve multiple layers of government, international organizations, energy and mining corporations, and non-profit organizations.

Similarly, the government of Iraq may wish to consider further defining the powers and roles of the federal government, governorates and regions in the development of policies related to water from sources both outside and within Iraq.

5.3 Other Models

One possible variation on disbursement of oil revenues could be direct payments to Iraqi citizens, perhaps based on the Alaskan model for oil revenue sharing, or by some other method. Canada provides another example. In Canada, provinces collect and allocate oil revenue from their territories, but the federal government has tax and regulatory powers over certain aspects of the oil industry.

For more information, please see PILPG's memorandum on Oil and Gas Resources in Iraq.

6. Addressing Human Rights Violations in Iraq: Past, Present and Future

The issue of human rights permeated all discussions related to the implementation of the Constitution. This was largely because so many Iraqis have had some personal connection to the issue of human rights – either as victims, relatives or friends of victims, or as members of a vulnerable community. As such, addressing past, present and future human rights abuses has been deemed essential to healing the nation, reconciling it with its past, and building trust between parties such that that they could move forward together to create a stable and just democracy.

Iraq's Constitution not only affirms a number of political, civil, economic, social and cultural rights (Section Two), but also calls for the establishment of a High

Commission for Human Rights (Art. 102). The Constitution provides that this Commission shall be independent and subject to monitoring by the Council of Representatives. The Constitution, however, does not provide any detail about the Commission's composition, structure, mandate, or authorities.

Participants stressed the need for the Council of Representatives to produce strong enabling legislation to build a strong legal framework and institutional capacity to protect the rights provided in the Constitution. This included addressing questions relating to Iraq's personal status law, and also included the rights of minorities, family law, the electoral system, and state guarantees to provide care and compensation for families of martyrs and victims of terrorism.

6.1 The High Commission on Human Rights

As previously noted, the Constitution calls for the immediate establishment of the High Commission on Human Rights. This could be accomplished by a possible combination of constitutional amendments and implementing legislation.

The Council of Representatives may wish to clarify the scope and functions of the Commission (including examination of mandate and the extent to which its work will overlap, complement, and be coordinated with other relevant institutions); while also guaranteeing the Commission independence. This could include a possible constitutional amendment to remove monitoring of the Commission by the Council of Representatives as currently called for in the Constitution.

Participants observed that one key to developing a responsive commission could be to establish commission subcommittees dedicated to discrete constituencies and topics, such as subcommittees on women, minorities, resettlement, or displaced persons.

It is possible that the Commission may have the ability to hear and/or adjudicate human rights complaints, and at its inception the Commission's relationship to the judiciary must be spelt out. Similarly, the Commission may seek to establish local and regional offices throughout the country to serve as focal points for a complaints and documentation process and ensure accessibility for all.

6.2 Truth and Reconciliation

Participants agreed that greater security and public education processes need to be in place prior to the establishment of any formal truth and reconciliation mechanism, such as a Commission. Should such a commission be contemplated, it

would need to maintain independence from the High Commission on Human Rights and other institutions such as the Human Rights Ministry, but also have mechanisms to complement the work of these other entities and coordinate their joint efforts where appropriate. Functions of a commission could include the collection, verification and cataloging of evidence, gathering of testimony, public education about human rights and truth and reconciliation processes, and systemization of human rights documentation.

6.3 Human Rights Documentation

Regardless of what form a future formal mechanism may take, all participants stressed the importance of taking immediate measures to catalogue and preserve human rights documentation, to ensure access to the documentation, and possibly to systemize collection of existing and new documentation; and gathering of evidence and testimony before the evidence is lost, obscured or eroded. The Ministry of Human Rights has taken a leadership role in this process. Other institutions may also be appropriately positioned to assist in this work, particularly if the international community provides each with much needed financial and technical support.

6.4 Human Rights Training and Education

The Iraqi government should consider highlighting the important role of training and education, possibly through designation of the Commission or Ministry of Human Rights as the responsible agency. This training could include:

- Human rights training of relevant ministries and law enforcement agencies;
- Human rights training for civil society; and
- Implementing public awareness campaigns regarding human rights and reporting mechanisms.

6.5 Clarifying Regional and Governorate Responsibility for Human Rights

As previously noted, Iraq's Council of Representatives may wish to confirm the applicability of the Constitution's human rights provisions to the regions, governorates and local governments through the legislative process. Meanwhile, any rationalization of roles and responsibilities in the area of human rights should also include identifying responsible regional or governorate institutions; ensuring immediate capacity and functioning of these institutions; clarifying mandates and ensuring coordination with other relevant institutions throughout the country. Some groups have argued that the regions and governorates should exercise

superior authority with respect to the promotion and enforcement of human rights. Others argue that this would not be consistent with the Constitution.

6.6 The Federal Supreme Court and its Impact on Human Rights

The Federal Supreme Court will have oversight of the constitutionality of laws and regulations in effect, and will interpret the provisions of the Constitution. Hence, the Court will play a critical role in the protection and enforcement of human rights. Participants stressed that ensuring immediate capacity and functioning of the court and other relevant bodies should be of the highest importance for the Iraqi government. Perhaps more importantly, support for the court system should have the goal of engendering support and legitimacy from Iraqi citizens by paying special attention to its working methods and its composition. The working methods and composition of the Court are discussed in greater detail in Section 9.

6.7 Law Enforcement

Protection of human rights starts with adequately trained and equipped law enforcement, and the Iraqi government should pay particular attention to the role of law enforcement agencies as guardians of Iraq's commitment to protect human rights and those who would report abuses and seek remedies for the same. The government should also support public education to raise awareness not only of the constitutional rights of Iraqi individuals and collectives, but also of the responsibilities of the federal, regional and local governments. This education can also provide the public with information about the mechanisms by which citizens can seek assistance when their rights have been violated.

6.8 Additional Information

For more detail on this topic, please see the following PILPG memoranda and legislative guides:

- Human Rights Commission Legislative Drafting Guide
- Women's Rights and Personal Status Law Memorandum
- Minority Rights in Iraq Memorandum
- Documentation and Accountability for Human Rights Abuses in Iraq Memorandum

7. Guaranteeing the Rights of Women and Minorities under the Constitution

With respect to women's rights, the Iraq Constitution provides a number of guarantees including, but not limited to: equality before the law, freedom from discrimination based on gender, equal rights to education, equal rights to “participate in public affairs and to enjoy political rights including the right to vote, to elect and to run for office,” (Art. 20) the prohibition on domestic violence, an electoral provision that aims to achieve no less than 25 percent representation of women in the parliament, and a prohibition on tribal traditions that contradict human rights (Arts. 14, 16, 20, 29, 34, 45, and 49 respectively).

With respect to family affairs (marriage, divorce, inheritance etc.) the Constitution provides that “Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law” (Art. 41).

7.1 Minority Rights

There are a number of communities that would consider themselves to be national or religious minorities within Iraq with legitimate concerns and needs. These communities might include Sunnis, Kurds, non-Arabs, Christians, Turkmen, ChaldoAssyrians and others.

With respect to minority rights, the Constitution provides for a number of protections, particularly with respect to religious freedoms, language rights, as well as a guarantee to the various nationalities of administrative, political, cultural and educational rights (Arts. 2-4, 42, 43, & 125). Minorities, however, have expressed equal concern over their freedom to practice their religion and over how the federalism provisions will be implemented as such to protect their local administrative rights. Participants expressed concern over minority representation in the Parliament (as per the new electoral law) and other government ministries, departments and leadership posts. All of these issues will need to inform the new government's work.

Participants suggested that since minority groups actually constituted majorities in some areas, these areas could be the basis for individual administrative districts with certain elements of self-governance.

7.2 The Judiciary

As has been stressed, the Federal Supreme Court will play a critical role in protecting human rights in general and the rights of women and minorities in particular. As the ultimate arbitrator of claims, the court must be seen as impartial, transparent, representative of all Iraqis (not just non-secular interests), and therefore, legitimate. Constitutional and legislative tools to build a strong, independent judiciary are discussed in Section Nine of this report, “Administering Justice in Iraq.”

7.3 Capacity Building for Government and Civil Society

Participants noted the need to increase awareness both within ministries and agencies of the Iraqi government as well as with the Iraqi public at large. The government of Iraq may wish to consider:

- Building the capacity of the Iraqi Human Rights Ministry, Human Rights Commission, and staff expected to be actively involved in protecting human rights;
- Establishing Sub-commissions across Iraqi ministries (as well as the Human Rights Commission) on women’s rights and minority rights;
- Providing education to minority and women’s groups about their rights and the mechanisms through which they can protect them;
- Educating Iraqi society at large on the rights, cultures and values of minority groups as well as the rights of women; and
- Supporting initiatives to empower women and minority groups and provide resources for advocacy projects.

7.4 Increase the Participation of Women and Minorities Within the Iraqi Government

Beyond the 25 percent requirement for women’s participation in the Council of Representatives, the Iraqi government may wish to consider:

- Creating legislative committees on minority and women’s rights within the Council of Representatives which could focus on these issues and serve an advisory role for the legislature. Specific language could require that the legislature consults on relevant issues;
- Ensuring that women and minorities are represented at all levels of the government in a variety of different departments and ministries, potentially

by creating offices of women's and minority rights within each governmental ministry;

- Supporting access for women and minorities to lower-level government officials in order to voice their concerns and ensure contact with government entities;
- Ensuring local authorities, who may be more able to resolve issues relating to women and minorities in their own communities, have the requisite power, authority and protections to facilitate change; and
- Supporting grassroots advocacy efforts at the local level.

7.5 Implementation of Personal Status Law

The status of Iraq's personal status law will have a direct bearing on women and minorities. Participants outlined three possible approaches to resolving questions of personal status:

1. Amending Article 41 of the Constitution to include an explicit protection of human rights for women and minorities;
2. Drafting legislation to ensure continuing adherence to the 1959 Personal Status Civil Code; and
3. Passing legislation which would mandate a default to civil law for adjudication of issues under the personal status laws (as is indicated in the 1959 Personal Status Civil Code), require consent of both parties to adjudicate in religious courts, and permit appeals of religious court judgments to a civil court.

The upcoming constitutional amendment process will be a critical moment for women and minorities, and it will be important that the special committee established to review and propose amendments to the Constitution includes diverse members that represent all the components of Iraqi society. Similarly, any review of Iraq's electoral system should consider enhancements for the representation of women and minorities, not just for elected office, but also for the IECI and related organizations.

7.6 Additional Information

For more information, please see the following PILPG legislative guides and memoranda:

- Independent Electoral Commission of Iraq Legislative Guide
- Human Rights Commission Legislative Drafting Guide
- Women's Rights and Personal Status Law in Iraq Memorandum
- Minority Rights in Iraq Memorandum

8. Administering Justice in Iraq

The independence, composition and authority of the various courts in Iraq – particularly the Federal Supreme Court – are critical issues that have the ability to feed as well as dissuade the fears of parties concerned with the eventual adjudication of a number of matters – not the least of which relate to federalism and the allocation of powers, as well as the rights of women and minorities.

The development of the judiciary is a key aspect of ensuring a commitment to the rule of law in Iraq. Chapter 3 (Articles 87 through 101) of the Iraq Constitution establishes Iraq's federal judicial authority as a financially and administratively independent entity. The judicial authority is to be comprised of the Higher Juridical Council, the Federal Supreme Court, the Federal Court of Cassation, the Public Prosecution Department, the Judiciary Oversight Commission, as well as "other federal courts that are regulated in accordance with the law."

With regards to the specific institutions, Article 92 of the Iraq Constitution establishes Iraq's Federal Supreme Court. Of concern to many, Article 92 states that the Court should be made up of "a number of judges, and experts in Islamic jurisprudence and law experts whose number, the method of their selection and the work" is to be determined by a law passed by two-thirds majority in the Council of Representatives. The Court is granted (in Article 93) jurisdiction over a number of specific issues including interpretation of constitutional provisions; matters arising from the application of federal laws; disputes between and among different levels of government; and competency disputes between and among judicial institutions.

Article 90 provides for the establishment of the Higher Juridical Council, and Article 91 tasks the Council with supervising the federal judiciary; preparing the judiciary budget; and the nominating select members of other judicial institutions. These nominations, as well as the judiciary budget, are subject to approval by the Council of Representatives. Within this broad constitutional framework, the mandate, structure, composition, and functions of these various components of the federal judicial authority, including their relationship to the other branches of government, to each other, and regional and governorate judicial bodies must be further developed and defined by legislation.

Hence, a number of outstanding matters regarding the Iraqi judiciary will require attention during the amendment and legislative process of the new Iraqi Parliament. The Iraqi government may wish to consider taking the following steps through implementing legislation:

8.1 Establishing the Federal Judicial Authority

Establishing a functional and viable Federal Supreme Court, with the capacity to protect human rights and resolve issues relating to federalism should be the highest priority. As previously noted, it will be essential that the court have support and legitimacy from Iraqi citizens, paying special attention to the composition of the court and its work methods. Legislation should include the following elements:

- Clarifying the relationship between the Higher Juridical Council and the Oversight Commission;
- Affirming the independence of the judiciary;
- Preserving the independence of the judiciary by strictly adhering to the two-thirds majority requirement for approving the Federal Supreme Court's enabling legislation; and
- Promoting an efficient judicial system by developing standardized methods for addressing issues relating to federalism and jurisdictional disputes, rather than handling these issues solely on a case-by-case basis.

8.2 Composition

Legislation should address the composition of the Federal Supreme Court as a priority matter. This includes:

- Establishing the method for nominating Supreme Court judges;
- Establishing concrete requirements for judges, assuring that the composition of the court is representative of Iraqi society, and that the members of the court have a high level of integrity and legal training, and are well versed in the different values, customs and traditions of Iraq's multinational society;
- Ensuring a merit based nomination process;
- Requiring civil-law training for all judges on the court, consistent with emerging international standards;
- Reserving seats for women and minorities on the court, or establishing other methods for ensuring minority representation (perhaps with a sunset clause);
- Requiring a supermajority in the Council of Representatives to approve judicial nominees; and
- Providing training for judges which includes instruction on various cultural and religious groups in Iraq.

8.3 Standing

Transparent and clear work methods should be assured, and issues of standing before the Federal Supreme Court should also be addressed in enabling legislation

- Clarifying standing requirements for the Court (granting individual citizens standing before the Court may ensure that the Court can effectively address human rights issues); and
- Establishing the method of bringing a claim before the Court -- for example, does an individual case have to be referred through a lower court or other government institution before it can be heard by the Court.

8.4 Jurisdiction

Legislation can and should clarify the jurisdiction of the federal system and its relationship to other institutions. These tasks include:

- Clarifying which courts have original and appellate jurisdiction over constitutional complaints and/or constitutional legal issues;
- Determining mechanisms for resolving competency disputes between lower courts and the Federal Supreme Court, including whether the Court's jurisdiction is limited to those powers within the exclusive jurisdiction of the federal government; and
- Establishing clear rules for appealing decisions from the religious courts to the Federal Supreme Court, especially regarding personal status laws. Personal status matters raise questions as to whether personal status laws are a local or federal issue and raise the issue of how conflicting interpretations can be resolved between religious and civil courts.

An additional task will be for the Iraqi government to define the relationship between local, regional and federal judicial bodies. It will be important to determine whether the Federal Supreme Court has the authority to review legislation enacted by regions and governorates under Article 93 (which sets out the competencies of the Federal Supreme Court). Several other important questions arise, such as:

- How would Article 125, which would appear to guarantee local administration of legal matters and therefore respect for minorities' legal institutions and customary laws, be interpreted; and
- How would the term "administrative rights" be defined under such articles in the Constitution?

Meanwhile, it will also be important to harmonize the relationship between the Federal courts and other institutions, such as the to-be-established Human Rights Commission (should this commission have the authority to hear and/or adjudicate human rights cases), and the Iraqi Special Tribunal.

8.5 Administrative Issues

According to Articles 87 and 88 the judiciary and its judges are independent. As per Article 91, the Higher Juridical Council manages the affairs of the judiciary and proposes the judiciary's budget for approval by the Council of Representatives. Legislation establishing the Higher Juridical Council should secure the judiciary's independence by ensuring that the legislature can not unreasonably alter or withhold its approval of the judiciary's budget. As part of the budgeting process, the Higher Juridical Council should ensure sufficient funds to carry out the following activities:

- Adequate training of individuals working in the judiciary;
- Adequate technical and financial resources for training and capacity building of Iraqi jurists;
- Public education programs, directed in particular at women and minorities regarding their rights under the Constitution, and the legal remedies available to them; and ensuring their access to judicial bodies; and
- Adequate resources to develop the necessary infrastructure to support a functioning Judiciary.

8.6 Additional information

For more information, please see the following PILPG legislative guides:

- Federal Supreme Court Legislative Drafting Guide
- Higher Juridical Council Legislative Drafting Guide
- Judiciary Oversight Commission Legislative Drafting Guide
- Federal Court of Cassation Legislative Drafting Guide
- Public Prosecution Department Legislative Drafting Guide

9. Instituting Fair, Transparent, and Accountable Electoral Systems

Article 49 of the Constitution provides for an electoral law that will not only “regulate the requirements for the candidate, the voter, and all that is related to the elections,” but also “aim to achieve a percentage of representation for women of not less than one-quarter of the members of the Council of Representatives.” Shortly after the elaboration of the Constitution, the Iraqi National Assembly approved an electoral law providing that the 275 members of the Parliament would be selected based on a multi-district proportional representation system where there would be a mixture of 230 seats apportioned to governorate-level constituencies, and 45 reserved as national and compensatory seats. The new Parliament will decide whether the existing electoral law needs reform.

Additionally, Article 102 of Iraq’s new Constitution establishes the Independent Electoral Commission of Iraq (IECI) and indicates that the law will regulate its activities. Previously, the Coalition Provisional Authority (CPA) issued Order number 92 on May 31, 2004, establishing the IECI to ensure the successful administration of elections in Iraq. The end of the transition period will mark the end of the CPA and therefore the expiration of the CPA Order number 92. At that point, based on the Constitution’s mandate, when the new Parliament is seated, it may enact a new law establishing the Electoral Commission, amend the CPA Order number 92, or extend the mandate of the existing IECI.

9.1 Capacity Building

Iraq has seen three elections occur in 2005, and building capacity for holding future elections was emphasized by most participants. They stressed the need to decentralize the capacity-building process and get training to regions, governorates, and localities, especially in light of possible local and governorate elections to be held in 2006. Many poll workers who worked on these elections need further training, and the IECI should make an extra effort to systematically review current poll worker qualifications and backgrounds given several irregularities uncovered in 2005. Given misunderstandings about the electoral system, building electoral capacity could also reinforce the legitimacy and integrity of the system.

9.2 The Independent Electoral Commission of Iraq

With the evaporation of CPA Order number 92, the existing IECI needs to be extended in the interim or the legislature needs to enact a new law to establish a

new Commission, particularly in light of upcoming elections in 2006. Future reforms could include:

- *Addressing the benefits of increasing the enforcement and prosecutorial powers of the IECI:* Provide a more effective electoral dispute mechanism and better sanctions to provide “teeth” and oversight to enforcement of electoral rules, particularly those that relate to candidacy and campaigning. Campaign finance violations should also be addressed, possibly combined with strengthened campaign finance rules and disclosure.
- *Better evaluate voter lists:* The current system is based on a national database for Oil-for-Food ration cards, and was adopted as a temporary measure. It is not as reliable as a formal voter registration effort, which should take place. Credible voter lists will increase the legitimacy of the electoral process and build long-term electoral capacity.
- *Census:* In general, issues of voter registration, census, national identity cards, and possible redistricting have to be considered in the future as an integrated whole since many of these functions overlap. This will also provide cost savings. Internally displaced persons should also be included in any registration or census process.
- *Institutional Cooperation:* One important lesson learned from the 2005 elections was the need to examine and clarify the relationship and possible cooperation between the work and mandate of the Electoral Commission, the Public Integrity Commission, and the De-Baathification Commission – particularly with respect to vetting candidate lists, registering political parties, and regulating and monitoring campaign activities.
- *Representation:* As the current electoral law is being amended or a new law drafted, legislative drafters should systematically analyze the results of the December elections and the effectiveness of current electoral systems in achieving a representative result, including evaluating the effectiveness of the compensatory/national seats regime used in the December elections.

9.3 Additional Information

For more information, please see PILPG’s Independent Electoral Commission of Iraq legislative drafting guide.

10. The Impact of Islam in the Constitution of Iraq

Iraq's new Constitution attempts to strike a necessary, albeit delicate, balance between the Islamic heritage of the majority of its citizens as well as the national movement toward a pluralistic democracy. Article 2 of Iraq's Constitution indicates that "Islam is the official religion of the State and is a foundation source of legislation" and that "no law may be enacted that contradicts the established provisions of Islam." This same article, however, also provides that no law may be established that contradicts the "principles of democracy" or "rights and basic freedoms stipulated in this Constitution." Article 2 further provides a guarantee to "the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandeans Sabians." Additional rights to freedom of conscience and religion appear in the Constitution as well as a guarantee against discrimination based on "religion, sect, belief, or opinion..." (Arts. 14, 42 & 43). The place of experts in Islamic jurisprudence on the Federal Supreme Court is further provided for by the Constitution as is the right of individuals to commit to their personal status issues in accordance with their own religions, sects, beliefs, or choices (Arts. 41 & 92 respectively).

The combined interpretation of all of these provisions, particularly in light of Article 2, has prompted a number of questions in regards to the kind of balance that must be achieved among the traditions of Islam, the principles of democracy, and fundamental rights and freedoms of the Iraqi people. As previously discussed, the Federal Supreme Court will play an integral role in implementing and interpreting the mandate of Article 2. As such, the legitimacy of this body can be furthered through effective legislation addressing its work method, composition and jurisdiction (as discussed above in Section Nine of this report).

The role of Islam in the new Iraqi state can also be effectively addressed by ensuring the formation of a government that is representative of all components of Iraqi society – secular and non-secular, Islamic and Christian, women and minorities. This extends to the composition of all government ministries and departments, as well as the special committees that will review the Constitution for possible amendments and address the issue of the formation of regions. Additionally, some participants of the roundtable series suggested the adoption of enabling legislation that affirms Iraq's international obligations to human rights and democratic norms – including those affirming equality for women and religious freedoms. Overall, all agreed that the appropriate role of Islam in Iraq's new democracy will best be achieved through the promotion of an inclusive,

national dialogue on the issue and the establishment of transparent mechanisms by which Iraqi citizens can voice their concerns.

10.1 Foundation of Martyrs

Article 104 established a commission named the Foundation of Martyrs, whose capacities shall be regulated by future legislation. This legislation should define the mission and role of the Foundation of the Martyrs, focusing on groups the Foundation is designed to support. Any legislation should also provide for rigorous accounting standards for funds administered by this commission, while ensuring transparency of the Foundation's activities.

11. Negotiation Simulation: Federalism and the Formation of Regions

One of the highest priorities is enacting, within six months, a law that defines the executive procedures to form regions as required by Article 118. Iraqis must also address the structure of the state and division of powers between the federal, regional, governorate, and local governments. Furthermore, the Constitution provides for the establishment of several public commissions that will impact the administration of federalism in Iraq. The character of these commissions must also be defined.

11.1 About The Simulation

PILPG held a negotiation simulation to address these issues and others related to the formation of regions. The included participants played the roles of the major coalitions and parties from the December 2005 elections. Participants interacted through group planning sessions, inter-group meetings, multiparty issue-specific meetings, and a plenary session. These sessions were complemented by informal negotiations and alliance-building that occurred organically throughout the session. The simulation followed the methodology used by the U.S. Department of State's National Foreign Affairs Training Center to train American diplomats prior to negotiations.

Negotiation simulation participants represented the major electoral alliances from the December 2005 elections. The alliances were often strained, however, and their positions were far from monolithic.

The negotiation simulation addressed three primary issues related to the formation

of regions: the mechanisms and structure of the formation of regions and regional and local elections; the distribution of powers and resources between the federal, regional, governorate, and local governments; and the role of the public commissions in representing regional and local interests.

The negotiations were most effective when grounded in discussion of the Constitution's actual provisions. In these cases, the parties developed more creative solutions and compromises when considering the Constitution. Emotions and rhetoric pervaded the more abstract discussions that lacked a constitutional foundation. This lesson from the negotiation supports the need for the dedication of resources to increased capacity building for Iraqi legislators, party leaders, and their staff.

11.2 State Structure

The federal state broadly sketched by the Constitution leaves many structural and procedural issues unresolved. The requirements for processes for creating regions were contentious issues among the parties.

11.3 Creating Regions

Some delegations favored the creation of four regions – one Kurdish, one Sunni, and two Shiite. Others, while acknowledging that new regions may be inevitable, sought to slow their creation and vest decisions on regional autonomy in federal commissions.

One issue that was raised, but not settled, was who would vote in the referenda on the formation of regions authorized in Article 119 of the Constitution, and more importantly, who would manage, supervise, and certify these referenda. The issue was also raised as to whether the vote would only occur at the governorate level or whether a regional or national level referendum would also be necessary. Some delegations were clear that they wanted only local control over the referenda and various delegates indicated some distrust or lack of confidence in the capacity of the Independent Electoral Commission of Iraq to occupy a role with respect to the referenda. Also, some interpreted Article 119 narrowly and said that once a favorable local referendum was achieved, regional status should be granted automatically.

Others interpreted the article more broadly and as merely calling for a referendum that would serve to initiate the regional and national discussion and processes related to forming a new region. These processes may include phased assumptions

of powers as well as a process of certifying that governorates have the capacity to exercise the powers of a region. The boundaries of governorates and regions were also an issue during the negotiation simulation. Would the boundaries of new regions be driven by geography or the ethnic and sectarian composition of the populations? Could the boundary lines of existing governorates be redrawn?

11.4 Resources Allocation

In defining federalism in Iraq, political leaders must continue the division of competencies between federal and regional governments that begins with Articles 110, 114, and 115 of the Constitution. Article 110 lists the exclusive competencies of the federal government, while Article 114 lists the powers shared by the federal and regional authorities. Article 115 states that powers not exclusively granted to the federal government are the domain of the regions and governorates, and that priority should be given to the law of regions and governorates. Control over natural resources and authority over human rights protection and enforcement were the most contentious government powers.

As to the first issue, predictably, the control over oil production and the resulting distribution of revenue was the most significant issue to the participants. Discussions included debate over revenue sharing and control over currently undeveloped oil fields. The delegations also addressed control and access to water sources and electricity.

11.5 Method and Formula for Division of Oil Revenue

The delegations entered the negotiation simulation with established positions on control of the oil industry. Some supported federal control of oil resources, stressing that the Constitution provided that oil was owned by all the people of Iraq in all the regions and governorates. Others pursued regional control of oil and other resources and proposed a percentage distribution formula that was closely tied to population percentages. Related to control of the field is the method and formula for distributing oil revenue; it was suggested that revenue be distributed to the regions and governorates based on population, with some agreed upon percentage going to the federal government such that it could carry out its functions and apply the funds based on need. Some delegations argued that the resources should go where the need is greatest; including compensatory distribution based on past injustice (the latter being phased out over time). Overall, the delegations could not reach agreement on the use of resource revenue to remedy past deprivations as provided for in Article 112. In all of the discussions there was a call for national reconciliation about the human rights violations that

were perpetrated against various sectors of the population.

This prompted another call for a more accurate population census as it related both to referendum voting, the issue of relocated and displaced individuals, as well fair and equitable revenue distribution. The parties generally agreed on the need for a national census. It was suggested that perhaps a national census will be a prerequisite to a final agreement on distribution of resources among the federal government, regions, governorates, and local administrations. The parties could not reach agreement on the details of the census.

11.6 Future Oil Production

Significantly, the parties disagreed over control of non-present oil fields. Some delegations read the Constitution to support regional control over new oil fields, interpreting the ambiguity or silence on this matter as triggering their reserved rights over all that is not stipulated as an exclusive authority of the federal government. They were not persuaded by arguments that Article 112(2) does not expressly provide for control over new oil fields, that Article 121(3) ensures that all regions and governorates must receive an equitable share of the national revenues sufficient to discharge their responsibilities, or that Article 115 actually provides that reserved powers go both to the regions *and* the governorates. However, they did support allocating a given percentage of revenues from those fields to the federal government. Some parties observed that existing fields that require substantial rehabilitation should be considered as new fields for the purposes of governmental control. Others did not support the distinction between present and future oil fields, arguing that the Constitution is silent on future production and therefore Article 111, guaranteeing ownership of oil and gas by all Iraqis, should govern. Still others clearly supported the central control over all oil and gas production.

11.7 Water

The negotiation simulation also addressed control over other resources, such as water and electricity. Some delegations appeared to agree that the federal government should be responsible for control of all water resources – those originating from within and outside of Iraq. This position is in accord with Article 110(8), granting exclusive authority to the federal government for water policy for sources from outside of Iraq. However, it would likely require a constitutional amendment or clarifying legislation with respect to Article 114(7) which provides for shared responsibilities between the regions and federal government over internal water resources.

The discussion of water rights highlighted the importance of small nuances in Constitutional language. This discussion also highlighted the need for delegates to distinguish and strategize with respect to those objectives which could be, and perhaps should be, addressed through constitutional amendments versus the greater number of issues that could probably be dealt with through implementing legislation.

11.8 Public Commissions

The Iraq Constitution creates a number of independent commissions to work alongside the government on a variety of issues. Some of these commissions will directly affect the relations among the federal government, regions, governorates, and local administrations. Two of the commissions in particular – the Public Commission on Regions and Governorates not Organized in Regions (Article 105) and the Public Commission to Audit and Appropriate Federal Revenues (Article 106) – will likely play a large role in policy creation and implementation of federalism in Iraq. As a result, the delegations specifically focused upon them in the simulation. The public commissions are also seen as an alternative means by which alliance goals could be achieved. Some depicted the public commissions as a means of representing minority interests separate from the Council of Representatives.

In the negotiations on public commissions, the major issues to settle included the powers of the commissions and the membership of the commissions. These issues are universal and will affect each of the new public commissions. Representation on the commissions was a contentious issue. Minority groups in particular raised concerns about being excluded from the public commissions, and, therefore, from the decision-making process. The representative composition of the special legislative body that will be established to review and propose amendments to the Constitution was also raised.

The Public Commission on Regions and Governorates not Organized in Regions was seen by the delegations as a potential advocate for their positions. Its role was unclear as to whether the commission would be responsible for the certification of referendum results or the determination of one or more governorates' capacity to exercise the powers of a region. Others held that such commissions would strengthen the federal government. Whether these powers over region creation are vested in the Public Commission on Regions and Governorates not Organized in Regions or another commission remains to be seen.

Additional commissions were also proposed, including a commission to protect the environment. The parties also discussed both a commission under the Ministry of Human Rights and as well as an independent body that would ensure the documentation and preservation of evidence, and investigation of past injustices.

There were a few points of agreement among the delegations on the public commissions. All parties recognized the need for transparency in the operation of the public commissions, particularly those responsible for distribution of revenue. The parties also stated the need for full and effective participation of all ethnic and religious groups, and in general, all components of Iraqi society. Though the exact powers could not be agreed upon, there was consensus on principle that a public commission should have some role in the establishment of new regions.

11.9 Human Rights

Many parties prioritized the need for institutions to protect human rights and investigate past human rights violations. The parties were able to agree on federal responsibility for human rights protection, but not on the powers of the federal government to ensure that regions, governorates and local administrations complied with the human rights and fundamental freedoms articulated in the Constitution. Considerable concern was expressed over the protection the regions would provide for the rights of women and minorities.

Though the need for federal protection of human rights was accepted by the delegations, the role of regional governments in protecting human rights was controversial. Some delegations proposed that new regions should guarantee federal human rights standards. While others supported federal enforcement of human rights protections, and proposed that there be some form of statement or assurance (whether enshrined in the Constitution, enabling legislation or other form) that affirms the federal government's supreme authority to ensure human rights protections throughout the entire region.

11.10 Security

Though not on the agenda, the issue of security pervaded the negotiations. Control over security forces in the nation was one of the most important issues. Alternatively, some delegations sought a system of review of allegations of abuse and a well-integrated federal rather than regional police and military forces.

11.11 Additional Information

For more information, please see the following PILPG legislative drafting guides and memoranda:

- Federal Structure and the Formation of Regions in Iraq Memorandum
- Security Sector Reform in Iraq Memorandum
- Oil and Gas Resources in Iraq Memorandum
- Commission to Protect the Rights of Regions and Governorates Legislative Drafting Guide
- Federation Council Legislative Drafting Guide
- PILPG Negotiation Simulation Report: Formation of Regions

12. Conclusion

The roundtable series hosted by PILPG and its nine co-sponsors had as its objective the identification of some of the next steps that must be taken to implement the Iraqi Constitution. The observations and recommendations made in this report are far from an exhaustive compilation of the priorities and tasks that lay before the new Iraqi Parliament. It is hoped, however, that the report offers, at best some preliminary points for departure and discussion.

Securing peace and stability in Iraq will inevitably take more than the amendment of a Constitution, the adoption of enabling legislation, or even the establishment of various commissions and agencies. Each of these activities will undeniably contribute to the development of new Iraq, but it will be the more profound changes that will take place subtly over time, that will have the greatest impact. In a culture where laws and policies were unilaterally handed down from Baghdad, local governments will now need to adapt to a new paradigm where they adopt and implement some of their own laws, establish their own institutions, and assume greater responsibility for their successes and failures. This takes more than just political will, but also political capacity. Additionally, as Iraq moves forward, with expected resistance, some customs and practices may be tested and forced to evolve, while others will find a synchronicity within the country's emerging pluralistic democracy.

While the continued support of the international community will be essential, in its own time and by the hands of its own people, Iraq will forge a new state. The greatness that once made it the cradle of civilization still exists in the hearts and minds of the Iraqi people. It is there that Iraq will find its balance and its future.

Annex 1
List of Roundtable Series Participants

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About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, is a non-profit organization, which operates as a global pro bono law firm providing free legal assistance to states and governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminals. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

PILPG's four primary practice areas are:

- **Peacebuilding**
- **War Crimes**
- **Post-Conflict Political Development**
- **Public International Law**

To provide pro bono legal advice and policy formulation expertise, PILPG draws on the volunteer services of over sixty former legal advisors and former Foreign Service officers from the US Department of State and other foreign ministries. PILPG also draws on pro bono assistance from major international law firms including Covington & Burling; Curtis, Mallet-Prevost, Colt and Mosle; DLA Piper Rudnick; Shearman & Sterling; Steptoe & Johnson; Sullivan & Cromwell; Vinson & Elkins; Wilmer, Cutler & Pickering; and graduate international affairs and law students at American University and Case Western Reserve Schools of Law. Annually, PILPG is able to provide over \$2 million worth of pro bono international legal services.

Frequently, PILPG sends members in-country to facilitate the provision of legal assistance and its members often serve on the delegations of its clients during peace negotiations. To facilitate this assistance, PILPG is based in Washington, D.C. and has points of contact in New York City, Boston, Seattle, Cleveland, London, Paris, Rome, The Hague, Stockholm, Belfast, Krakow, Budapest, Zurich, Tbilisi, Kabul, and Nairobi.

PILPG was founded in London in 1995 and moved to Washington, D.C. in 1996, where it operated under the auspices of the Carnegie Endowment for International Peace for two years. PILPG currently maintains an association with American University in Washington, D.C., and Case Western Reserve University in Cleveland, Ohio. In July 1999, the United Nations granted official Non-Governmental Organizations status to PILPG.

In January 2005, a half dozen of PILPG's pro bono clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial pro bono legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."