



# KIRKUK

**Prepared by Orrick, Herrington & Sutcliffe LLP for  
the Public International Law & Policy Group**

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## **STATEMENT OF SCOPE**

Over the course of the past two and a half years, the Public International Law & Policy Group (PILPG) has provided assistance with preparing, drafting, and implementing the new Constitution in Iraq.

Related to this work, PILPG occasionally releases policy planning papers on issues of import to Iraq's constitutional process. The purpose of this report is to help inform the discussion regarding the future of Kirkuk, both in the context of the current constitutional amendment process and the wider political debate in Iraq.

This report, drafted for PILPG by attorneys at Orrick, Herrington & Sutcliffe LLP, reviews the factual background underlying the status of Kirkuk and related areas, and provides an analysis of possible ways to resolve certain disputed issues in the context of the Kirkuk Referendum established in the Iraq 2005 Constitution. In addition, it provides a potential approach to the situation of Kirkuk and suggestions for constitutional amendments to implement this approach.

As part of PILPG's ongoing work with Iraqi representatives and policy-makers in the United States on issues relating to Iraq, this report complements a recent deployment to Baghdad of PILPG attorneys to assist with the constitutional amendment process. Deployed at the request of the Iraqi Constitutional Review Committee, the parliamentary committee responsible for drafting amendments to the 2005 Iraqi Constitution, PILPG's team of lawyers provided legal assistance to the Committee and other lawmakers. This assistance included drafting legal memoranda on comparative state practice, as well as drafting and commenting on suggested amendments to the Constitution.

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## INTRODUCTION

This report reviews the factual background underlying the status of the Iraqi city Kirkuk and a related voter referendum (the “Kirkuk Referendum”), which is currently scheduled to take place by the end of 2007 under the 2005 Iraqi Constitution, and it sets forth the major issues disputed in this area. This report then provides an analysis of possible resolutions to these disputed issues. Finally, it provides a new approach to resolve the status of Kirkuk and suggests constitutional amendments to implement this approach.

Part I of this report summarizes the main issues, conclusions and recommendations of this report regarding the Kirkuk Referendum. Part II sets forth (i) a brief background review relating to the area that forms the governorate of Kirkuk (including the city of Kirkuk) and the Kurdistan region of Iraq; (ii) an analysis of the respective provisions of the Iraqi Constitution that establish its federal system, that impact the Kirkuk question, including the Kirkuk Referendum, and that mandate the process of normalization; (iii) the implications of recent normalization-related demographic changes in Kirkuk; and (iv) a discussion of Kirkuk’s potential oil wealth and its implications.

Part III analyzes whether a postponement and/or alternative approaches that have been suggested in lieu of the referendum (with a focus on those called for by the Iraq Study Group<sup>1</sup> and the International Crisis Group<sup>2</sup>) could enhance chances for a peaceful resolution to the conflicting claims on Kirkuk, and also explores the possibility of these approaches in the form of a referendum question. Finally, it suggests a new approach involving constitutional amendments and understanding amongst the various interested parties. Part IV provides recommended language

<sup>1</sup> James A. Baker, III and Lee H. Hamilton, *The Iraq Study Group Report*, Vintage Books, December 2006.

for constitutional amendments to implement the approach recommended by this report. Part V provides concluding reflections on the issues and recommendations covered by this report.

<sup>2</sup> International Crisis Group, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, Middle East Report No. 56, July 18, 2006.

## PART I

### Issues Summary

During the initial negotiations over the governmental structure of the then recently liberated Iraq, the Kurds (who, along with the Sunni and Shiite Arab populations, are one of the three main demographic populations comprising Iraq) won certain major concessions from the drafters of the Transitional Administrative Law (the “TAL”), which were later carried over into the Iraqi Constitution. One such concession was a three-step process with the stated goal to reverse certain injustices carried out under the Saddam Hussein regime against the non-Arab populations of the disputed areas of Northern Iraq.<sup>3</sup>

The process, among other things, offered a final resolution to the status of Kirkuk.<sup>4</sup> The first step in the process was “normalization,” which entailed the reversal of the “Arabization” of Kirkuk that had been implemented in the Kirkuk region through the alteration of ethnic identity and the strategic and purposeful removal of the Kurdish population from the region. Normalization would then be followed by a census and ultimately would culminate in the Kirkuk Referendum, which could lead to the city and governorate of Kirkuk becoming a part of the Kurdistan Region by the end of 2007.

The brief history of 2005 elections in Iraq suggests that, despite the efforts of some to develop a political culture decoupled from identity politics, Iraqis have generally voted in blocks along ethnic and religious lines. Although a census has not yet been conducted, it is assumed by many that normalization, largely under the auspices of local Kurdish authorities, has already resulted in a Kurdish majority in

<sup>3</sup> Coalition Provisional Authority, *Law of Administration for the State of Iraq for the Transitional Period*, Article 58, March 8, 2004.

Kirkuk. So, if the issue of joining the Kurdistan Region is put to those voters as part of the Kirkuk Referendum, it is hard to imagine an election outcome other than the integration of Kirkuk into the Kurdistan Region.

This result is, however, not without potential dangers. Tensions have been on the rise as Kirkuk's various other established ethnic and religious groups that predated the Arabization campaign, such as the substantial Turkoman and Arab populations, have objected to the normalization process and the prospect of becoming minorities not only within the city and region of Kirkuk, but also within a larger Kurdistan Region. Furthermore, the absorption of the oil-rich Kirkuk governorate into the Kurdistan Region is seen by surrounding nations as another step toward an independent Kurdistan—an entity that would have a strong pull on the Kurdish populations of Turkey, Syria and Iran, with potentially destabilizing results. Finally, although Shiite political factions largely conceded the constitutional provisions regarding the Kirkuk normalization process, certain Shiite forces, particularly the political and militant groups associated with Muqtada al-Sadr, have opposed the concept of a loose Iraqi federal structure. These forces support the more recent Kirkuk Shiite residents who stand to lose the most from the continued process of normalization.

Thus, what the Kurds have seemingly gained, albeit largely through peaceful negotiation and skillful political horse-trading, could be lost to internal violence and external military action. It is therefore reasonable to explore whether the Kirkuk Referendum as currently scheduled is inevitable, and, if so, whether (i) its outcome would inexorably take the form of Kirkuk rapidly joining the Kurdistan

<sup>4</sup> This report focuses on the specifically to the normalization process and census as they apply to Kirkuk, and not to other "disputed areas," also referenced in Article 140 of the 2005 Iraqi Constitution.

Region and (ii) whether some more flexible approach can be found that would minimize the immediate risk of greater opposition and violence.

### **Summary Conclusion**

This report addresses certain policy recommendations that have been suggested as ways to minimize the risk of violence associated with the scheduled Kirkuk Referendum. Certain nongovernmental organizations, political experts and commentators have, amongst other things, called for an indefinite postponement of the Kirkuk Referendum, special federal status for Kirkuk as a fully independent federal area with ethnic power sharing that can not be integrated with the Kurdistan Region, and outside adjudication of the ultimate status of Kirkuk.<sup>5</sup> We believe that such measures, which would directly prevent or make unlikely the integration of Kirkuk into the Kurdistan Region, would be rejected by the Kurds. Our opinion was based on, in addition to the statements of Kurdish leaders and our understanding of Kurdish sentiment, an acceptance of the single minded resoluteness with which the Kurds bargained for the constitutional provisions that would directly and indirectly enable their future integration of Kirkuk. We further considered that the only tangible benefit held out to the Kurds under those suggestions was an uncertain chance to avoid threatened violence; a threat that we reasoned they had already calculated and were willing to accept in order to gain Kirkuk. Our analysis of the Iraqi Constitution also lead us to conclude that, without Kurdish acquiesce, such policy recommendations would likely be unconstitutional under the current constitutional framework without further amendment of the 2005 Iraqi Constitution. Finally, any such delay could be bypassed by the Kurds through alternative constitutional mechanisms which they could use to integrate Kirkuk.

<sup>5</sup> Delay of the Kirkuk Referendum is one of the policy recommendations of certain commentators and is one of the suggestions set forth in *The Iraq Study Group Report*.

Recognizing both the dangers of Kirkuk’s potential integration and the Kurds’ perceived constitutional rights and likely demographic majority in Kirkuk, this report sets forth a new approach based on a “grand bargain” requiring concessions from each of the main parties surrounding the disputed status of Kirkuk that would be implemented through constitutional amendments and political agreements.

### **Summary of Recommendations**

Below is a new approach designed to empower the local constituencies of Kirkuk and protect their rights and functional independence while enabling the Kurds to, in a more limited fashion, potentially achieve the integration of Kirkuk into the Kurdistan Region. The key elements of this approach would be as follows:

With respect to the status of Kirkuk, each of the following could be mandated through a constitutional amendment:

- A special constitutionally established status for the city of Kirkuk as a multi-ethnic and religiously diverse administrative area;
- A local legislative governmental structure that is designed to share power among Kirkuk’s ethnic and religious communities;
- A division of powers, assigning certain governmental authorities and powers involving governate or region-wide concerns (such as oil and security issues) to the governate of Kirkuk, or if it joins the Kurdistan Region, to the Kurdistan Region, but reserving other powers (other than exclusively federal powers) for Kirkuk’s local city government;
- Jurisdiction of the Iraq Federal Supreme Court<sup>6</sup> to adjudicate disputes between the Kirkuk governorate and any Region which it joins;

<sup>6</sup> If the Federal Supreme Court is transitioned into a Constitutional Court, then the Constitutional Court would be the appropriate body to handle these disputes.

- The reservation of a certain portion of the proceeds of oil development in Kirkuk for the maintenance of the Kirkuk city government and/or distribution to its population; and
- A short postponement of the Kirkuk Referendum to a date certain as may be necessary.

With respect to the process of normalization of Kirkuk, each of the following could be set forth through constitutional amendment:

- Establish remaining actions to be taken in connection with the completion of the process of normalization;
- Delegation by the federal government of normalization duties to the Kurdish Regional Government, with such delegation subject to federal oversight;
- Specifically ban any coercive actions (other than payments, grants and other incentives under the official normalization program) designed to force Shiite Arabs who were transferred to Kirkuk under the “Arabization” measures of the Baathist regime to leave Kirkuk;
- Prohibit any payments not made under the official normalization process to any person designed to influence such person’s decision to reside in or leave Kirkuk;
- Establish a new date certain for the termination of the normalization process; and
- Upon termination of the normalization process, prohibit any organized effort, whether by public or private entities or organizations, designed to alter the demographic makeup of Kirkuk’s population.

The following political steps could also be undertaken in support of above constitutional amendments to further diffuse the tensions surrounding Kirkuk:

- Strengthen and add constitutional language in the Kurdish Region's constitution that pledges to maintain the integrity of Iraq as an indivisible nation and the Kurdish Region as an integral part of that nation;
- An agreement signed by representatives of the Turkish government, the Iraqi federal government and the Kurdish Region in which each party pledges to unconditionally cease any and all official support (and to actively prevent any non-official support) for any group engaging in violent activities and operating within the other nation's borders; and
- An agreement by the Iraqi federal government and Turkey in which each promises to respect the borders of the other and pledges to resolve all political disagreements through negotiation.

## PART II

### Background

#### 1. The Kurdistan Region.

The origins of the present form of the Kurdistan Region of Iraq can be traced back to events that unfolded in the immediate aftermath of World War I. With the defeat of the Ottoman Empire (whose territory included most of the areas of Turkey, Syria and Iraq that are inhabited by Kurds), the victorious Allied powers sanctioned the notion of an independent Kurdish nation-state in the 1920 Treaty of Sèvres.<sup>7</sup> The treaty was never ratified, however, and a Kurdish state was never established. Since that time, the Kurds of the region have remained a large minority population under the political control of governments associated with some other ethnic/religious group, particularly, Turks in Turkey, Allawite Baathists in Syria, Shiite Persians in Iran and (until recently) Sunni Arabs in Iraq.

After many years of on-again off-again armed conflict between the Kurds and the Iraqi government, a small step toward Kurdish autonomy was made in 1970 with the formal establishment of the “Kurdish Autonomous Region” under an autonomy accord reached between the government of Iraq and certain leaders of the Iraqi Kurdish community.<sup>8</sup> This region remained autonomous in name only, however, and for the next twenty years, during continuing cycles of armed rebellion and suppression, the Kurdish Autonomous Region was little more than a designation for an administrative division of the state of Iraq.<sup>9</sup> Following the Iraqi government’s military campaign against Kurdish militants and civilians in the

<sup>7</sup> *Treaty of Sèvres, 1920*, Section III, Kurdistan, Article 62.

<sup>8</sup> Robert G. Rabil, *The Iraqi Opposition’s Evolution: From Conflict to Unity?*, Middle East Review of International Affairs, Volume 6, No. 4, December 2002.

<sup>9</sup> Robert Olson, *The Kurdish Nationalist Movement in the 1990s*, University Press of Kentucky, 1996.

aftermath of the Gulf War, the passing of United Nations Security Council Resolution 688 (which established the “no-fly” zone under which the Kurdish zone was protected from the Iraqi Air Force) enabled the Kurds to gradually establish *de facto* autonomy. Since then, the Kurdistan Region has enjoyed a large degree of independence in local military, economic, and political affairs.<sup>10</sup> In fact, after some internecine fighting between the two main Kurdish factions, the Kurds had—even prior to the fall of the Hussein government—managed to establish a proto-state with many of the hallmarks of a country, including a regional government divided into executive and legislative branches, a security force, a flag and national anthem, and effective military control of the region’s borders.<sup>11</sup>

The majority population of the Kurdistan Region consists of Kurds, who largely follow a moderate form of Sunni Islam, although there are also significant numbers of ethnically Kurd Yazidis and Christians. Major ethnic minorities in the region include the Turkoman, Assyrians (Chaldeans), Armenians, and Sunni and Shiite Arabs. With some exceptions, during the past few years there have been few reports of strong ethnic/sectarian tension or violence in the Kurdistan Region and Kurd-controlled disputed territories. It has even been reported that certain other Iraqi ethnic and religious minorities have moved to the Kurdistan Region to escape local violence in the troubled areas of central and southern Iraq, and that the Kurdistan Regional Government has provided resettlement money and housing for some Arab Christians.<sup>12</sup>

<sup>10</sup> Kenneth Katzman and Alfred B. Prados, *The Kurds in Post-Saddam Iraq*, CRS Report for Congress, Order Code RS22079, updated May 5, 2005.

<sup>11</sup> See, generally, Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition); Aamer Madhani, *Iraq’s Kurds Press Their Claim on Kirkuk*, Chicago Tribune, November 16, 2006 (online edition); Judith Miller, *Kurdistan: A Conversation with the President of Iraq’s Most Successful Region*, Wall Street Journal, October 28, 2006 (online edition).

<sup>12</sup> Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition).

The Kurdistan Region's relative economic, political and military stability, when coupled with nearly 15 years of *de facto* independence, has helped to foster a strong sense of identity politics among the majority of Kurds. Full independence is clearly the desired outcome for many, even if it is not openly touted by the more pragmatic Kurdish political leadership. For example, an informal referendum held in January 2005 saw a turnout of more than 80%, with over 98% voting to secede from Iraq.<sup>13</sup> Despite popular support for independence, since the fall of the Saddam Hussein regime the two main political parties that share joint political control of the Kurdistan Region, the Kurdish Democratic Party and the Patriotic Union of Kurdistan, have remained publicly committed to a unified Iraq (albeit upon the condition of a high degree of Kurdish autonomy and the incorporation of all or substantially all of the disputed territories), and they have shied away from the question of independence.

The Kurdish leadership's stance may be traced to many factors, but most notably it can be attributed to the expressed opposition (and potential violent reaction) of Iraq's neighbors, particularly Turkey, to any move toward independence.<sup>14</sup> Kurds form a significant minority of the overall population of Turkey and a majority of the population in parts of the western Anatolian peninsula of Turkey. Since the early 1980s, Turkey has engaged militarily with Kurdish separatists, who Turkey has claimed are based in and/or have support from Kurdish areas and communities in Northern Iraq.<sup>15</sup> The Turkish government points to these factors and the cultural force that an independent Kurdistan in Northern Iraq would wield over its own restive Kurdish population to justify its opposition to Kurdish independence (or

<sup>13</sup> *Ibid.*

<sup>14</sup> International Crisis Group, *Iraq: Allaying Turkey's Fears Over Kurdish Ambitions*, Middle East Report No. 35, January 26, 2005.

<sup>15</sup> *Ibid.*

even steps that would make such a move feasible).<sup>16</sup> The Turkish government has backed up its opposition with a recent deployment of 200,000 troops to its border with Iraq and the Kurdistan Region.<sup>17</sup> Iran and Syria also have significant Kurdish populations, and they have at various times supported Kurdish organizations that fought the Iraqi regime, while at other times they have been in conflict with those that might have independence aspirations within their own borders. Thus, Iraq's neighboring countries, if not inclined to outright hostility in response to any move toward an independent Iraqi Kurdistan, may be inclined to view the prospect warily. For the moment, however, each of those governments seems to be reconciled with the *status quo* position of the Kurdistan Region as a semiautonomous region in a larger federal Iraq.

## 2. Kirkuk.

The governorate Kirkuk (or *al-Ta'mim* in Arabic), is situated to the southern and western borders, respectively, of the Erbil and Sulaymaniyah governorates of the Kurdistan Region. The principal metropolis of the governorate is the city of Kirkuk, which lies just south of the border with the Kurdistan Region. The city of Kirkuk has historically been a multi-ethnic and multi-denominational area, with a mixed population that has included, at various times, differing numbers of Turkoman, Kurds, Sunni Arabs, and Assyrians. Although the different ethnic groups promote competing and inconsistent claims regarding the ethnic-historical character and development of the city, it is likely that the two largest ethnic groupings making up the population of Kirkuk city during the final days of the Ottoman Empire were the Kurds and Turkoman. With the discovery of oil in the

<sup>16</sup> International Crisis Group, *Iraq: Allaying Turkey's Fears Over Kurdish Ambitions*, Middle East Report No. 35, January 26, 2005.

<sup>17</sup> Kemal Balci, *EU Suspension Would Impact Iraq*, *The New Anatolian*, November 27, 2006 (online edition); Jeffrey Young, *Kirkuk Caught in Struggle*, *Voice of America*, June 12, 2006 (retrieved from [www.globalsecurity.com](http://www.globalsecurity.com)).

area of Kirkuk city, during the 1920s the region experienced an influx of Assyrians (who claim historical ties to the city as the ancient Assyrian capital of Arrapha).<sup>18</sup>

Since Iraqi independence, Iraqi Sunni regimes have supported a policy of “Arabization” of the Kirkuk area. Measures that were enacted under this policy have included: the redrawing of the borders of Kirkuk, with the intended effect of gerrymandering the ethnic composition of the governorate; pressuring non-Arab residents to register as Arabs; and purported massive instances of systematic removal of Kurds, with the Baathist regime destroying scores of Kurdish villages in the areas surrounding Kirkuk city during the 1970s and 1980s.<sup>19</sup> Some sources claim that since the 1980s over half a million Kurds were deported from Iraq to Iran, although it is uncertain exactly how many of the displaced persons were removed from Kirkuk or from the south and central areas of Iraq.<sup>20</sup>

After the first Gulf War, the regime of Saddam Hussein intensified the Arabization process, which, according to a Human Rights Watch report published in March 2003, resulted in the deportation of an estimated 120,000 Kurds, Turkoman and Assyrians from Kirkuk city and its surrounding towns and villages.<sup>21</sup> Other sources claim that the number of Kurds and Turkoman forcibly removed from the area in the 1980s and 1990s might actually have been 200,000<sup>22</sup> or as high as 250,000.<sup>23</sup>

The main Kurdish governing political parties have publicly stated their desire, and have negotiated during the 2005 process of the formation of the constitutional structure of Iraq with the clear goal, to incorporate Kirkuk into the Kurdistan

<sup>18</sup> International Crisis Group, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, July 18, 2006.

<sup>19</sup> *Ibid.*

<sup>20</sup> Article on Kirkuk at [globalsecurity.org \(/www.globalsecurity.org/military/world/iraq/kirkuk.htm\)](http://www.globalsecurity.org/military/world/iraq/kirkuk.htm).

<sup>21</sup> Human Rights Watch, *Iraq: Forcible Expulsion of Ethnic Minorities*, March 2003 (retrieved from <http://www.hrw.org/reports/2003/iraq0303>).

<sup>22</sup> *Kirkuk: A City at Boiling Point*, Guardian Unlimited (Special Report), October 27, 2006 (online edition).

<sup>23</sup> *Arabization of the Kirkuk Region* (in Arabic), Kurdistan Studies Press, Uppsala, 2001, at 131, cited at the Wikipedia article on Kirkuk ([en.wikipedia.org/wiki/Kirkuk](http://en.wikipedia.org/wiki/Kirkuk)).

Region. While acknowledging the sensitivity of the question of Kirkuk, Kurdish leaders have maintained that the eventual integration of Kirkuk into the Kurdistan Region as a final outcome is a necessary step to rectify the forced removals and other injustices that they suffered.<sup>24</sup> Although they have control over the area due to success in local elections, the Kurds have thus far refrained from moving the full force of their militia, the Pesh Merga, into Kirkuk.<sup>25</sup> However, there is little doubt that they are militarily capable of seizing control of the city by force, although maintaining control, as has been proved throughout the wider area of Iraq, may be a different matter.<sup>26</sup>

### 3. The Constitution and Federalism.

Since the fall of the Saddam Hussein regime, the Kurds have been enthusiastic participants in the political process, actively supporting a unified (but federal) Iraq and the drafting process of the 2005 Iraqi Constitution. This support, however, has been linked to three major conditions: a federal system that would provide the Kurds with a significant degree of autonomy over the Kurdistan Region; a remediation of the forced removal of Kurds from the areas of Northern Iraq, most notably Kirkuk; and a legal process by which those areas could, if they so choose, officially join the Kurdistan Region. The Kurds have until now played their hand deftly throughout the evolution of the constitutional process, succeeding in having their goals incorporated into the constitutional system in such an organic way that challenging them may not be possible without destabilizing the integrity of the current Iraqi federal constitutional system. The stages in which the Kurds have laid the framework for this result have proceeded as follows:

<sup>24</sup> Aamer Madhani, *Iraq's Kurds Press Their Claim on Kirkuk*, Chicago Tribune, November 16, 2006 (online edition).

<sup>25</sup> Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition).

<sup>26</sup> *Ibid.*

A. *The Initial Kurdish Plan.* In 2004, the Kurdistan Regional Government proposed a constitution for the Federal Republic of Iraq.<sup>27</sup> The draft called for an Iraq composed of an Arab region and a Kurdistan Region.<sup>28</sup> The Kurdistan Region, under this proposal, would have had Kirkuk as its capital and a territory roughly twice the size of the previously recognized Kurdish Autonomous Region.<sup>29</sup> The draft constitution also described procedures for the “normalization” (the remediation of the forced removal of Kurds from disputed areas) of Arabized areas.<sup>30</sup>

B. *The TAL and the Iraqi Constitution on Kurdistan and Normalization.* The process of normalization was incorporated into the TAL adopted in 2004, which formed the basic law of Iraq prior to the adoption of the Iraqi Constitution in 2005.<sup>31</sup> The TAL also recognized the Kurdistan Region in its current form (consisting of the governorates of As Sulaymaniyah, Erbil and Dahuk) and called for a just resolution to disputed areas (including Kirkuk) on the basis of the “will of the people.”<sup>32</sup>

In 2005, the new Iraqi Constitution was adopted and ratified.<sup>33</sup> The Iraqi Constitution superseded the TAL in all areas; however, it explicitly incorporated by reference two articles of the TAL that were of crucial importance to the Kurds. The first such article affirmed the TAL recognition of the Kurdistan Region and its borders. The second, under Article 140 of the Constitution,

<sup>27</sup> Public International Law and Policy Group and The Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 New Eng. L. Rev. 53, at 57 (Fall 2004).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Law of Administration for the State of Iraq for the Transitional Period, March 8, 2004, Article 58.

<sup>32</sup> *Ibid.*

<sup>33</sup> There is some confusion as to the actual text of the Iraqi Constitution as there were amendments right up until ratification. The most common English translations are of the near final version but they do not include several provisions. These provisions are not relevant for our purposes except that they modify section numbering.

incorporated Article 58 of the TAL. This article mandated the process of normalization and other steps to resolve the status of the disputed areas:

“(A) The Iraqi Transitional Government, and especially the Iraqi Property Claims Commission and other relevant bodies, shall act expeditiously to take measures to remedy the injustice caused by the previous regime’s practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality. To remedy this injustice, the Iraqi Transitional Government shall take the following steps:

(1) With regard to residents who were deported, expelled, or who emigrated; it shall, in accordance with the statute of the Iraqi Property Claims Commission and other measures within the law, within a reasonable period of time, restore the residents to their homes and property, or, where this is unfeasible, shall provide just compensation.

(2) With regard to the individuals newly introduced to specific regions and territories, it shall act in accordance with Article 10 of the Iraqi Property Claims Commission statute to ensure that such individuals may be resettled, may receive compensation from the state, may receive new land from the state near their residence in the governorate from which they came, or may receive compensation for the cost of moving to such areas.

(3) With regard to persons deprived of employment or other means of support in order to force migration out of their regions and territories, it shall promote new employment opportunities in the regions and territories.

(4) With regard to nationality correction, it shall repeal all relevant decrees and shall permit affected persons the right to determine their own national identity and ethnic affiliation free from coercion and duress.”

Article 140 of the Constitution further provides that the three-step process with respect to the status of the disputed territories (normalization, a census and then a referendum to determine the will of the people) should be completed not later than December 31, 2007.<sup>34</sup>

*C. The Federal Structure of Iraq.* The federal structure established by the Iraqi Constitution set up three distinct layers of government: (i) a centralized federal government that governs state-level issues such as the sharing of oil revenues, national defense and international affairs; (ii) local provincial governments consisting of the 18 existing “governorates”; and (iii) “regions,” which, while composed of two or more governorates, have broader quasi-federal powers than those governorates.

*D. The Formation of Regions.* A region may be legally formed, pursuant to Article 119 of the Iraqi Constitution, after a referendum proposal requesting such formation is adopted by one or more governorates. Such a referendum may be called by either one-third of the members of the governing council of each of the

governorates seeking to form or join a region, or through a petition signed by one-tenth of each governorates' total population. Procedural rules enacted after ratification of the Iraqi Constitution confirm that a governorate may join an existing region.<sup>35</sup> Although no regions have as of yet been formed pursuant to this constitutional mechanism, these provisions are not a required process for the Kurdistan region, as the Iraqi Constitution explicitly affirmed the existing Kurdistan Region.

The Kirkuk Referendum to determine the “will of the people” in the disputed areas bordering the Kurdistan Region (including Kirkuk) is specifically required by the Iraqi Constitution and would allow its citizens to determine whether or not they wish to join the Kurdistan Region. However, even if such a referendum were not required by the Iraqi Constitution, the existing constitutional provisions for the formation of regions, independent of the constitutionally required Kirkuk Referendum, allow the Kurds to call a referendum of their own and proceed independently with the process of attempting to integrate Kirkuk to the Kurdistan Region. Therefore, commentators who have called for halting the constitutionally mandated Kirkuk Referendum must also account for the alternative mechanisms available to the Kurds to otherwise achieve the same outcome.

#### 4. Demographic Changes and Reality.

A. *Normalization, Demographics, and Reality on the Ground.* The Iraqi Constitution (and before it, the TAL) requires the Iraqi federal government to implement the process of normalization and explicitly sanctions the continuing

<sup>34</sup> Note that a Chicago Tribune article states that the Constitution requires the normalization process to be completed by March 29, 2007, and the census – by July 15, 2007. See Aamer Madhani, *Iraq's Kurds Press Their Claim on Kirkuk*, Chicago Tribune, November 16, 2006.

existence of the Property Claims Commission, the institution first created under the TAL to handle the claims and resettlement of peoples dispossessed and/or relocated by the Arabization campaign.

The Kurds, however, claim that on several fronts the constitutional mandates have been, and continue to be, ignored. For example, although the Property Claims Commission has been active since the TAL, current reports claim that thousands of Kurds who say they were displaced from the area remain in legal limbo in refugee camps (including a soccer stadium) around the city of Kirkuk, awaiting the slow adjudication of their claims and official repatriation.<sup>36</sup> The Kurds further claim that with respect to other normalization activities that the federal government is officially required to undertake (such as the redrawing of borders), it has been unwilling (or unable) to do so in any meaningful way. Even with respect to the explicitly constitutionally mandated Kirkuk Referendum, as recently as November 2006, a Kurdish politician publicly accused Prime Minister Maliki of withholding funds necessary for the referendum's preparation.<sup>37</sup>

Citing this failure, Kurdish political interests have, under the putative cover of the TAL and explicit constitutional mandates, taken matters into their own hands by acting independently to proceed with normalization.<sup>38</sup> Some of these independent moves have included facilitating the return and/or transfer of a large number of Kurds into the governorate and city of Kirkuk, and financing the construction of new housing for the returned/new residents.<sup>39</sup>

<sup>35</sup> However, the rules (adopted by overcoming, by a single vote, a protest boycott by Arab Sunni and some Shiite legislators) specify that no new regions can be formed in the 18-month period following October 2006 (the time of the procedural rules adoption). See The Daily Star, *Iraqi Parliament Approves Law to Form Federal Regions*, October 12, 2006.

<sup>36</sup> Amer Madhani, *Iraq's Kurds Press Their Claim on Kirkuk*, Chicago Tribune, November 16, 2006 (online edition).

<sup>37</sup> Ilnur Cevik, *PKK Dominates Ankara Talks with No Real Action*, The New Anatolian, November 17, 2006 (online edition).

<sup>38</sup> Steve Fainaru, *Kurds Reclaiming Prized Territory in Northern Iraq*, October 30, 2005, (retrieved from [www.krg.org](http://www.krg.org)).

<sup>39</sup> *Ibid.*

Kurdish representatives can justify their actions by pointing to constitutional requirements and the righting of past wrongs, but it is impossible to escape the fact that these moves have obvious implications with respect to the future, especially given the looming importance of the role of ethnic demography (and the tendency of Iraqis to vote in ethnic blocks) in the mandated Kirkuk Referendum. While the process is ongoing, and objective and unbiased data remains elusive, most parties assume that Kurdish actions have already resulted in a dramatic shift in the population of Kirkuk from its pre-liberation demographic makeup. Indeed, Arab and Turkoman reports from as early as 2005 have claimed that as many as 350,000 Kurds had already been resettled into the governorate of Kirkuk (and, likewise, claim that this number far exceeds the number of Kurds who were originally driven out of the region).<sup>40</sup>

More recently, a report submitted to top Turkish civilian and military authorities by a Turkish ruling party Member of Parliament estimated the number of Kurds who have moved into the Kirkuk area over the past few years to be as high as 600,000.<sup>41</sup> Circumstantial evidence of the extent of the demographic shift and the proportion of the Kirkuk population consisting of Kurds can also be found in municipal elections in Kirkuk in January 2005, which resulted in Kurdish parties gaining 26 out of the 41 seats on the governing city council.<sup>42</sup> Although it is uncertain to what extent other members of ethnic groups may have chosen not to participate in the elections, amongst those that did vote, the political parties that represented Kurdish tickets captured 59.19% of the vote, suggesting that, as a voting block, the Kurds may already command a majority in Kirkuk.<sup>43</sup>

<sup>40</sup> *Ibid.*

<sup>41</sup> Cihan News Agency, *President Sezger Expresses Concern over Kirkuk Issue*, November 24, 2006 (online edition).

<sup>42</sup> See International Crisis Group, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, July 18, 2006.

<sup>43</sup> *Ibid.*

Therefore, while each of the regional and local players has its own interests in manipulating the data, rendering all numbers suspect at best, it seems clear that the available data and evidence from the various parties consistently points in one direction and to one conclusion: the number of Kurdish residents in the city and governorate of Kirkuk has dramatically increased and the Kirkuk Kurdish population may now have the balance of voting power in the governorate. Based on this conclusion, the Kurds may have successfully managed to alter the facts on the ground in their favor, making the “will of the people” a Kurdish-determined outcome.

*B. Reactions to Normalization.* It is possible to argue that the freedom of movement that accompanied the fall of Saddam Hussein’s regime all but ensured that, even without the constitutional mandates or the efforts of Kurdish political interests, there would have been a natural return of large numbers of displaced persons (chief among them, Kurds) to their former homes in Kirkuk.<sup>44</sup> Nevertheless, whether this demographic change was planned or inevitable (or both), it has not occurred without concern, complaint and even claims of ethnic cleansing. As early as 2003, Human Rights Watch voiced concern over expected reprisal killings, retaliatory displacements and other acts of violence that might follow the return of dispossessed citizens, and declared Kirkuk a “disaster waiting to happen.”<sup>45</sup> For most of the past few years, while the subject of contentious debate and heated complaints, Kirkuk has been spared the extraordinary level of violence that has plagued other areas of Iraq.<sup>46</sup> Recently, however, the calm has been shattered and the city of Kirkuk has seen a marked increase in violence, with,

<sup>44</sup> Kirkuk’s economic opportunities will also naturally attract new residents, and given the impending Kirkuk Referendum and the possibility that Kirkuk will be integrated into the Kurdistan Region, it should be no surprise if a large number of these new residents are Kurdish.

<sup>45</sup> Human Rights Watch, *Kirkuk: Disaster Waiting to Happen*, May 29, 2003, (retrieved from [www.gnn.tv](http://www.gnn.tv)).

<sup>46</sup> Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition).

according to Kurdish police sources, 319 people were killed, 1,383 were wounded, and 69 unidentified bodies were found in Kirkuk in 2006; during the first three weeks of 2007, bombings and attacks killed 23 people and injured 102,<sup>47</sup> and violence has only increased with car bombings and other violence becoming more prevalent (although some claim that this upsurge is a reaction to the impending referendum rather than as a consequence of demographic tensions).<sup>48</sup>

One possible reason for the relative lack of violence in Kirkuk may be that a significant number of Shiite Arab families who were forcibly settled in Kirkuk have chosen to voluntarily leave the area, and while there have been instances of evictions of Shiites, there are also reports of compensation (as demanded by the Iraqi Constitution) for those evicted.<sup>49</sup> Another factor may be that, until now, the Kurds have limited their focus to those Arab families that arrived with the Arabization policy but have tolerated those (largely Sunni) Arab families who predated that policy.<sup>50</sup> This lends some weight to Kurdish claims that they are not seeking to forcibly alter the demographics of the area but are merely seeking to right the past wrongs of Arabization. For their part, in public the Kurds have generally been careful to tout their commitment to the multiethnic character of the city in statements such as those by Kirkuk's governor, Abdul Rahman Mustafa (a Kurd), who, notwithstanding the tensions introduced by the normalization process, has said “. . . Kurds, Turkomans and Arabs still eat in the same restaurants, mix together.”<sup>51</sup>

<sup>47</sup> RadioFreeEurope RadioLiberty, *Iraq: Committee Decision Increases Tensions In Kirkuk*, February 8, 2007 (online edition).

<sup>48</sup> For many, the message behind the attacks is to stop implementation of Article 140 of Iraq's Constitution and to inflame sectarian strife in the province. See Mohhamed Salih, *Kirkuk Fearful of Future*, Inter Press Service, October 2, 2006 (retrieved from [www.antiwar.com](http://www.antiwar.com)).

<sup>49</sup> Guardian Unlimited, *Kirkuk: A City at Boiling Point*, October 27, 2006 (online edition).

<sup>50</sup> International Crisis Group, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, July 18, 2006.

<sup>51</sup> Guardian Unlimited, *Kirkuk: A City at Boiling Point*, October 27, 2006 (online edition).

Although most reports maintain that normalization has been relatively peaceful (compared to the more violent areas of Iraq), at least some parties have made claims that significant violence has occurred. An IRIN report by the UN Office for the Coordination of Humanitarian Affairs in late 2006, promoting a report on Kirkuk by the International Crisis Group, cited unnamed “analysts” who stated that “in the process of the Kurds’ reversal of the Arabization of Kirkuk, thousands of Arabs and Turkoman were killed.”<sup>52</sup> Other than Al-Jazeera news network,<sup>53</sup> it is difficult to find corroborative sources or reports for this statement, and most other reports are, at least contextually, in direct contrast to its claims. It does point out, however, that even in the absence of violence, the level of hostility remains high and each side has its own version of the facts supportive of its cause, rendering an objective analysis of the many competing claims of the parties involved difficult. For example, it is not entirely clear whether the Turkoman, the largest ethnic community in Kirkuk alongside the Kurds, are as adamantly opposed to Kirkuk joining the Kurdistan Region as frequently claimed. The Turkoman were also targeted by the Arabization policy in the past and, therefore, are aware of the potentially precarious position of being a minority under the control of some other ethnic group. Nevertheless, it is clear that, whatever resolution is ultimately determined for Kirkuk, the fact of its geographical position means that the Turkoman will remain an ethnic minority within some larger ethnic/religious group’s federal or regional polity. Although there are clearly Turkoman groups who would oppose the absorption of Kirkuk by the Kurdistan Region,<sup>54</sup> given the increasingly deteriorating situation in Iraq and the relative calm and prosperity of

<sup>52</sup> *Iraq: Ethnic Tensions Mount in Kirkuk*, IRINews.org, November 16, 2006 (retrieved from [www.globalsecurity.org](http://www.globalsecurity.org)). Note that the report contains the following disclaimer: “This material comes to you via IRIN, a UN humanitarian information unit, but may not necessarily reflect the news of the UN or its agencies.”

<sup>53</sup> Ahmed Janabi, *Kirkuk: The Potential Spark for Civil War*, Al-Jazeera, printed at Signs of the Times for September 18, 2006 ([www.signs-of-the-times.org](http://www.signs-of-the-times.org)).

<sup>54</sup> *Ibid.* See statements by Najati Qalaji, secretary-general of the London-based Committee for Defending TurkomanRights, quoted in the Al-Jazeera report cited above.

the Kurdistan Region, there may also be certain groups among the Turkoman population that might welcome the transition in light of the alternatives.<sup>55</sup>

## 5. Kirkuk and the Fight for Oil.

The area surrounding the city of Kirkuk has significant deposits of oil and is an important part of the Iraqi petroleum industry. The Kirkuk oil field, originally brought into production in 1934 under British auspices, is estimated to have over 10 billion barrels or Iraq's remaining 112 billion barrels of proven oil reserves.<sup>56</sup> Oil produced in the area is transported to external refining and shipping areas by means of a pipeline that traverses the Kurdistan Region and Turkey to Ceyhan, a Turkish terminal on the Mediterranean. Oil from the area is not currently transported to the Persian Gulf through central and southern Iraq.<sup>57</sup> Oil production in the area has fallen far short of capacity, however, as the northern oil fields still suffer the lingering effects of the damage incurred during fighting between Kurdish and Iraqi forces in the aftermath of the first Gulf War.<sup>58</sup> In addition, the Ceyhan pipeline has recently been hit with many instances of sabotage and, as a result, has been operational for only a few days per month.<sup>59</sup>

The Kurds have consistently expressed their claims to Kirkuk in terms of ethnic identity and historical presence. Members of the Barzani clan (which heads one of the two main Kurdish political parties) have even sought to elevate Kirkuk to a

<sup>55</sup> See the statement of Irfan Kirkuli, a Turkoman leader in Kirkuk, who says that Turkomans will be better off joining the Kurdistan Region and that the outside powers should stop interfering in the Kirkuk affairs (Mohammed Salih, *Kirkuk Fearful of Future*, Inter Press Service, October 2, 2006 (retrieved from [www.antiwar.com](http://www.antiwar.com))).

<sup>56</sup> Kenneth Katzman and Alfred B. Prados, *The Kurds in Post-Saddam Iraq*, CRS Report for Congress, Order Code RS22079, updated May 5, 2005.

<sup>57</sup> The International Crisis Group Report states, on page 18, that the "current realities dictate that [Kirkuk oil] would have to be refined in Baiji in the Sunni Arab heartland..." However, the authors of this report could not locate any other independent indication that Kirkuk oil cannot be pumped directly to Ceyhan through the pipeline (designed for the transportation of crude) and refined at the terminal.

<sup>58</sup> Anthony H. Cordesman and Arleigh A. Burke, *Options for Iraq: The Almost Good, the Bad, and the Ugly*, Center for Strategic and International Studies, revised working draft October 18, 2006.

<sup>59</sup> AME Info, *Iraq, 1m barrels from Kirkuk*, October 14, 2006 (retrieved from [www.ameinfo.com](http://www.ameinfo.com)).

status of primary importance, popularizing the notion of the city as “our Jerusalem” (although this is dismissed by other Kurdish leaders, including Kurdistan Regional Government minister Falah Bakir, as mere public relations trickery).<sup>60</sup> Both of the dominant Kurdish political parties insist that Kirkuk, upon joining the Kurdistan Region, should become its capital city.

Despite this emphasis on cultural importance, suspicion remains that its oil resources are the core interest underlying Kurdish claims with respect to Kirkuk. In particular, it is thought that the Kurds believe the oil riches of Kirkuk will provide the economic strength necessary to ensure the viability of the Kurdistan Region both as part of Iraq and potentially as an independent entity. In essence, the suspicion is that the Kurd’s pursuit of the process of normalization in Kirkuk is merely a pretext to an oil grab and, eventually, a move toward independence.

There is no denying the Kurds have made plans to develop the oil resources of the Kurdistan Region and the disputed areas. The Kurdistan oil law, the *Petroleum Act of the Kurdistan Region of Iraq*,<sup>61</sup> extends not only to the Kurdistan Region’s oil resources, but also (in Article 51 of the Act) to petroleum operations in the “disputed territories” until such time as their future is decided by referendum. Article 51 calls for the sharing of power over oil development in the disputed area between the Iraq federal government and the Kurdistan Region’s Minister of Natural Resources (a position created under the act to be appointed by the Prime Minister of the Kurdistan Region) until the Kirkuk Referendum.<sup>62</sup> This is in line with the proactive and leading role that the Kurdistan Regional Government has

<sup>60</sup> Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition).

<sup>61</sup> [http://web.krg.org/pdf/Kurdistan\\_Act\\_COM\\_draft\\_22\\_October\\_2006.pdf](http://web.krg.org/pdf/Kurdistan_Act_COM_draft_22_October_2006.pdf).

<sup>62</sup> However, the Minister has the right to “declare invalid” any agreements reached by the Government of Iraq with respect to the Kirkuk oil operations “in the event of a decision of the citizens of the Disputed Territories that those Disputed Territories are to be part of the Kurdistan Region.”

taken with respect to national oil development generally, which included the drafting of the federal Iraqi natural resources law.

There are, however, noteworthy reasons why a quick and contentious integration of Kirkuk into the Kurdistan Region may not, in the short run, yield the additional oil wealth to the Kurds that many people assume. First, they may not need outright formal political control of the area to substantially benefit from the exploitation of its oil resources. As currently situated, the route of the Kirkuk pipelines through the Kurdistan Region opens the possibility that, even if Kirkuk were not to fall under Kurdish control as part of the Kurdistan Region, the Kurds would still be in a strong position to bargain for a share of the wealth produced and/or an active involvement in its development. On the other hand, a contentious absorption of Kirkuk by the Kurdistan Region accompanied by threats of violence might discourage the investment needed to rebuild the currently decrepit oil infrastructure. Furthermore, if actual violence erupts, storage and transmission facilities are very susceptible to sabotage and damage. Thus, from a purely monetary perspective, it is unclear whether the incorporation of Kirkuk into the Kurdistan Region would necessarily be financially beneficial to the Kurds when compared to some other resolution to the question of the disputed areas, if such resolution could be accomplished peacefully and in a way that maximizes oil production.

It also is unclear whether the Kurdistan Region would be economically viable without control of the majority of the oil proceeds. The Kurdistan Region's economy has done well during the last several years, especially in comparison to the rest of Iraq and other areas of the Middle East.<sup>63</sup> However, as demonstrated by the substantial "oil curse" literature, the presence of mineral resources does not

guaranty, and might perhaps hinder, the long-run economic and political development of a country or area that is primarily reliant on such resources.

<sup>63</sup> Michael J. Totten, *The Kurds Go Their Own Way*, Reason Magazine, August/September 2006 (online edition).

## PART III

### Approaches to the Kirkuk Dispute

Given their actions and words, it is safe to assume that a referendum in Kirkuk that offers voters the opportunity to join the Kurdistan Region would be backed by a substantial majority of the Kurdish political and clan leadership, as well as by the general populace. Since voters in post-Hussein Iraqi elections have shown a proven tendency to vote along sectarian and ethnic lines and follow the dictates of political, tribal, and religious leaders, the success of such a referendum proposal hinges on whether the Kurds have achieved the demographic tipping point of a voting majority within the governorate of Kirkuk. The likely demographic reality (which must still be confirmed by the census required under the Constitution) is that the Kurds have achieved just such a majority, and therefore the success of any referendum with respect to Kirkuk that offers the choice of integration with the Kurdistan Region is a *fait accompli*. The Kurdish people and their leadership know this; they recognize that they are very close to a goal, control of Kirkuk, that they have been seeking for generations.

However, there are significant dangers associated with the integration of Kirkuk into the Kurdistan Region and, by extension, a Kirkuk Referendum that would lead to that result.<sup>64</sup> Certain members of ethnic communities within Kirkuk actively (or might reasonably potentially seek to) oppose this result: the Turkoman because they have a competing historical claim to Kirkuk; certain members of the established Sunni Arab minority community for a mixture of possible reasons, including a desire to avoid being subsumed within a Kurdish-controlled political entity; and Shiite Arabs, who were in many instances forcibly relocated to Kirkuk

in connection with Baathist regime policies of Arabization, who may fear that the process of their relocation out of Kirkuk might continue under even less-favorable circumstances than those under which it has proceeded until now. Each of these groups, in turn, has potential protectors both within and outside of Iraq. The potential protectors may, because of shared ethnic and religious identities with such groups (and because of other self interests), instigate violence in the aftermath of an integration of Kirkuk into the Kurdistan Region on behalf of such groups, or may feel compelled to interfere to protect them if such violence otherwise erupts.

Many political leaders and commentators in neighboring Turkey perceive the Kurdish incorporation of Kirkuk (to the extent such an incorporation enhances the viability of an independent Kurdistan) as a potential catalyst for secessionist hopes amongst Turkey's significant Kurdish population.<sup>65</sup> The Turks need only point to the fact that they have been engaged in armed conflict with Kurdish secessionist groups in the western areas of Turkey bordering Iraqi Kurdistan for over 20 years to justify that perception.<sup>66</sup> As a result, they view even the prospect of that incorporation to be a direct provocation that threatens the territorial integrity and national interests of Turkey and have signaled that they may act accordingly to protect their interests.<sup>67</sup> An outcome following the Kirkuk Referendum that would dispossess the Iraqi Turkoman (who have ethnic ties to the Turks) of their historical claim to Kirkuk or other rights, or that might endanger them in the context of other resultant violence, might very well serve as a pretext to Turkish

<sup>64</sup> The Iraq Study Group Report of the Baker-Hamilton Commission called the situation in Kirkuk "very dangerous," noting that its mix of populations amounted to a "powder keg."

<sup>65</sup> International Crisis Group, *Iraq: Allaying Turkey's Fears Over Kurdish Ambitions*, Middle East Report No. 35, January 26, 2005.

<sup>66</sup> Turkey and the Kurdistan Workers' Party (the "PKK") have reached a relatively stable truce that has recently reduced the level of violence, but the PKK is still very much active. *Lonesome rebels, Turkish Kurds in Iraq*, The Economist, December 13, 2006.

<sup>67</sup> International Crisis Group, *Iraq: Allaying Turkey's Fears Over Kurdish Ambitions*, Middle East Report No. 35, January 26, 2005.

actions to further destabilize the situation through political or military means.<sup>68</sup> Although this possibility is remote while U.S. troops remain stationed in Iraq, the probability of a withdrawal of a substantial number of such troops in the near future has become increasingly likely. In turn, any such move by Turkey might necessitate other regional powers (and/or ethnic factions within Iraq) to make similar moves in order to protect their own perceived interests and related ethnic and religious groups, which could range from further material support to their co-religionists/ethnic groups to an actual armed conflict of areas of Iraq. It should be noted that this danger is not necessarily inevitable, and many factors weigh against such moves by Turkey (and by extension, other neighboring countries) including the increased tensions with regional Arab countries that might result; the prospect of inflaming its local Kurdish population, resulting in greater internal instability; the potential for substantial damage to the U.S.-Turkey relationship; and the likelihood that such a move would destroy any chance that Turkey has of joining the European Union.

Kirkuk's Sunni Arab minority has a historical presence within the city that has not apparently been challenged by Kurdish groups, nor have they been involved in the wider Iraqi insurgency in a significant way. However, even if a small minority of the existing Sunni community objects to the incorporation of Kirkuk into Kurdistan, there is a danger that they might receive material support from (or serve as a beachhead for) insurgent elements that may engage in violent actions with the aim of further destabilizing the country and the viability of the largely Shiite and Kurdish-backed federal government.

<sup>68</sup> International Crisis Group, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, Middle East Report No. 56, July 18, 2006.

The Shiite Arab community of Kirkuk primarily consists of residents who were (sometimes forcibly) relocated from other areas of Iraq to Kirkuk in connection with the Baathist Arabization campaigns.<sup>69</sup> Although some Shiites independently chose to leave Kirkuk following the fall of the Saddam Hussein regime, others have been actively relocated (albeit in some instances with compensation) out of the area.<sup>70</sup> With the formal consolidation of Kurdish control over Kirkuk that would accompany the integration of Kirkuk into the Kurdistan Region, those Shiites remaining in Kirkuk may fear that this process might accelerate and proceed in a way that is even less favorable or just than the current relocation efforts.<sup>71</sup>

The constitutionally mandated normalization process, the federal constitutional structure, and the probability that each might pave the way for the integration of Kirkuk into the Kurdistan Region, were implicitly accepted by certain Shiite political factions in their active participation in the political bargaining that yielded those structures and their support for the Constitution. For certain Shiite political parties, especially those with a power base in the oil-rich Shiite majority governorates of Southern Iraq, this was a logical trade-off; the same loose federal structure that empowers the Kurdistan Region today (and may facilitate the Kirkuk integration) would equally enable those Shiite political powers to consolidate their power, and control of oil resources, in Southern Iraq. However, other Shiite factions, particularly the one lead by Muqtada al-Sadr, have expressed opposition to a federal governing structure for Iraq, maintaining that the country should be ruled by a religious government similar to the Iranian theocracy.<sup>72</sup> This opposition,

<sup>69</sup> Quil Lawrence, *Kurdish Green Line, Turkish Red Line*, Middle East Report Online, March 11, 2005.

<sup>70</sup> International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, July 18, 2006.

<sup>71</sup> Integrated Regional Information Networks United Nations, *Ethnic Tensions Mount in Kirkuk*, World Press.org, November 17, 2006.

<sup>72</sup> David Loyn, *Battle Lines Drawn in Iraq Federal Row*, BBC News, September 8, 2006.

combined with the fact that the Shiite population of Kirkuk fits the profile of Sadr's typical support base of poor, urban Shiites (such as in the Sadr City district of Baghdad), makes Sadr and his Imam Al-Mahdi Army militia a potential armed player that may spark or contribute to violence in the wake of (or run up to) the integration of Kirkuk. The probability of this danger may likely depend on the results of the current power struggles within the Shiite community and whether efforts to disarm Sadr's militia and/or form a governing coalition in which he has less power are successful.

### **Analysis of Outside Recommendations**

With these factors in mind, set forth below is an exploration of the recommendations of two prominent groups with respect to international affairs and the conflict in Iraq, the International Crisis Group and the Iraq Study Group, which have respectively called for a postponement of, and a set of alternative dispute resolution measures in lieu of holding, the Kirkuk Referendum. This exploration includes a suggested repackaging of such recommendations in the form a referendum question designed to conform to Iraqi constitutional mandates.

#### **1. Postponement of the Kirkuk Referendum, either through inaction or by amending the Iraqi Constitution.**

One measure that prominent commentators have recommended as necessary in order to avert the immediate dangers associated with a Kirkuk Referendum is to postpone it. This proposal is one of the specific recommendations made in the Iraq Study Group Report authored by the Baker-Hamilton Commission, which stated “. . . a referendum on the future of Kirkuk (as required by the Iraqi Constitution before the end of 2007) would be explosive and *should be delayed* [emphasis

added].”<sup>73</sup> A delay has also been strongly recommended by the International Crisis Group, which in its July 2006 report on Kirkuk (the “ICG Report”) stated that the situation there remains “. . . dangerous and dangerously neglected,” and called for “postponing the constitutionally-mandated referendum on Kirkuk’s status which, in today’s environment, would only exacerbate tensions. . . .”<sup>74</sup> A postponement, it is said, would provide an opportunity for the interested parties to negotiate, or for international or regional powers to arbitrate (or impose), a solution for the disputed territories that, on a longer term basis, would help to diffuse the present dangers.

However, postponement raises certain questions that must be addressed: can a postponement be accomplished within the current parameters of the Iraqi Constitution; if it cannot, what are the prospects that the Iraqi Constitution can be amended to allow for such a postponement; if a constitutional amendment is not feasible, what might be the consequences of simply ignoring the constitutional mandates with respect to the Kirkuk Referendum; and if the Kurdish leadership does not agree to a postponement or amendment, but such a postponement nevertheless occurs as a result of inaction on the part of Iraq’s federal authorities, to what extent does the Kurdish leadership have the legal ability to bypass that postponement?

As detailed in Part II of this report, the Iraqi Constitution explicitly adopted Article 58 of the TAL, which sets forth the basic parameters of the normalization process in the disputed areas, including Kirkuk. Under Article 58(C), the normalization process is to be followed by a permanent resolution of the status of the disputed areas, and such resolution is required to be “consistent with the principle of justice,

<sup>73</sup>See James A. Baker, III, and Lee H. Hamilton, Co-Chairs, *The Iraq Study Group Report*, Vintage Book, 2006, Recommendation 30, page 45.

<sup>74</sup> See International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, page i, July 18, 2006.

taking into account the will of the people of those territories.” In addition to the incorporation of Article 58 of the TAL in its entirety, the Iraqi Constitution expands and clarifies its requirements with respect to the final resolution of the disputed territories in Article 140:

“The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority in accordance with this constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007.”

Thus, the executive branch of the Iraqi government is assigned the task of completing the constitutionally mandated process of normalization prior to December 31, 2007, and this process must culminate in a referendum to determine the will of the people in the disputed areas (including Kirkuk) with respect to their status. While one could complain that the language is short on specific details and perhaps lacks clarity in some respects, on its face it does not appear to empower the executive (or any other power) to delay or fail to perform its duties with respect to the completion of the normalization process and the Kirkuk Referendum. As a result, a postponement would effectively mean that either the executive branch has been unconstitutionally (and therefore illegally) prevented from implementing its duties or, if it agrees to a postponement through inaction or delay with respect to the Kirkuk Referendum, it might itself be guilty of a form of nonfeasance with respect to its constitutional duties.

The practical implications of such unconstitutional inaction under the Iraqi Constitution, however, are unclear. The Iraqi Constitution assigns to the Iraq Federal Supreme Court jurisdiction over the interpretation of constitutional provisions, the settlement of disputes between the federal government and the governorates and regions (to the extent the Kurds control the government of Kirkuk they might, through that government, have standing to directly challenge federal inaction as an interested party in the constitutional provision), and stipulates that the “decisions of the Federal Supreme Court are final and binding on all authorities.”<sup>75</sup> However, without an established body of interpretive constitutional law; a fleshed out set of federal laws, regulations, and codes with respect to the provisions of the Iraqi Constitution; or a tradition of judicial independence, it is unclear what “constitutional” measures might be taken to force the executive authority to proceed with a Kirkuk Referendum if it chooses not to. It should be noted, however, that ignoring constitutional mandates would not strengthen respect for, or confidence in, the Iraqi Constitution, and may indeed set a precedent for other parties and authorities of government to ignore its mandates when doing so is in their interests or merely expedient.

To the extent that ignoring constitutional mandates is undesirable, one ameliorative step would be to amend the Iraqi Constitution to explicitly allow for a postponement (or even to incorporate a different approach to the resolution of the disputed areas other than a referendum). The process of amending the Iraqi Constitution is not easy, and with the passage of time will only become more difficult. Article 142 of Section Six, Chapter Two, “Transitional Provisions,” of the Iraqi Constitution provides for a onetime temporary and abbreviated process for amending the Iraqi Constitution as an exception to its normal amending

<sup>75</sup> Iraqi Constitution, Section Three, Chapter Three, Article 94.

provisions. The normal constitutional amending provisions provide a higher bar than the temporary ones,<sup>76</sup> so it will be sufficient as a significant hurdle to determine whether an amendment to postpone the referendum under the temporary provisions is feasible. Under Article 142, the temporary amending provisions provide that the first sitting of the Council of Representatives is required to form a committee that, in a period not to exceed four months, must propose amendments to the Iraqi Constitution. Such amendments must be approved by both a majority of the members of the Council of Representatives and, within two months following such approval, by a majority of voters in a nationwide referendum. However, the Article goes on to stipulate that the amendments will fail if they are “...rejected by two-thirds of those who vote *in three governorates* or more [emphasis added].” It is no coincidence that the Kurdistan Region is currently composed of exactly three governorates. Therefore, even under the temporary abbreviated procedures for approving constitutional amendments, proponents of a delay would need to (a) convince the Constitutional Review Committee, the entity tasked with drafting the constitutional amendments within the four-month period, to propose the amendment, (b) obtain the approval of the Council of Representatives, and (c) pass a nationwide referendum. Assuming that such a proposal could pass each of these steps, even if supported by the majority of the Iraqi leadership and people, if the Kurdish leadership can marshal two-thirds of the voters within the Kurdistan Region to vote against such an amendment, it would be rejected. As noted above, the normal amendment provisions of the Iraqi

<sup>76</sup> Iraqi Constitution, Section Six, Chapter One, Article 126 requires the approval of the President of Iraq, which is the Kurdish leader Jalal Talabani.

Constitution provide an even higher bar of approval and even greater opportunities for an effective Kurdish veto.<sup>77</sup>

If postponement would be unconstitutional and a constitutional amendment unobtainable without the acquiescence of the Kurds and their leadership, do the dangers inherent in proceeding with the Kirkuk Referendum nevertheless still warrant executive inaction? Perhaps. However, even if it is assumed that this is the case, the Iraqi Constitution provides alternative means for the Kurds to pursue the integration of Kirkuk into the Kurdistan Region other than the mandated referendum pursuant to Article 140. Article 119 of the Iraqi Constitution provides the process by which a referendum to form a region may be proposed:

“One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods: First: A request by one-third of the council members of each governorate intending to form a region. Second: A request by one-tenth of the voters in each of the governorates intending to form a region.”

The Iraqi Constitution further provides that, unless otherwise stipulated, each referendum required by the Iraqi Constitution is valid with the approval of a simple majority of the votes cast.<sup>78</sup> Therefore, with a vote of one-third of the council members of the Kirkuk governorate and each of the three governorates forming the Kurdistan Region, and with the approval of a majority of the voters in each of those governorates, the Kurds have a clear constitutional mechanism to nevertheless push the process of the integration of Kirkuk forward, even if the

<sup>77</sup> Iraqi Constitution, Section Six, Chapter One, Article 126 requires that any amendment that decreases the power of a region must be approved by the populace of that region.

<sup>78</sup> Iraqi Constitution, Section Six, Chapter One, Article 131.

constitutionally mandated Kirkuk Referendum does not take place. Indeed, the Council of Representatives has apparently (as specifically required by the Iraqi Constitution) passed a law that sets forth the formal procedures for the formation of regions.<sup>79</sup> That law confirms that a governorate (such as Kirkuk) may join an existing region (as noted earlier there is only one currently existing region, the Kurdistan Region).<sup>80</sup> However, because the law also stipulates that no new regions can be formed within the 18-month period following the date of the law's date of adoption (October 2006),<sup>81</sup> the Kurds would have to wait until April of 2008 to form such a region, which represents a delay of four months from the constitutionally mandated December 31, 2007, date for the Kirkuk Referendum.

Therefore, assuming that the Kurds have achieved a voting majority within Kirkuk (and that they can marshal two-thirds of the voters within the Kurdistan Region to defeat any postponing amendment), while the executive branch might attempt to postpone the Kirkuk Referendum by choosing to ignore its constitutional mandate, without at least the passive consent of the Kurds, any such attempted postponement would only serve to delay the question of the integration of Kirkuk by a mere matter of months at the cost of possibly eroding the integrity of the mandates of the Iraqi Constitution.

What is the likelihood that the Kurds can be persuaded to consent (or at least acquiesce) to either a unilateral amendment with respect to these proposals on the Kirkuk Referendum or merely to look the other way with respect to executive inaction in implementing the referendum? This is a question that only the Kurdish

<sup>79</sup> See The Daily Star, *Iraqi Parliament Approves Law to Form Federal Regions*, October 12, 2006.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

leadership (and people) can answer definitively.<sup>82</sup> However, the circumstantial evidence is telling. The structures, provisions, and requirements with respect to normalization, a census, the Kirkuk Referendum, Iraqi federalism, the approbation of the Kurdistan Region by the Iraqi Constitution, and the high bar set with respect to amending the Iraqi Constitution (placed just high enough to provide the Kurds with veto power in most instances with respect to regional matters and Kirkuk) all have two common aspects. They were bargained for vigorously by the Kurds (in fact, it can even be said that they were the price the Kurds exacted for their participation in and support for a unified Iraq); and they all are designed to, among other things, either pave the way for or block any obstacles to the integration of Kirkuk into the Kurdistan Region. Presumably, the Kurds bargained for these provisions because they perceived them to be in their best interests. It can be argued that, given the deteriorating situation in Iraq, the Kurds may recognize that any move forward with respect to Kirkuk might inflame the situation and that a Kirkuk Referendum is, at least in the near term, no longer in their interests. On the other hand, in the face of a deteriorating situation, it is also possible that the Kurds may reason that the increasingly dangerous situation is precisely why they must move with greater urgency and consolidate their gains while such consolidation is still possible within a unified Iraq and under the legal mandate of an Iraqi Constitution. The *sine qua non* remains: unless the Kurdish leadership can be convinced that the price of acting on what they have bargained for would be greater than the benefits that they hope to receive, it is unrealistic to assume that they would agree to relinquish those bargained-for benefits by acquiescing to any

<sup>82</sup> It should be noted that a postponement has not been ruled out by all Kurds. For example, Alaa Talabani, a Kurdistan Region councilwoman and a niece of Iraqi President Jalal Talabani, has said that “[i]t is too soon to deal with Kirkuk. Maybe in a year or two, we can let [sic] people of Kirkuk decide their fate.” (Aamer Madhani, *Iraq’s Kurds Press Their Claim on Kirkuk*, Chicago Tribune, November 16, 2006 (online edition)). However, for the reasons outlined above, this view is likely a minority one amongst the Kurdish leadership and the Kurdish people.

substantial postponement proposal or foregoing acting with respect to the integration of Kirkuk.

2. Allowing the referendum to go forward, but putting forward a proposal that incorporates proposals that delay or prevent the incorporation of Kirkuk into the Kurdistan Region.

The ICG Report and the Iraq Study Group Report each added to their call for a postponement of the Kirkuk Referendum suggestions for actions to be taken after the referendum is so delayed. The Iraq Study Group Report recommended that once the constitutionally mandated Kirkuk Referendum is put on hold the “. . . issue [of Kirkuk] should be placed on the agenda of the International Iraq Support Group [a group that would include all countries that border Iraq as well as other key countries in the region and the world<sup>83</sup>] as part of the New Diplomatic Offensive.”<sup>84</sup> The ICG Report likewise, in addition to its recommendation for a referendum postponement, suggests that a special envoy be appointed by the UN Security Council charged with “. . . facilitating a negotiated solution to the status of Kirkuk as well as other Kurdish-claimed areas.”<sup>85</sup> The ICG Report further stipulates that during this period of negotiation: (a) the process of normalization should continue; (b) the various Kirkuk communities should agree to equitable power-sharing arrangements; and (c) the Council of Representatives should (presumably pursuant to its authority under the temporary abbreviated constitutional amendment provisions) (i) set aside the Kirkuk Referendum and (ii) draft a charter for Kirkuk that would confer upon it interim status as a special

<sup>83</sup> *Ibid*, page 34.

<sup>84</sup> See James A. Baker, III, and Lee H. Hamilton, Co-Chairs, *The Iraq Study Group Report*, Vintage Books, 2006, Recommendation 30, page 45.

<sup>85</sup> See International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, page ii (July 18, 2006).

“stand-alone” governorate, outside of the direct jurisdiction of the Kurdistan Region or the Iraqi federal government.<sup>86</sup>

Although the authors of the Iraq Study Group Report were apparently aware of the constitutionally mandated nature of the Kirkuk Referendum (since they refer to it as “constitutionally required”), in making their recommendations they make no comment as to how to deal with the potential constitutional (or rather unconstitutional) implications of their recommendations. As discussed above, a postponement of the Kirkuk Referendum not sanctioned through a constitutional amendment would likely violate the Constitution.<sup>87</sup> The authors of the ICG Report presumptively deal with this issue by recommending that the Council of Representatives set aside the Kirkuk Referendum.<sup>88</sup> As earlier noted, while this suggestion (which amounts to postponement) would clearly require an amendment to the Constitution, the drafting of such an amendment is within the temporary special constitutional powers of the Council of Representatives. Nevertheless, as also noted above, even this special process of amendment is subject to approval conditions that enable the Kurds to block any amendment put forward if they are sufficiently motivated to do so.

It should also be noted that, without a constitutional amendment or approval by referendum, delegating the resolution of the “Kirkuk issue” (under the ICG Report to a special UN envoy; under the Iraq Study Group Report to the International Iraq

<sup>86</sup> The Iraqi Constitution does potentially provide a means to accomplish (at least part of) the ICG Report recommendation with regard to designating Kirkuk a “stand-alone” entity. Article 119 of the Iraqi Constitution provides that “Powers exercised by the federal government can be delegated to the governorates . . . with the consent of both governments and shall be regulated by law.”

<sup>87</sup> It should also be noted that these reports have not been well received by the Kurdish leadership. Masrour Barzani, director of Intelligence and Security Agency for the Kurdistan Regional Government, said in an op-ed article to the Washington Post, “Our federal constitution, which the majority of the Iraqi people voted for, is treated flippantly, as though it were a negotiable document rather than the hard-fought result of lengthy negotiation among those willing to participate in the new Iraq.” Washington Post, *For Iraqis, A Promise Is in Peril: Baker-Hamilton Would Sell Out Democracy*, December 20, 2006.

Support Group) may in and of itself be unconstitutional since the language of the Iraqi Constitution from which the requirement of the Kirkuk Referendum emerges requires the status of the disputed territories to be resolved on the basis of the will of the people of those territories.<sup>89</sup> However, while a referendum to determine the will of the people in the disputed territories is constitutionally mandated, the Iraqi Constitution does not specify the form or nature of the proposals to be voted on by the people of those territories. It may be possible to craft from the recommendations of the Iraq Study Group Report and the ICG Report a referendum proposal (or proposals) that conforms to both the general substance of those recommendations and the mandates of the Iraqi Constitution.

Such a referendum proposal might be drafted as follows:

“Whereas Article 140 of the Constitution requires that the status of Kirkuk be determined in accordance with the principles of justice and the will of the people of Kirkuk, I, a legal resident of the governorate of Kirkuk, hereby cast the following vote [pick one of the following (A), (B) or (C)]:<sup>90</sup>

(A) The people of Kirkuk<sup>91</sup> request that the governorate of Kirkuk, as of [a date certain], shall join the Kurdistan Region; or

(B) The people of Kirkuk call for a delay in the final determination of the status of Kirkuk and for the implementation of the following measures on an expedited basis:

<sup>88</sup> See International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, page ii, July 18, 2006.

<sup>89</sup> If such delegation is approved by referendum, as required by the Iraqi Constitution, then it would likely be constitutional as it would reflect the “will” of the people as required.

<sup>90</sup> One possible issue that might emerge from such a referendum question is how to resolve a vote that gives no single proposal a clear majority, as required by the Iraqi Constitution.

<sup>91</sup> For the sake of simplicity, the language has been limited to Kirkuk rather than each of the individual disputed areas.

i. for the Council of Representatives to enact legislation that authorizes and directs the executive authority, in conjunction with local authorities, to continue the process of normalization after December 31, 2007, *provided* that adequate measures and funding are provided to ensure just compensation and adequate time is afforded to those persons relocated from the Kirkuk area under such process;

ii. the Iraqi federal government shall request the appointment by the UN Security Council of a special envoy charged with facilitating a negotiated solution to the final status of Kirkuk and equitable power-sharing arrangements among the communities thereof;<sup>92</sup> and

iii. until such time as the negotiations stipulated in item (ii) above are concluded, the people of Kirkuk hereby express their desire to remain a governorate that shall, on the basis of provisions agreed to under the negotiated process, determine its own affairs in compliance with the Constitution (the “Temporary Kirkuk Governing Commission”). To that end, the people of Kirkuk, in compliance with Article 123 of the Constitution, consent to and formally request that the federal executive and legislative authorities delegate their respective authorities with respect to all substantial matters and affairs relating to the internal governance of Kirkuk to the Temporary Kirkuk Governing Commission;  
or

<sup>92</sup> Alternatively, item (ii) could, following the Iraq Study Group Report, request a similar provision and delegation of negotiation powers with respect to the International Iraq Support Group.

(C) The people of Kirkuk hereby request to remain a governorate, as currently constituted, with no change of status and independent of any region until such time as the people of Kirkuk shall otherwise decide.

The referendum question as so crafted should both obviate the need for any constitutional amendments in connection with postponement and, in each of its suggestions, stay within the parameters set forth in the Constitution. At the same time, it potentially allows the substance of the major suggestions of the Iraq Study Group Report and the ICG Report to be implemented (other than the notion that a referendum in and of itself be postponed), if approved by a majority of the people of Kirkuk.

However, crafting a means of constitutionally putting these suggestions before the people of Kirkuk by no means ensures that they will be adopted by a majority of its citizens; the fundamental question of the support (or potential lack thereof) of the Kurdish leadership and people remains. As earlier noted, the reality on the ground is that the process of normalization over the preceding few years may have already ensured a Kurdish voting majority within the governorate of Kirkuk. If this is the case, and if the Kurdish leadership and/or people object to the ICG Report/Iraq Study Group Report recommendations as reformulated in proposal (B) above, then they can simply vote for proposal (A) and none of the dangers that the proposals of the ICG Report or the Iraq Study Group Report are meant to ameliorate would be averted. If proposal (A) were left off of the ballot, then presumably the Kurds could still vote down proposal (B) (under the reasonable assumption that a vote implies the existence of a “no” alternative) and then proceed with the independent constitutional process available to them in order to effectuate the integration of Kirkuk into the Kurdistan Region.

## **Suggested Recommendations**

The conclusions above put in doubt the constitutionality of implementing the calls of the International Crisis Group and the Iraq Study Group for postponement of the Kirkuk Referendum and the related recommendation to delegate (without a referendum) the determination of the status of the disputed territories to parties other than the people of those territories. Although either a constitutional amendment or a repackaging of the recommendations in the form of a referendum proposal would likely pass constitutional muster, there is strong circumstantial evidence that in their current form those recommendations could and would be blocked by the Kurds.

The dangers that prompted those recommendations, however, are not easily dismissed and potentially grow larger each day they remain unaddressed. It therefore remains of critical importance to determine which of the recommendations may be adjusted and supplemented in such a way as to be acceptable to the Kurds, while maintaining their effectiveness as preventatives by addressing the concerns of other groups with interests affected by Kirkuk. If the Kurdish leadership accepts these recommendations, then the impasse with respect to Kirkuk could be solved through their acquiescence or support of constitutional amendments that incorporate those principles in a way that is also acceptable to the other interested parties to the dispute.

The recommendations of the Iraq Study Group and the International Crisis Group have a common characteristic: they call for the Kurds effectively to forego the primary concessions they won during the constitutional bargaining process, while failing to offer any offsetting reciprocal benefits other than the notion that this outcome is the only way to avoid war. Put another way, from a Kurd perspective

the recommendations are “all stick and no carrot.” It is improbable that the Kurds have consistently pushed for constitutional provisions that are designed to result in their control of Kirkuk without contemplating the real and probable dangers involved. These are also dangers of the sort that the Kurds have faced during generations of violent struggle for their independence. It is therefore unlikely that simply pointing out those same dangers, no matter how probable, without offering anything else would induce them to agree to yield what they now have a constitutional right to potentially achieve. The solution, therefore, must involve the formulation of a set of recommendations that would both adopt those measures in the ICG Report and Iraq Study Group Report that are essentially designed to diffuse the threat of violence by protecting the rights and interest of Kirkuk’s different ethnic and religious groups, while preserving for the Kurds the main constitutional concessions they have won.

With these goals in mind, this report provides a list of general recommendations and principles for a solution to the disputed status of Kirkuk, including specific constitutional amendment language implementing certain parts of these recommendations. This new approach represents a “grand bargain” that is designed to be acceptable to each interested party. We are suggesting the following measures: (i) to constitutionally protect the special nature of Kirkuk as a multi-denominational city, (ii) to stabilize Kirkuk’s demography, (iii) to constitutionally protect ethnic and denominationally based local power sharing, (iv) to constitutionally mandate a division of powers between the local government and the Kurdistan Region after integration, and (v) to diffuse tensions with outside powers through understandings and agreements.

## 1. Special Status for Kirkuk; Power Sharing and Guaranteed Representation Amongst the Different Groups of Kirkuk.

It has been recommended that a significant step necessary to diffuse tensions amongst the different groups within Kirkuk would be to apportion the various executive government ministries and posts on an equitable basis, and that there be guaranteed minimum representation for each of the various ethnic groups in the Kirkuk legislature.<sup>93</sup> It has also been recommended that Kirkuk be granted special status as an entity that would be independent of any region.<sup>94</sup> We concluded above that the Kurds would reject such recommendations if they precluded the integration of Kirkuk. However, we believe that the core features of these recommendations can be implemented and constitutionally protected in such a way that does not preclude integration. We have provided in Part IV of this report draft language for constitutional amendments that would implement these recommendations in such a way.

These amendments would designate the city of Kirkuk as a special administrative area, a status it would retain even upon incorporation into the Kurdistan Region. The electoral process for the legislative council of this administrative area would be mandated by such amendments and designed in such a way as to result in an apportionment of power between the diverse communities of Kirkuk. By setting forth these arrangements in the Iraqi Constitution, as amended, this status and power sharing would be constitutionally protected even after the integration of the governate of Kirkuk into a region.

<sup>93</sup> See James A. Baker, III, and Lee H. Hamilton, Co-Chairs, *The Iraq Study Group Report*, Vintage Book, 2006, Recommendation 30, page 45. *And see also* International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, page ii, July 18, 2006.

<sup>94</sup> See International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The Brewing Battle Over Kirkuk*, page ii, July 18, 2006.

## 2. A Division of Powers Between the Kirkuk Administrative Area and the Kurdistan Region Upon Integration.

One recommendation offered by commentators has been that Kirkuk be granted (either on an intermediate or permanent basis) special status as a “stand-alone” governorate outside the control of both the Kurdistan Region and the federal government.<sup>95</sup> This recommendation implies that if Kirkuk falls under the direct jurisdiction of either the federal government or the Kurdistan Region, one ethnic group will inevitably be unfairly favored and the balance of interests within Kirkuk would be dangerously altered. It further assumes that the only way effectively to preserve that balance, therefore, is through a scheme of self-governance. The implication of this recommendation is that self-governance is incompatible with the integration of Kirkuk into the Kurdistan Region.

A government’s jurisdiction, however, may be seen as a set of distinct powers that occupy different spheres of competence over various political, economic, and military factors affecting a people and an area; those powers may be separated and apportioned in varying degrees of mutual exclusivity amongst differing layers of government. This notion is the primary idea upon which a system of federalism is predicated and, indeed, underlies Iraqi federalism. It is unlikely that the Kurdistan Regional Government desires to micromanage the details of daily governance of the city of Kirkuk but rather would be satisfied to control issues of larger regional importance, such as regional police powers, control of regional borders and commerce between Kirkuk and other governorates and regions, and the exploitation of natural resources. It may therefore be possible to design a constitutionally mandated separation of powers between the Kurdistan Regional

Government and the local city government of Kirkuk, similar in concept to a federal/regional separation of powers, that allows the integration of Kirkuk into the Kurdistan Region but retains at the local Kirkuk city government level all powers that are not specifically assigned to the Kurdistan Region. We have provided in Part IV of this report draft language for constitutional amendments that would implement these recommendations.

### 3. Economic Measures to Protect the Independence of Kirkuk's Local Government.

The Iraqi Constitution should require the Kurdistan Region, after integration of Kirkuk into the Kurdistan Region, to earmark a certain portion of the proceeds (that are not required to be apportioned to the federal government pursuant to the Iraqi Constitution) from the exploitation of oil resources to local Kirkuk development, the funding of the local government and its institutions and even, perhaps, for a fund that periodically distributes proceeds to the legal residents of Kirkuk. This would hopefully create a strong economic incentive on the part of the various groups of Kirkuk to cooperate in order to maximize the exploitation of oil resources, and would create an area of shared common interest across the various groups. We have provided in Part IV of this report draft language for constitutional amendments that would implement this recommendation.

### 4. Maintenance of the Ethnic Balance Within Kirkuk and the Completion of the Normalization Process.

Enforced migration and displacement and re-registration of ethnic identities in different areas of Iraq, including Kirkuk, have historically been used as a tool to

<sup>95</sup> See James A. Baker, III, and Lee H. Hamilton, Co-Chairs, *The Iraq Study Group Report*, Vintage Book, 2006, Recommendation 30, page 45. *And see also* International Crisis Group, Middle East Report No 56, *Iraq and the Kurds: The*

punish or enforce the compliance of some ethnic groups within Iraq, while bolstering the power of other favored groups. This history is, undoubtedly, not lost on the many ethnic minorities of Iraq, including the various ethnic and religious groups of Kirkuk. With this history in mind, however sincere the verbal assurances that the Kurdish leadership may offer to such groups of their commitment to protecting the multi-ethnic nature of Kirkuk, it would require a leap of faith on the part of those groups to accept such assurances alone without other protections.

One possible way to ensure such protection, in combination with the apportionment of local political power discussed above, would be to stabilize the ethnic balance of Kirkuk. In order to accomplish such a stabilization, the process of normalization must first be completed by a pre-determined date. The Iraqi Constitution currently sets this date as December 31, 2007. It has been noted earlier in this report, however, that the federal government of Iraq has not acted effectively in resolving the claims of displaced persons and that the Kurds have consequently been implementing the process on their own. It may thus be advisable that the Kurds formulate a formal institution to complete this process, and that the federal government delegate its powers with respect to its completion, under federal oversight, to such institution (this would both acknowledge reality and remain within the requirements of the Iraqi Constitution). That institution could set a date certain prior to the referendum deadline for the final filing of all claims by persons previously dispossessed from Kirkuk. These actions could be followed by the constitutionally required census, taking into account the claims filed by displaced persons that have not yet been adjudicated in a just manner. Once the census establishes the ethnic makeup of Kirkuk, legal measures and

restrictions consistent with the federal Iraqi Constitution could be adopted both on a local governorate level and on a regional level to protect against organized efforts to influence the ethnic balance of Kirkuk. Organic migration would continue to occur as the result of free movement by citizens, but it would not be supported by outside forces.

It would be advisable to offer fair and just compensation to any Shiite resident family transferred to Kirkuk in connection with the Arabization program, with families offered such compensation given adequate time to relocate. The parties involved could, within this process, consider whether a certain number of Shiite families might be offered what amounts to an “amnesty” and allowed to stay.

We have provided in Part IV of this report draft language for constitutional amendments that would implement these recommendations.

##### 5. Region Level Measures to Protect the Interests of the Non-Kurdish Minorities of Kirkuk.

As a parallel recommendation to the constitutional guarantee of local Kirkuk political representation on the basis of ethnic apportionment, a number of seats in the main legislative council of the Kurdistan Region could be permanently apportioned to council members from the city of Kirkuk. This representation would potentially provide the ethnic groups of Kirkuk with a means to effect the wider regional decisions that might impact their interests. The group of representatives could be elected on the basis of areas of ethnic concentration within Kirkuk in a way that is reasonably calculated to result in a group of persons representative of Kirkuk’s diverse ethnic groupings, or could be appointed by Kirkuk’s legislative council (which would already have apportioned ethnic representation). This measure would likely require amendments to the constitution

of the Kurdistan Region. In addition to this measure, the constitution of the Kurdistan Region could be amended to strengthen the rights of minority ethnic and religious groups within the Kurdistan Region (consistent with the protections required under the Iraqi Constitution) and require the creation of jurisprudential and executive mechanisms for the enforcement of such rights.

#### 6. Additional Political and Constitutional Measures and Agreements to Diffuse Regional Tensions.

Each of the above measures should help diffuse both the concerns of the various ethnic groups of Kirkuk and the danger that other groups in Iraq would engage in violence to protect the interests of their affiliated communities. Concerns have been voiced, however, that with control of the oil resources of Kirkuk the Kurdish Region might be emboldened to break away from Iraq. An independent Kurdish state has the potential to destabilize areas in Turkey, Iran and Syria which have significant Kurdish minority populations. Turkey in particular has faced several decades of violent struggles with Kurdish separatist, which it claims have operated in and found support from the Kurdish Region of Iraq. Turkey also has ethnic and historical ties to the Turkoman of Kirkuk, who have a competing historical claim to that area. For this and other reasons, Turkey has made public pronouncements indicating its objections to the integration of Kirkuk into the Kurdish Region.

Although, the constitutional recommendations above are designed to partly diffuse this issue by addressing the concerns of Kirkuk's Turkoman community, they would not alleviate the main objections of Iraq's neighbors to the integration of Kirkuk. Therefore, the integration of Kirkuk could potentially still serve as the trigger that causes those underlying tensions to ignite into violence. There are a number of actions that may help to ameliorate some of the tensions surrounding

those issues. While acknowledging that it may be unrealistic to expect such steps to be completed prior to the Kirkuk Referendum, the authors of this report strongly suggest that a dialogue be commenced as soon as possible and that these steps be pursued in tandem with the other steps listed in this report.

One step that may help to assuage concerns of ethnic minorities in the Kurdish Region as well as neighboring states would be to strengthen and add constitutional language in the Kurdish Region's constitution that pledges to maintain the integrity of Iraq as an indivisible nation and the Kurdish Region as an integral part of that nation. Such constitutional language would represent a foundational commitment to the current national boundaries of Iraq and, implicitly, a recognition and respect for the integrity of the national borders of Iraq's neighbors.

A more political, and perhaps less legal, commitment to the integrity of existing international norms would be an agreement signed by representatives of the Turkish government, the Iraqi federal government and the Kurdish Region in which each party pledges to unconditionally cease any and all official support (and to actively prevent any non-official support) for any group engaging in violent activities within the other nation's borders. Lastly, an agreement by the Iraqi federal government and Turkey in which each promises to respect the borders of the other and pledges to resolve all political disagreements through negotiation would indicate the intent of the affected parties to respect the sovereignty of the other and help to reduce the chance that the integration of Kirkuk into the Kurdish Region would lead to increased regional tensions.

## **PART IV**

### **Suggested Constitutional Provisions**

The below language represents possible constitutional provisions which could be introduced, either through the temporary abbreviated procedures or permanent process for amending the 2005 Iraqi Constitution, to implement the recommendations contained in this report.

#### **The Kirkuk Administrative Area**

##### **Article 1:**

First: The city of Kirkuk has historically been and is a city of diverse and multiple ethnicities, religions, and communities.

Second: The city of Kirkuk shall constitute within its municipal borders a special administrative area within the governorate of Kirkuk, referred to as the “Kirkuk Administrative Area”, whose local governmental structure and powers shall be set by law in accordance with the requirements, rights and limitations set forth in this Chapter.

Third: The municipal borders of the Kirkuk Administrative Area may only be changed with at least a 2/3 majority vote of the Kirkuk Governorate Council, or if the governorate of Kirkuk has joined a region, the regional legislative council, and the Administrative Area Council of the Kirkuk Administrative Area elected pursuant to Article 2 below.

#### **Government of Kirkuk Administrative Area**

##### **Article 2:**

###### **First:**

A. The Constitution, upon the coming into force of this Chapter, shall recognize the existing City Council and other governing authorities of the city of Kirkuk, as the initial governing authorities of the Kirkuk

Administrative Area. All legislation and decisions issued by such City Council and other governing authorities, including court decisions and contracts, shall remain and shall be effective, provided that they do not otherwise contradict the Constitution, until such time as they are amended or annulled by the Administrative Area Council duly elected in accordance with this Chapter.

B. On the date of the referendum to determine the status of the governorate of Kirkuk an election shall be held to determine the members of the first Administrative Area Council. The first election of the members of the Administrative Area Council shall be regulated by rules established by the existing City Council in accordance with the requirements of this Constitution.

C. The first Administrative Area Council shall take office and shall have its initial session within [30] days of its election. Upon the opening of the initial session of the Administrative Area Council, the City Council shall be dissolved and thereafter the legislative function of the government of the Kirkuk Administrative Area shall be vested in the Administrative Area Council, elected from time to time in accordance with this Chapter.

D. Within the first [90] days of its initial session, the Administrative Area Council shall:

1 – Adopt a “basic law” for the Kirkuk Administrative Area defining the structure of powers of its authorities, including the executive and judicial branches, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution; and

2 – Appoint interim members of the executive and judicial branches, and establish laws with respect to the future election or appointment of such authorities and the future election of the Administrative Area Council, provided that such laws shall not contradict the requirements of this Chapter.

Second:

A. The “Administrative Area Council” of the Kirkuk Administrative Area shall consist of [42] members. [Thirty-four] members of the Kirkuk Administrative Council shall be persons elected by the constituents of the

[17] voting districts established pursuant to and in accordance with the requirements of this Chapter, with each voting district electing [two] members. The remaining [8] members of the Administrative Area Council shall be elected by the popular vote of all the residents of the Kirkuk Administrative Area.

B. There shall be [17] “voting districts”, which are composed in a manner that recognizes the diverse and multiple ethnicities, religions, and communities of the Kirkuk Administrative Area. Each resident of the Kirkuk Administrative Area shall be represented in a voting district. The voting districts of the Kirkuk Administrative Area shall be apportioned as follows:

1 – [Five] districts in which at least [75] percent of the residents of voting age in each such district have self-identified in the most recent census as being of Kurdish ethnicity;

2 – [Five] districts in which at least [75] percent of the residents of voting age in each such district have self-identified in the most recent census as being of Turkmen ethnicity;

3 – [Five] districts in which at least [75] percent of the residents of voting age in each such district have self-identified in the most recent census as being of Arab ethnicity; and

4 – [Two] districts in which at least [75] percent of the residents of voting age in each such district have self-identified in the most recent census as being of an ethnicity other than Kurdish, Arab or Turkmen.

Third:

A. Following the ending of the normalization process and the completion of the census required pursuant to this Constitution but at least [90] days prior to the first election of the Administrative Area Council required by this Chapter, a committee established by the existing City Council of the Kirkuk Administrative Area shall establish and publicly announce voting districts in compliance with this Article.

B. Every seventh year following the date of the initial establishment of the voting districts, a committee appointed by the Administrative Area Council

shall recommend adjustments to the boundaries of the voting districts on the basis of a fair and neutral census held within a year of such recommendation. Such adjustments shall be effective upon approval of at least a [majority] of the members of the Administrative Area Council.

C. Competence to challenge the Constitutionality of the boundaries of any voting district, or the fairness and neutrality of any census related thereto, shall rest solely in the members of the City Council or, if after its dissolution, the Administrative Area Council, provided that a minimum of at least [12] such members must collectively bring any such challenge.

D. The Federal Supreme Court<sup>96</sup> shall have sole jurisdiction to adjudicate any challenge to the Constitutionality of voting district boundaries or the fairness and neutrality of the census related thereto. If such challenge involves the failure by the City Council, or the Administrative Area Council or its appointed committees, to act in a timely manner as required hereunder to establish or adjust voting districts, the Federal Supreme Court may make binding determinations effecting such establishment or adjustment.

Fourth: During the 25th year following the date of the initial establishment of the voting districts, a referendum shall be held to determine if the residents of the Kirkuk Administrative Area desire to amend the apportionment of voting districts set forth in Item B of the Second Clause of this Article 2. If at least 2/3 of the residents registered to vote approve the referendum measure to amend the apportionment, then a drafting committee chosen by the Federal Supreme Court consisting of one member of the Federal Supreme Court, two members of the Administrative Area Council and four members each representative of one of the four distinct district groups set forth in Item B of the Second Clause of this Article 2 shall be formed. The committee shall within [six] months of its formation, taking into account the opinions and desires of representatives of the different ethnic and religious communities of the Kirkuk Administrative Area, publicly propose a new basis upon which voting districts shall be apportioned which shall be submitted for approval by popular vote. If at least 2/3 of the residents vote to approve the new apportionment, Item B of the Second Clause of this Article 2 shall be replaced in its entirety by such measure but only to the extent and only such language as deals directly with the adjustment to apportionment of voting districts in the Kirkuk Administrative Area.

<sup>96</sup> If the Federal Supreme Court is transitioned into a Constitutional Court, then the Constitutional Court would be the appropriate body to handle these disputes.

## **Powers of the Kirkuk Administrative Area**

### **Article 3:**

First: The governorate of Kirkuk, or if such governorate has joined a region, such region, shall have exclusive authorities in the following matters within the municipal boundaries of the Kirkuk Administrative Area:

- A. Formulating and executing policy effecting security matters of governorate or regional wide scope, including the establishment and management of security forces and guards and the deployment thereof.
- B. Regulating policy with respect to trade and commerce occurring across the boundaries of the Kirkuk Administrative Area and regions and governorates in Iraq.
- C. All powers granted to the governorate of Kirkuk or such region, as the case may be, with respect to oil, gas or other natural resource under Article 112 of the Constitution or through any further amendments to the Constitution or legislation provided that such legislation does not contradict the Constitution.

Second: The governing authorities of the Kirkuk Administrative Area shall share competency with the governing authorities of the governorate of Kirkuk, or if such governorate has joined a region, such region, in the following matters within the municipal boundaries of the Kirkuk Administrative Area:

- A. Regulation of the main sources of electricity and its distribution.
- B. To formulate development and general planning policies.
- C. To formulate public health policy.
- D. To formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organized in a region.
- E. Police matters with respect to violations of law that involve the crossing in or out of the municipal boundaries of the Kirkuk Administrative Area.

Third:

A. The Kirkuk Administrative Area shall have the right to exercise the executive, legislative, judicial powers and police powers solely within its municipal borders in accordance with this Constitution, except for those powers and authorities:

1 – Stipulated in the Constitution as exclusive authorities of the federal government, and

2 – Stipulated in this Article 3 as exclusive powers and authorities of the governorate of Kirkuk or any region into which the governorate of Kirkuk incorporates.

B. With regard to powers stipulated as shared between the governing authorities of the Kirkuk Administrative Area and the governorate of Kirkuk or any region into which the governorate of Kirkuk incorporates, priority in the application of such power within its municipal boundaries shall be given to the law of the Kirkuk Administrative Area in case of dispute.

C. In case of a contradiction between legislation of the Kirkuk Administrative Area and that of the federal government, the governorate of Kirkuk or any region into which the governorate of Kirkuk is incorporated with respect to a matter outside the exclusive authorities of the federal government, the governorate of Kirkuk or any region into which the governorate of Kirkuk is incorporated, the governing authorities of the Kirkuk Administrative Area shall have the right to supersede or amend the application of such external legislation within the Kirkuk Administrative Area in accordance with the constitution.

Fourth:

A. The Kirkuk Administrative Area shall be allocated an equitable share of the national revenues that have been allocated from the federal government to the governorate of Kirkuk and any region into which the governorate of Kirkuk is incorporated, in an amount sufficient to discharge its responsibilities and duties and having regard to its resources, needs, and the percentage of its population.

B. A minimum of at least [10] percent of the revenues from the extraction of oil in the governorate of Kirkuk that are retained by the governorate of

Kirkuk, any region into which the governorate of Kirkuk is incorporated or any authority thereof after the application of the sharing provisions set forth by this Constitution and laws promulgated in accordance with the requirements thereof, shall be promptly allocated to the governing authorities of the Kirkuk Administrative Area for purposes benefiting the public welfare and distribution to the residents of the Kirkuk Administrative Area on an equal basis.

Fifth:

A. Nothing in this Chapter shall be construed to limit the powers otherwise granted under this Constitution to the governing authorities of the governorate of Kirkuk or any region into which the governorate of Kirkuk is incorporated with respect to areas outside of the municipal boundaries of the Kirkuk Administrative Area.

B. The Federal Supreme Court shall have jurisdiction over the settling of all disputes that arise between the government of the Kirkuk Administrative Area and the government of the governorate of Kirkuk or the government of any region into which the governorate of Kirkuk has been incorporated.

### **The Process of Normalization**

Article 4:

First: The government of the Region of Kurdistan shall be delegated the following responsibilities, subject to the oversight of the Council of Representatives, in connection with the completion of the process of normalization:

A. The receipt and settlement of all claims by persons previously dispossessed from the governorate of Kirkuk by [June of 2008].

B. The organization and execution of an official census, as provided for in Article 140 of this Constitution. This census shall be completed by [September of 2008].

C. The establishment of legal measures and restrictions, consistent with the federal constitution, on both the local governorate and regional level, to protect against forced migration.

D. The provision of fair and equitable compensation, and adequate time to relocate, to any Shiite resident family transferred to the governorate of Kirkuk in connection with the programs of the previous regime that does not apply for amnesty pursuant to Item E below.

E. The provision of amnesty for those Shiites, transferred to the governorate of Kirkuk in connection with the programs of the previous regime, who apply for official residency on or prior to [June 30, 2008].

Second: Other responsibilities may also be delegated to the Kurdish Regional Government by federal law.

### **Article 5:**

First: No payments, other than those authorized by the governmental authorities implementing the official normalization program, by any person shall be permitted to any person which is designed to influence such person's decision to reside in or leave the governorate of Kirkuk or the Kirkuk Administrative Area.

Second: No requirement or coercive actions, designed to force Shiite residents to leave the governorate of Kirkuk, other than those consistent with the official normalization program, shall be permitted.

Third: The deadline for the completion of the normalization process set forth above shall be the end of [September of 2008].

Fourth: Upon the completion of the normalization process, any organized effort, whether by public or private entities or organizations, designed to alter the demographic makeup of the governorate of Kirkuk's population shall be prohibited.

Fifth: A referendum to determine the will of the people with respect to the status of the governorate of Kirkuk shall be held in the governorate of Kirkuk upon the conclusion of the normalization process, but no later than the end of [2008]. Such referendum shall include a proposal for the governorate of Kirkuk to join the Kurdistan Region, as well as such other proposals that have been voted on and approved by a [majority] of the legislative body of the governorate of Kirkuk.

## **PART V**

### **Conclusion**

In summary, notwithstanding the increased threat of armed conflict in Iraq, it is most likely the Kurds will conclude that the only way to safeguard and expand the gains already made is the fairly rapid incorporation of Kirkuk into the Kurdistan Region. While an adverse affect on relations with Turkey (or Iran) is a possibility, and increased insurgent activity from domestic and internationally supported Iraqi militias and terrorists will likely occur, the Kurds have faced decades of violence during their struggles against the various Iraqi regimes and are unlikely to be swayed by such threats.

The Iraqi Constitution has been drafted with two separate mechanisms that allow the Kurds to achieve their goal of control of Kirkuk. The Kurds have achieved the demographic means to exercise these mechanisms. Any solution, therefore, can not be based on unrealistic unilateral concessions by the Kurds. The proposals set forth in this report require each of the interested parties in Kirkuk to make moderate but meaningful concessions and therefore could be the basis for a settlement of the Kirkuk issue.

## **About Orrick, Herrington & Sutcliffe LLP**

Orrick, Herrington & Sutcliffe LLP is a global law firm with approximately 980 lawyers in North America, Europe and Asia. The firm focuses on litigation, complex and novel finance and innovative corporate transactions. Orrick clients include *Fortune* 100 companies, major industrial and financial corporations, commercial and investment banks, high-growth companies, governmental entities, start-ups and individuals. The firm's size, resources, geographic breadth, advanced IT systems and business-oriented culture ensure that its clients receive responsive, value-added services. Orrick's depth and breadth of experience include a wide range of transactional and litigation matters, and Orrick lawyers are committed to providing high-quality, innovative solutions to the most complex legal challenges.

The firm's 18 offices are located in Beijing, Hong Kong, London, Los Angeles, Milan, Moscow, New York, Orange County, Pacific Northwest, Paris, Rome, Sacramento, San Francisco, Shanghai, Silicon Valley, Taipei, Tokyo and Washington, D.C.

### **Transactional**

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International Dispute  
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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 Baker & McKenzie, Covington & Burling; DLA Piper Rudnick; Orrick, Herrington & Sutcliffe, 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 \$10 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 has also maintained temporary project offices in Baghdad, Colombo, Kosovo, and Tbilisi.

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."

## **About the PILPG Iraq Program**

Over the course of the past two and a half years, the Public International Law & Policy Group (PILPG) has provided assistance with preparing, drafting, and implementing the new Constitution in Iraq.

### *2007 Constitutional Amendment Process*

At the request of the Iraqi Constitutional Review Committee, the parliamentary committee responsible for drafting amendments to the 2005 Constitution, PILPG deployed a team of lawyers to Baghdad in the spring of 2007 to provide legal assistance to the Committee and other law makers involved in the amendment process. This assistance has included drafting legal memorandum on comparative state practice as well as drafting and commenting on suggested amendments to the Constitution.

This deployment has been supported by PILPG's law firm partners including Baker & Mckenzie, Covington & Burling; DLA Piper; Milbank Tweed Hadley McCloy; Orrick, Herrington & Sutcliffe; Shearman & Sterling; Steptoe & Johnson; and Sullivan & Cromwell.

### *2005 Constitutional Negotiations*

In the spring of 2005, American University's Center for Global Peace, at the request of the Chairman of the Iraqi Constitution Drafting Committee, arranged for PILPG to provide assistance to the Drafting Committee. In July, the Center and PILPG, as part of a USAID program operated by one of its major international contractors, deployed a team of experts to Iraq. The Chairman called upon the team to provide legal and other expert assistance with matters ranging from state structure and electoral systems to resource allocation and the protection of human and minority rights.

Prior to and during the negotiations PILPG prepared a series of legal briefs on Iraq's post-conflict constitutional and nation-building issues, such as structuring an executive branch, promoting judicial independence, protecting human rights, resolving property claims, and repatriating refugees and internally displaced persons. These memoranda were prepared with the pro bono assistance of major international law firms, including Covington & Burling; DLA Piper; Shearman & Sterling; Steptoe & Johnson; and Sutherland Asbill & Brennan. This work was sponsored by the Ploughshares Fund and the Compton Foundation.

### *Policy Reports and Policy Planning Negotiation Simulations*

During 2004, PILPG, in cooperation with American University and sponsored by the Carnegie Corporation of New York, conducted a series of diplomacy simulation exercises on negotiating a permanent constitution for Iraq and on constructing formulas for allocating oil revenue. The diplomacy simulation exercises were run with participants from various Iraqi constituencies, the U.S. government, academia and foreign policy NGOs.

PILPG has also published in Arabic and English legislative drafting guides to aid in developing legislation for key institutions and issues. The drafting guides are intended to identify important issues and provide examples of approaches taken by other states, and provide comparative legal analysis and sample legislative language.

### *Roundtables*

PILPG frequently hosts roundtables on timely topics, often in collaboration with other institutions. To facilitate the process of constitutional implementation, PILPG, along with nine co-sponsoring organizations in Washington, DC, hosted a series of roundtable discussions and conducted a Negotiation Simulation to address the key issues relating to this constitutional process. These events in the winter of 2005-06 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 amendments, and best-practices from other countries that have sought to create effective governmental frameworks for democratic societies.

The resulting report addresses and makes recommendations on a wide variety of issues, including 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 country's Constitution.

This program was co-sponsored by the American University Center for Global Peace, the American Society of International Law (ASIL), 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 (USIP).

In May 2003, PILPG, in collaboration with The Century Foundation, convened a roundtable of experts, including some who would play a role in new Iraqi governing bodies, under the Chairmanship of Ambassador Morton Abramowitz and Judge Abraham Sofaer to discuss issues that would likely arise during the anticipated constitutional negotiations. The roundtable produced a report which was designed to help navigate the complexities of the constitution-building process by providing analysis and recommendations on the various state structures and processes post-conflict states have adopted in order to achieve both stability and democracy when faced with a diversity of ethnic and religious interests.

### *In-Country Project Office*

PILPG opened a Baghdad office in November 2006 to provide legal assistance to the Iraqi government on the implementation of the Iraq Constitution. PILPG attorneys are working with Iraqi government officials and Parliament members to develop enabling legislation for institutions created by the Constitution and laws governing the judiciary, human, women's and minority rights, and issues of federalism.