

## American University International Law Review

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Volume 24 | Issue 2

Article 2

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2008

# Rethinking the Political Future: An Alternative to the Ethno-Sectarian Division of Iraq

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# RETHINKING THE POLITICAL FUTURE: AN ALTERNATIVE TO THE ETHNO-SECTARIAN DIVISION OF IRAQ

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MATTHEW T. SIMPSON\*\*

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## INTRODUCTION

In the coming year, the political leadership in Iraq will need to make a final determination as to whether they are going to structure

the state of Iraq as a federal state with ethnically heterogeneous provinces, a loose federal state with ethnically defined provinces or regions, or whether they are going to divide the state into three new states based on ethno-sectarian lines.

A number of prominent American law makers and foreign policy shapers have strongly advocated for the soft, and sometimes hard, partition of Iraq—either through the creation of a loose federal structure based on ethno-sectarian lines, or through its outright partition.<sup>1</sup> These commentators have prophesized that the ethno-sectarian division of Iraq “may soon be all we have left.”<sup>2</sup>

In fact, the ethno-sectarian division of Iraq is fraught with logistical infeasibilities and dangers that threaten to compound the issues facing the people of Iraq instead of solving them. The political solution rests not on a return to failed approaches of division and entrenched conflict, but rather on the construction of a viable modern federal state that promotes unity, political compromise, and consensus building.

To address the question of whether the future of Iraq rests with ethno-sectarian division or with multi-ethnic federalism, this Article first addresses the ideas behind ethno-sectarian division and describes the most prominent plans for the division of Iraq along ethno-sectarian lines. This Article then critiques such a division of Iraq by: (1) identifying the overwhelming lack of popular support for such a division; (2) exposing the practical and political difficulties of dividing a state as diverse and heterogeneous as Iraq; (3) discussing the likelihood that ethno-sectarian division will increase violent conflict; (4) highlighting the lessons of prior ethno-sectarian divisionist attempts; (5) noting insurmountable constitutional hurdles; and (6) setting out the significant signs of recent progress and cooperation in the Iraqi political framework.

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1. Joseph R. Biden, Jr., Op-Ed., *A Plan to Hold Iraq Together*, WASH. POST, Aug. 24, 2006, at A21.

2. EDWARD P. JOSEPH & MICHAEL E. O'HANLON, BROOKINGS INST., ANALYSIS PAPER NO. 12: THE CASE FOR SOFT PARTITION IN IRAQ, 31 (2007), available at [http://www.brookings.edu/~media/Files/rc/papers/2007/06iraq\\_joseph/06iraq\\_joseph.pdf](http://www.brookings.edu/~media/Files/rc/papers/2007/06iraq_joseph/06iraq_joseph.pdf) (underlining the problems associated with a soft partition before admitting the options in Iraq are narrowing).

Next, this Article sets forth a plan for an enhanced federal structure based on the existing Iraq Constitution and recent Iraqi laws. The proposal begins with the fundamental position that Iraq requires a federalist structure based upon an eighteen governorate model as set forth in the Constitution. With the sub-federal boundaries already drawn, Iraqis are in a position to devolve appropriate power to these entities in an asymmetric and gradual manner. With this power devolution, Iraq would benefit from the development of resource and revenue distribution systems to promote fair and equitable economic growth across the federation. Coordination mechanisms, such as framework legislation and dispute resolution committees, could be established to ensure that the transition to viable federalism occurs with minimal encumbrance. To respect the complex and diverse identities of Iraqis, the government must erect safeguards to protect the rights of sub-federal entities and Iraq's many minorities.

## I. ETHNO-SECTARIAN DIVISION

Ethno-sectarian division involves the partition or decentralization of a state along ethnic and/or sectarian lines.<sup>3</sup> At the core of ethno-sectarian division argument is the so-called security dilemma.<sup>4</sup> According to Professor Robert Jervis of Columbia University, the security dilemma exists when one community faces a distrustful "other" while at the same time its own defensive actions are viewed as antagonistic to the security of that other.<sup>5</sup> Thus, when war begins,

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3. Great debate exists surrounding the definition and use of the terms "ethnicity" or "ethnic" and "sectarian." Some prefer the former, while others prefer the latter. From our vantage point, both appear to have valid arguments. To avoid this fray, we have intentionally chosen the term ethno-sectarian. Our intent is to use this term as broadly and inclusively as possible and to leave the nuances to those more versed in the subject. Therefore, for the purposes of this Article, the use of the term ethno-sectarian division refers to division of Iraq along primarily Sunni, Shi'a, and Kurdish lines.

4. See JOSEPH & O'HANLON, *supra* note 2, at 2 n.2 (explaining that the security dilemma is "[d]rawn from the realist school of international relations, . . . [and] that in a state of anarchy, one state's defensive action makes everyone less secure.").

5. See Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POLITICS 167, 169-70 (1978) (contemplating the difficulty in increasing personal, community, or national security without appearing threatening to other groups); see also Barry Posen, *The Security Dilemma and Ethnic Conflict*, SURVIVAL,

mobilization of all members of one group is necessary, as other groups are likely to recognize those members as enemies.<sup>6</sup> Once war mobilizes ethnic groups, “the war cannot end until the populations are separated into defensible, mostly homogenous regions.”<sup>7</sup> Those advocating for ethno-sectarian division believe that the restoration of civil politics cannot occur unless the groups are separated into defensible, ethnically-determined enclaves. They argue that that solution designed to avoid population transfers, such as power-sharing or state re-building, are insufficient in and of themselves to resolve the security dilemma.<sup>8</sup>

Chaim Kaufmann, a staunch proponent of ethno-sectarian partition, defines partition as a separation “jointly decided upon by the responsible powers: either agreed between the two sides (and not under pressure of imminent military victory by one side), or imposed on both sides by a stronger third party.”<sup>9</sup> Ethno-sectarian division may be accomplished either by partitioning a state into smaller ethnic based states, or through the creation of a loose federal or confederal structure based upon ethnically defined provinces.<sup>10</sup> The general idea behind ethno-sectarian partition is that if ethno-sectarian groups

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Spring 1993, at 27, 29 (suggesting that the security dilemma is intensified when the opponents belong to different ethnic groups).

6. Nicholas Sambanis, *Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature*, in *LIVING TOGETHER AFTER ETHNIC KILLING: EXPLORING THE CHAIM KAUFMANN ARGUMENT* 41, 42 (Roy Licklider & Mia Bloom eds., 2007) [hereinafter Sambanis, *Partition as a Solution to Ethnic War*] (citing Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, *INT’L SECURITY*, Spring 1996, at 136, 150 [hereinafter Kaufmann, *Possible and Impossible Solutions*]) (summarizing and analyzing Chaim Kaufmann’s hypotheses about ethnic interaction during war times and the security dilemma).

7. Kaufmann, *Possible and Impossible Solutions*, *supra* note 6, at 150.

8. Sambanis, *Partition as a Solution to Ethnic War*, *supra* note 6, at 42.

9. Chaim D. Kaufmann, *When All Else Fails: Ethnic Population Transfers and Partitions in the Twentieth Century*, *INT’L SECURITY*, Fall 1998, at 120, 125 n.12.

10. Nicole B. Herther-Spiro, Comment, *Can Ethnic Federalism Prevent “Recourse to Rebellion?” A Comparative Analysis of the Ethiopian and Iraqi Constitutional Structures*, 21 *EMORY INT’L L. REV.* 321, 330 (2007) (proposing that ethno-sectarian divisions as the basis for political units stems from the desire to group already cohesive community units together to increase the chances of creating a functioning governmental unit).

cannot live together in a heterogeneous state, then it is better to form multiple homogeneous states or provinces.<sup>11</sup>

## II. CALLS FOR THE ETHNO-SECTARIAN DIVISION OF IRAQ

Those calling for the ethno-sectarian division of Iraq are the dominant voice in the current discourse surrounding the political future of Iraq.<sup>12</sup> Their argument begins with the belief that “Iraq is deeply divided along ethnic and sectarian lines.”<sup>13</sup> For them, Iraq has three separate and distinct ethno-sectarian communities, namely Sunni, Shi’a, and Kurd.<sup>14</sup> In analyzing this position, Toby Dodge, a Senior Fellow for the Middle East at the International Institute for Strategic Studies, describes their rationale as follows:

[t]hese communities, it is claimed, are largely geographically homogenous and mutually hostile. They have been locked in an artificial, Sunni-dominated state for eighty-five years. This analysis leads its promoters to view the post-Saddam civil war as tragic but largely unavoidable. This approach asserts that Iraqi politics has always been and will continue to be animated by deeply held communal antipathies; the civil war is simply an outcome of this. From this perspective, there can only be one policy option: the situation will be stabilized by dividing the country into three smaller, ethnically purer and more manageable units.<sup>15</sup>

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11. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 588 (2d ed., 2000); see also AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* 44-47 (1977).

12. See, e.g., JOSEPH & O’HANLON, *supra* note 2; Leslie H. Gelb, Op-Ed., *Divide Iraq into Three States*, INT’L HERALD TRIB., Nov. 26, 2003, at 8; Peter W. Galbraith, *How to Get Out of Iraq*, N.Y. REV. BOOKS, May 13, 2004, at 42 [hereinafter Galbraith, *How to Get Out of Iraq*].

13. DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POST-WAR RECONSTRUCTION FIASCO* 237 (Westview Press 2005).

14. See *id.*; Gelb, *supra* note 12, at 8 (implying that the fact that the three ethnic groups do not already exist as one country is a matter of historical accident); Galbraith, *How to Get Out of Iraq*, *supra* note 12, at 45 (describing the varying desires of the three predominant ethnic groups).

15. Toby Dodge, *State Collapse and the Rise of Identity Politics, in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT* 23, 25 (Markus E. Bouillon, David M. Malone & Ben Roswell eds., 2007) [hereinafter Dodge, *State Collapse*].

It is only upon the nature of the smaller, ethnically purer and more manageable units that those arguing for ethno-sectarian division differ. Generally speaking, ethno-partitionists call for the creation of highly autonomous or independent units, which exercise the powers of self-government,<sup>16</sup> while ethno-federalists advocate for a federal structure built upon ethnically based regions with an overlay of a central government with limited power and authority.<sup>17</sup>

A number of prominent commentators have called for the ethno-sectarian division of Iraq,<sup>18</sup> and at least two detailed, published plans for the ethno-sectarian division of Iraq have been put forward. Common to both these plans is an explicit deviation from the present political structure as set forth in the Iraqi Constitution.

At the forefront of the debate is the Biden-Gelb Plan. In the spring of 2006, U.S. Senator Joseph R. Biden Jr. and President Emeritus of the Council on Foreign Relations Leslie H. Gelb co-authored a plan aimed at resolving the increasing violence and hardening political stalemate in Iraq by shaping an Iraqi federal structure along ethno-sectarian lines.<sup>19</sup>

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16. See, e.g., Gelb, *supra* note 12, at 8 (“The only viable strategy, then, may be to . . . move in stages toward a three-state solution: Kurds in the north, Sunnis in the center and Shiites in the south.”).

17. See, e.g., Joseph R. Biden Jr. & Leslie H. Gelb, Op-Ed., *Unity Through Autonomy in Iraq*, N.Y. TIMES, May 1, 2006, at A19 (advocating the division of Iraq into three autonomous regions with responsibility for domestic law, administration, and security while the central government retains control over defense of its borders, foreign affairs, and revenue from oil).

18. See, e.g., Alexander B. Downes, *More Borders, Less Conflict? Partition as a Solution to Ethnic Civil Wars*, 27 SAIS REV. 49, 58-59 (2006) (characterizing a partitioning of Iraq into three regions as inevitable); Peter W. Galbraith, Op-Ed., *Our Corner of Iraq*, N.Y. TIMES, July 25, 2006, at A19 [hereinafter Galbraith, *Our Corner*] (advocating the creation of Sunni and Shi’a regions in Iraq and the withdrawal of U.S. troops except a small force that could be left behind in Kurdistan to prevent al-Qaeda’s surge in power in Iraq); Simon Jenkins, Op-Ed., *The Fantasy is Over, We Must Partition Iraq and Get Out Now*, SUNDAY TIMES (LONDON), May 21, 2006, at 16 (advocating the governorates’ unification into Sunni and Shi’a regions under Chapter 5 of the Iraq Constitution); Catherine Larkin, *Talabani Supports Proposal to Divide Iraq into Three Regions*, BLOOMBERG, Oct. 7, 2007, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYraIgKc\\_A50](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYraIgKc_A50) (noting that Iraqi President Jalal Talabani supported Biden’s plan for federalism in Iraq).

19. See JOSEPH R. BIDEN JR., IRAQ: A WAY FORWARD (2006), available at <http://americancentristparty.net/PDF/planforiraq.pdf> (summarizing the Biden-Gelb plan).



The core of the Biden-Gelb plan is to replace the current governorate system with three distinct ethno-sectarian regions—one Sunni, one Shi'a and one Kurdish<sup>20</sup>—and create a mechanism to share Iraqi oil proceeds among the three regions.<sup>21</sup> The plan further calls for the United States, in conjunction with the United Nations, to convene an international conference to engage Iraq's neighbors<sup>22</sup> and for a framework for reducing U.S. forces in the region.<sup>23</sup> Lastly, the plan envisions the allocation of additional funds to assist in reconstruction and to establish a jobs program to offer Iraqi youth an alternative to the militias that remain prevalent in Iraq.<sup>24</sup>

In June 2007, using the Biden-Gelb plan as his template, Senator Biden, in conjunction with Senators Brownback, Boxer, Smith, Nelson, and Hutchison, sponsored a bi-partisan resolution supporting a political settlement among Iraq's "major factions."<sup>25</sup> The resolution passed the Senate on September 26, 2007 with seventy-five votes in support.<sup>26</sup> Representative Gallegly sponsored an identical resolution in the House of Representatives.<sup>27</sup> Biden's colleague and co-sponsor of the Senate bill, Senator Sam Brownback, clarified that the "major factions" referenced in the bill were the three "main ethno-sectarian groups" of Iraq: the Shi'a, the Kurds, and the Sunnis.<sup>28</sup> According to

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20. *Id.* at 2 (stating that the plan seeks to "[p]ut the central government in charge of truly common interests: border defense, foreign policy, oil production and revenues [and] [f]orm regional governments . . . responsible for administering their own regions").

21. *See id.* (recommending that U.S. policymakers push to for an "agreement for the federal solution from the Sunni Arabs by guaranteeing them 20 percent of all present and future oil revenues - an amount roughly proportional to their size - which would make their region economically viable").

22. *See id.* (suggesting that the U.S. should work to have Iraq's neighbors "pledge to support Iraq's power sharing agreement and respect Iraq's borders").

23. *See id.* (positing the need for only a residual force of as few as 20,000 in a very short time-frame).

24. *See id.*

25. S. Con. Res. 37, 110th Cong. (2007) (advocating for a federal structure to implement a political settlement). Representative Gallegly sponsored an identical resolution in the House of Representatives. H.R. Res. 688, 110th Cong. (2007).

26. *See* 153 CONG. REC. S12093, 12095 (2007) (roll call vote no. 348).

27. H.R. Res. 688, 110th Cong. (2007).

28. Reidar Visser, *The U.S. Senate Votes to Partition Iraq, Softly*, HIST. POL. IMAGINING, Sept. 27, 2007, <http://historiae.org/biden.asp> [hereinafter Visser, *The U.S. Senate Votes*].

Biden and Gelb, such a division, “may be the only way to prevent a violent partition . . . and preserve a unified Iraq.”<sup>29</sup>

Brookings Institute scholars Edward Joseph and Michael O’Hanlon developed a second prominent ethno-sectarian divisionist plan for Iraq (the “Brookings Plan”). The Brookings Plan, authored in the summer of 2007, sets out the means for implementing a so-called soft ethno-sectarian-based partition.<sup>30</sup> The Brookings Plan argues that soft ethno-sectarian partition is the lesser of a number of possible evils,<sup>31</sup> and points to increased ethno-sectarian killings, political choices, and population movements into homogenous communities as an indication that Iraqis are leaning more towards separation than ever before.<sup>32</sup> Even though most Iraqis today still do not favor soft partition,<sup>33</sup> the Brookings Plan argues, indicators of Shi’a support for soft partition, along with the on-going sectarian civil war, mean that ethno-sectarian partition may soon become “the best option available for Iraq.”<sup>34</sup>

A central element of the Brookings Plan is facilitating the voluntary relocation of populations.<sup>35</sup> The plan proposes dividing the country into Shi’a, Sunni, and Kurdish regions, none of which would be ethnically pure, but would be defined by natural geographic boundaries as much as possible.<sup>36</sup> The plan advocates dividing major cities like Baghdad and Mosul along natural boundaries, but with the goal of minimizing population transfers.<sup>37</sup> Under the Brookings Plan, the ethno-sectarian division could provide equal distribution of

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29. BIDEN, *supra* note 19, at 3.

30. *See generally* JOSEPH & O’HANLON, *supra* note 2 (differentiating between soft partition of the type proposed in the Biden-Gelb plan and hard partition, involving outright division of Iraq).

31. *See id.* at 1 (admitting that while partition might not be ideal, the truths observed on the ground begin to make partition look like a plausible alternative).

32. *See id.* at 1-3 (describing instances of Iraqis disapproving of rational alternatives to partition, thus creating the inference that Iraq’s citizens are accepting the idea of separation).

33. *Id.* at 2.

34. *Id.* at 13.

35. *See id.* at 15 (implying that numerous people feel unsafe but may need help to move).

36. *See id.* at 15-16 (explaining that the number of inter-sectarian marriages alone precludes any possibility of ethnically homogenous regions).

37. *See id.* at 16 (asserting that the Tigris River embodies a useful demarcation of different ethnic zones).

country's oil wealth, compensation and assistance to all persons choosing to relocate and protection for minorities in the new regions.<sup>38</sup>

In addition to the two plans above, several organizations have advocated for the ethno-sectarian based "hard partition" of Iraq into three independent states. In 2006, a number of prominent commentators predicted that such partition was likely inevitable.<sup>39</sup> Highlighting the Kurdish threat to secede,<sup>40</sup> they claimed the de facto partition that allegedly already existed provided an irreversible inertia towards hard partition along ethno-sectarian lines.<sup>41</sup> In the summer of 2007, the Washington D.C. based think tank *Fund for Peace* issued a report considering the merits of a hard partition of Iraq.<sup>42</sup> The report called for the creation of three independent political states based on ethno-sectarian lines along with the creation of a new political order modeled loosely after the European Union.<sup>43</sup>

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38. *Id.* at 17.

39. See Patrick Cockburn, *Sectarian Break-Up of Iraq is Now Inevitable, Admit Officials*, THE INDEPENDENT, July 24, 2006, at 18 (reporting that members of Shi'a, Sunni, and Kurdish parties were examining the possibility of dividing Iraq along ethnic lines); Kelley Beaucar Vlahos, *Burdensome Weight of Unity Could Force Iraq Break-Up*, FOXNEWS.COM, Sept. 20, 2006, <http://www.foxnews.com/story/0,2933,214820,00.html> (relating that Abdel Aziz Hakim, a prominent Shiite politician, called for the formation of a Shiite region in southern Iraq similar to Kurdistan in northern Iraq).

40. See, e.g., Yahya Barsanji, *Kurdish Leader Threatens Iraq Secession*, ASSOCIATED PRESS, Sept. 3, 2006, available at [www.institutkurde.org/en/info/1157362753.html](http://www.institutkurde.org/en/info/1157362753.html) (reporting that the "leader of the Kurdish region in northern Iraq threatened secession Sunday as a dispute over flying the Iraqi flag intensified"); Steve Negus, *Iraq's Kurds Threaten Secession Over Oil Rights*, FIN. TIMES, Sept. 29, 2006, at 7 (noting that the Kurdish Prime Minister asserted that "[i]f Baghdad ministers refuse to abide by that constitution, the people of Kurdistan reserve the right to reconsider our choice" to participate in Iraq's voluntary union).

41. See, e.g., Vlahos, *supra* note 39 (noting that Tony Sullivan, director of Near East Support Services, a defense consulting firm, asserted that "[t]he partitioning is already in progress in Iraq . . . . What is happening in Iraq, I think, is a movement into . . . civil war or partitioning").

42. See generally PAULINE H. BAKER, THE FUND FOR PEACE, A WAY OUT: THE UNION OF IRAQI STATES (2007), <http://www.fundforpeace.org/web/images/pdf/Iraq-report07full.pdf> (attempting to provide systematic analysis of the progress or lack of progress by using various metrics to measure progress).

43. See *id.* at 6 (discussing the possibility of a relationship among three independent Iraqi states with economic, but not political ties).

### III. THE CASE AGAINST THE ETHNO-SECTARIAN DIVISION OF IRAQ

The common theme among the above cited proposals is the division of Iraq along ethno-sectarian lines. Ultimately, regardless of the mechanism or method by which it is achieved, the ethno-sectarian division of Iraq is not the best way forward for Iraqis or the international community.

In the following analysis, this Article sets out a series of critiques of the ethno-sectarian division of Iraq. First, and perhaps foremost, Iraqis oppose the ethno-sectarian division of their country. Next, any attempt to divide the diverse and heterogeneous modern day Iraq will result in a cartographic conundrum, as neat ethno-sectarian lines are nearly impossible to draw. Further, the ethno-sectarian division of Iraq will not end the violence. The prevalence of inter-sectarian and non-sectarian based violence, the disintegration of the Iraqi central government, the alienation and isolation of Iraqi minorities, and the likelihood of opportunistic or defensive neighbors all suggest the violence in Iraq will continue. Iraq's diversity would also necessitate the forced relocation of thousands of Iraqis that will only compound the on-going displacement. Historically, the ethno-sectarian division of states has been a failure. In light of the diversity of the proposed regions, a constitutionally valid formation of three ethno-sectarian regions is highly unlikely. Finally, given the successful efforts of the Iraqi parliament to adopt key pieces of legislation in February 2008,<sup>44</sup> the ethno-sectarian division of Iraq would fail to capitalize on the emerging political cooperation.

#### A. IRAQIS OPPOSE ETHNO-SECTARIAN DIVISION

As violence raged in the summer of 2006, seventy-eight percent of Iraqis opposed the division of Iraq along ethno-sectarian lines.<sup>45</sup>

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44. See, e.g., Alissa J. Rubin, *Ending Impasse, Iraq Parliament Backs Measurers*, N.Y. TIMES, Feb. 14, 2008, at A1 (noting that Iraqi politicians passed "three far reaching measures . . .").

45. JOSEPH & O'HANLON, *supra* note 2, at 8 n.34 (noting that an International Republican Institute poll conducted in July 2006 "reported [seventy-eight] percent of respondents disagreeing with the suggestion that Iraqis should be segregated according to religion or sect").

More recent polling shows that one in six Iraqis believe forcible separation of people along ethno-sectarian lines had occurred in their area,<sup>46</sup> and ninety-eight percent of Iraqis polled saw this division as “a bad thing for Iraq.”<sup>47</sup>

Following the passage of Biden’s resolution in the U.S. Senate, Iraqis voiced near-unanimous opposition. Iraq’s parliamentary political blocs issued a joint statement criticizing the ethno-sectarian division as “a threat to Iraq sovereignty and unity . . . based on an incorrect reading and unrealistic estimations of the history, present and future of Iraq.”<sup>48</sup> Individual Iraqi leaders also condemned the resolution, including Iraqi Vice President Tariq al-Hashimi, who stressed that, “the Iraqi people, government, constitutional institutions, and civil society organizations” had rejected the ethno-sectarian division plan.<sup>49</sup> Iraqi President Nouri al-Maliki also reportedly called the Biden-Gelb plan a “catastrophe.”<sup>50</sup> Further, Sharwan al-Wa’ili, Iraqi Minister of State for National Security,

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46. ABC NEWS/BBC/NHK POLL, SECURITY GAINS REVERSE IRAQ’S SPIRAL THOUGH SERIOUS PROBLEMS REMAIN 40 (2008), <http://abcnews.go.com/images/PollingUnit/1060a1IraqWhereThingsStand.pdf> [hereinafter 2008 POLL].

47. ABC NEWS/BBC/NHK POLL, IRAQIS’ OWN SURGE ASSESSMENT: FEW SEE SECURITY GAINS (2007), <http://www.abcnews.go.com/images/US/1043a1IraqWhereThingsStand.pdf> [hereinafter 2007 POLL] (reporting that “separation is enormously unpopular: ninety-eight percent [of Iraqis], with agreement across ethnic and sectarian lines, oppose it.”).

48. Stephen Zunes, *Support for Iraq Partition: Cynical and Dangerous*, FOREIGN POLICY IN FOCUS, Oct. 12, 2007, <http://www.fpif.org/fpiftxt/4639>; see also Ned Parker & Raheem Salman, *A Divided Iraq Unites Against Partition Plan*, L.A. TIMES, Oct. 1, 2007, at A4 (describing the Iraqi politicians reaction to the Senate resolution as a “rare show of unity,” but one in which they uniformly “skewered” the proposition); *Iraqi TV Channels Carry Reactions to US Senate Resolution*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 10, 2007 (stressing the possibility of a law to ban all possibility of a split of Iraq into multiple entities).

49. *Iraqi TV Channels Carry Reactions to US Senate Resolutions*, *supra* note 48.

50. See, e.g., Mohamed Khodr, *Iraq, Iraq, Partitioning Iraq for a Nomination*, MEDIA MONITORS NETWORK, Oct. 15, 2007, <http://usa.mediamonitors.net/content/view/full/46672> (asserting that partition “of Iraq is opposed by Iraq’s Prime Minister Nuri Al Maliki, a Shiite, who called the plan a ‘catastrophe.’ the Iraqi Parliament, the O.I.C, representing all [fifty-seven] Muslim nations (Organization of Islamic Conferences), the Arab League, [and] the Gulf Cooperation Council (includes Saudi Arabia)”).

called on Iraq and the world to “denounce it as a disastrous resolution.”<sup>51</sup>

The Arab media also condemned the proposal for the ethno-sectarian division of Iraq.<sup>52</sup> Rejection of Biden’s resolution “filled editorial pages across the Arab world, and has widely been interpreted as an imperialistic attempt to decide both Iraq’s and the region’s fate.”<sup>53</sup> Iraqi and other Arab editorials voiced strong support for federalism, but opposed strongly the idea of ethno-sectarian division.<sup>54</sup>

Even supporters of the ethno-sectarian division of Iraq recognize that it is not a viable plan without the support of Iraq’s Sunni Arab population. According to the authors of the Brookings Plan, “Iraq’s Sunni Arabs bitterly and categorically reject” their version of ethno-sectarian division, adding that it is hard to find “any initial support” among Sunnis, and ultimately concluding that “winning Sunni Arab acquiescence for such a plan—without which it could not be safely implemented—will be difficult.”<sup>55</sup>

#### B. A CARTOGRAPHIC CONUNDRUM

The perception of an already divided Iraq of three ethnic communities motivates many of those who argue for a formal ethno-sectarian division.<sup>56</sup> To describe Iraq as divided into three easily

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51. *Iraq Minister in al-Hayah Rejects US Senate Resolution*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 3, 2007.

52. See Trudy Rubin, *Why a Plan for Iraq’s Soft Partition Would Backfire*, PHILA. INQUIRER, Oct. 3, 2007, at A15 (relating a conversation the author had with the Iraqi Foreign Minister and the general uproar over the resolution).

53. Kathleen Ridolfo, *Criticism of U.S. Senate’s Partition Resolution Echoes Across Arab World*, RADIO FREE EUROPE: RADIO LIBERTY, Oct. 4, 2007, <http://www.rferl.org/featuresarticle/2007/10/770D037B-73B3-45F2-91BB-2456A7AE8318.html>.

54. See, e.g., *BBC Monitoring Weekly Roundup of Iraqi Press 26 Sep to 02 Oct. 07*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 2, 2007; see also *Iraq’s Al-Bayyinah Editorial Censures US Senate’s Partition Resolution*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 4, 2007; *Kuwaiti Emir Warns Against Iraq Partition, US-Iranian Friction*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 3, 2007; *Saudi Editorial Warns Against Partitioning Iraq*, BBC MONITORING MIDDLE EAST – POLITICAL, Oct. 20, 2006.

55. JOSEPH & O’HANLON, *supra* note 2, at 10.

56. See BIDEN, *supra* note 19, at 2 (calling for the division of Iraq into three regions: Shi’a, Sunni and Kurd).

demarcated, mutually hostile communities, however, is a “static caricature that does great damage to a complex, historically grounded, reality.”<sup>57</sup> The intensity of ethno-sectarian tension that exists in Iraq today is a recent development, feeding largely on the security void left by the dismantlement of Saddam Hussein’s regime and the initial inability to create an effective central government.<sup>58</sup> Further, the prevalence of diverse and multi-ethnic cities makes dividing those cities along ethno-sectarian lines unfeasible.<sup>59</sup> Finally, massive relocations of Iraqis, when combined with a census over ten years old, makes determining exactly where individuals live for purposes of dividing the state impossible.<sup>60</sup>

### 1. Complex Identities

The reality of Iraqi identity is rooted in a complex history, and not simply upon ethno-sectarian characteristics.<sup>61</sup> Historically, Iraq’s

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57. Dodge, *State Collapse*, *supra* note 15, at 25; *see also* Reidar Visser, *Centralism and Unitary State Logic in Iraq from Midhat Pasha to Jawad al-Maliki: A Continuous Trend?*, HIST. POL. IMAGINING, Apr. 22, 2006, <http://www.historiae.org/Maliki.asp> [hereinafter Visser, *Centralism and Unitary State Logic*] (explaining that while the “unitary state model” was created artificially by the British, nevertheless it was a philosophy and organization that quickly found wide-spread support within the population, with the exception of the Kurds); Gary Bass, *Breaking up (a Country) is Hard to Do*, WASH. POST, Aug. 27, 2006, at B3 (relating that many respected experts are very skeptical of the idea that a partition would create homogenous and stable regions); Aaron S. Klieman, *The Resolution of Conflicts Through Territorial Partition: The Palestine Experience*, 22 COMP. STUD. SOC’Y HIST. 281, 291 (1980) (postulating whether partition results in short-term security but necessarily leads to long-term fighting and strife); Thom Shanker, *Divided they Stand, but on Graves*, N.Y. TIMES, Aug. 19, 2007, at WK1 (revealing the probable necessity of a large peace-keeping presence for years to come to maintain any proposed partition).

58. *See* Richard A. Opiel, Jr., *Buried Bomb Kills 5 G.I.’s in Baghdad Neighborhood*, N.Y. TIMES, June 30, 2007, at A3 (describing the Iraqi government as “disastrously ineffective”).

59. *See* GARETH STANSFIELD, IRAQ: PEOPLE, HISTORY, POLITICS 57 (2007) (discussing the deep-rooted divide between Sunni and Shi’a).

60. *See* SAMEER N. YACOB, *Iraq Plans to Conduct General Census Next Year*, Associated Press, June 10, 2008, *available at* <http://wiredispatch.com/news/?id=205701> (noting that Iraq’s last census, conducted in 1997, did not include several northern Kurdish provinces).

61. *See generally* WILLIAM R. POLK, UNDERSTANDING IRAQ (2005) (tracing the history of Iraq from ancient times through modern occupations to demonstrate the difficulties that the United States may face by ignoring Iraq’s complex history); CHARLES TRIPP, A HISTORY OF IRAQ (2000) (developing the modern political

social classes were complex and differentiable along lines of property ownership, income, and political influence in addition to ethnicity, religion, and sectarianism.<sup>62</sup> According to Reidar Visser, a research fellow at the Norwegian Institute for International Affairs, “[t]o many Iraqis, the ethno-religious community is but one of several possible foci of identity . . . . Instead, villages, towns and regions have shaped identities.”<sup>63</sup> Similarly, Laith Kubba, former spokesman for the Iraqi Prime Minister, has highlighted the historical lack of inter-communal tension among Iraqis,<sup>64</sup> and even some ethno-partitionists acknowledge the recency of the sectarian divide.<sup>65</sup> One prominent historian of modern Iraq has also suggested that the sectarian violence and population displacement “is taking place for the first time in Iraq’s modern history.”<sup>66</sup>

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history of Iraq and discussing the evolution of relations among Iraqi ethnic groups); TOBY DODGE, *INVENTING IRAQ: THE FAILURE OF NATION-BUILDING AND A HISTORY DENIED* (2005) (outlining the development of Iraqi government from the British occupation to the U.S. invasion and overthrow of Saddam Hussein and suggesting that Iraq’s occupiers have often ignored Iraq’s history).

62. See generally HANNA BATATU, *THE OLD SOCIAL CLASSES AND THE REVOLUTIONARY MOVEMENTS OF IRAQ* 6-7 (2004) (discussing the varying categories that make up the definition of “class” in the context of Iraq).

63. AN IRAQ OF ITS REGIONS 2 (Visser & Stansfield eds., 2008) [hereinafter Visser & Stansfield]; see also Public International Law & Policy Group & The Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 69 (2003) [hereinafter *Establishing a Stable Democratic Constitutional Structure*] (indicating that Iraqi Shi’a more often identify with their Arab culture rather than their Shi’a sectarian group, as evidenced by their fighting alongside their fellow Sunni Arabs in the Iran/Iraq war and against the Persian Shi’a of Iran).

64. Laith Kubba, Senior Dir. for the Middle East and North Africa, Nat’l Endowment for Democracy, Remarks at the American University International Law Review and Public International Law and Policy Group Symposium, *Rethinking the Future: The Next Five Years in Iraq* (Feb. 11, 2008) (transcript on file with the American University International Law Review).

65. See David Brooks, Op-Ed., *The Road to Partition*, N.Y. TIMES, Sept. 11, 2007, at A27 (describing the sectarian divide through the eyes of an Iraqi politician: “there is a wall in her mind separating Sunnis from Shi’a, a wall that was erected during Saddam’s persecution and that has been fortified by the violence since.”).

66. Phebe Marr, *Iraq’s Identity Crisis*, in *IRAQ: PREVENTING A NEW GENERATION OF CONFLICT* 45 (Markus E. Boullion, David M. Malone & Ben Roswell eds., 2007) (blaming the overlap of a variety of fears, including loss of jobs and violence, for the sectarian divide).



Much of this recent rise in ethno-sectarian tension is attributable to the security vacuum that followed the collapse of the Saddam Hussein regime.<sup>67</sup> When central state authority crumbles, individuals are freed from institutional restraints and lose the protection normally supplied by public offices.<sup>68</sup> Thus, in response, they often seek safety, profit, or both.<sup>69</sup> Once the state's capacity is removed, its ability to influence is reduced greatly, and ultimately "[p]eople will look to whatever grouping, militia, or identity offers them the best chance of survival in times of profound uncertainty."<sup>70</sup> Often offering hope are "ethnic entrepreneurs" who mobilize significant portions of the population on the basis of communalistic identity: "[p]reviously 'fuzzy' or secondary identity traits become politicized and 'enumerated.' The struggle to survive, to gain a degree of predictability for yourself and your family, then becomes obtainable primarily through the increasingly militant deployment of ethnic or sectarian identity."<sup>71</sup> Thus, the lack of institutional and coercive national government authority is a significant cause of the recent rise of ethno-sectarian tension in Iraq as Iraqis starving for protection turn to the only organizations that appear to offer it: groups organized along ethno-sectarian lines.

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67. See Ayad Rahim, *Attitudes to the West, Arabs, and Fellow Iraqis*, in *IRAQ SINCE THE GULF WAR: PROSPECTS FOR DEMOCRACY* 189-91 (Fran Hazelton ed., 1994) (citing a "rising resentment and growing rift between Sunni Arabs and the rest of the population" fostered by the Hussein regime, Rahim states that Iraqis began retreating into particular clans or sects because they feared they could trust no one but close family members).

68. See Nelson Kasfir, *Domestic Anarchy, Security Dilemmas, and Violent Predation: Causes of Failure*, in *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* 54-55 (Robert I. Rotberg ed., 2004).

69. *Id.* at 55.

70. See Dodge, *State Collapse*, *supra* note 15, at 26; see also Daniel N. Posner, *Civil Society and the Reconstruction of Failed States*, in *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* 237, 240-41 (Robert I. Rotberg ed., 2004) (observing that when the public order is in disarray, people's concern turns toward survival); Andrea Kathryn Talentino, *The Two Faces of Nation Building: Developing Function and Identity*, 17 *CAMBRIDGE REV. INT'L AFF.* 557, 569 (2004) (examining experiences in Bosnia and Kosovo, and concluding that when a state begins to disintegrate, the organizations at the local level are reinforced and creating a culture in which exclusion is favored).

71. Dodge, *State Collapse*, *supra* note 15, at 27.

## 2. Urban Areas

Even if ethnic identities were paramount, the diversity of the heavily populated major urban areas will ultimately result in sixty-seven percent of the Iraqi population falling outside of any conceivable ethno-sectarian divisionist plan.<sup>72</sup> With nearly forty percent of Iraqis living in the multiethnic cities of Baghdad and Mosul alone, dividing these cities, as well as Iraq's other major urban centers, may well be impossible.<sup>73</sup> The division of major urban centers has historically been difficult,<sup>74</sup> and there is no reason to expect that a contemporary division would be any less so. Given the challenge inherent in dividing Iraq's major cities along ethnic lines, most calling for the ethno-sectarian division of Iraq have proposed exceptions to their plans ranging from administering Baghdad as an international city,<sup>75</sup> to allowing it to form its own region<sup>76</sup> (despite the Constitution's prohibiting Baghdad from joining any region).<sup>77</sup> Regardless, any ethno-sectarian divisionist plan would require exception of some sort for major urban areas. With such exceptions swallowing the rule, it is reasonable to challenge the rule.

## 3. Who Lives Where?

Finally, the last official Iraqi census was more than ten years ago.<sup>78</sup> Coupled with the thousands of undocumented Iraqi casualties since the fall of Saddam Hussein's regime,<sup>79</sup> the two million or so

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72. See UNICEF, IRAQ: STATISTICS, [http://www.unicef.org/infobycountry/iraq\\_statistics.html](http://www.unicef.org/infobycountry/iraq_statistics.html) (last visited Sept. 5, 2008) (stating that sixty-seven percent of the population lives in urban areas).

73. Anthony Cordesman, Op-Ed., *Three Iraqs Would be One Big Problem*, N.Y. TIMES, May 9, 2006, at A27.

74. See *id.* ("We have seen in Northern Ireland and the Balkans how difficult it is to split cities . . .").

75. See BIDEN, *supra* note 19.

76. JOSEPH & O'HANLON, *supra* note 2, at 16.

77. IRAQ CONSTITUTION art. 120.

78. See Press Briefing, United Nations Statistics Division, Press Briefing on Iraq Demographics (Aug. 8, 2003), available at <http://www.un.org/News/briefings/docs/2003/iraqdemobrf.doc.htm> (explaining that the 1997 Iraqi census data is inaccurate because it excluded the three Kurdish governorates); see also Cordesman, *supra* note 73, at A27 ("There has never been a meaningful census of Iraq showing exactly how its Arab Sunnis, Arab Shi'a, Kurds and other factions are divided or where they live.").

79. Compare IRAQ BODY COUNT HOME PAGE, <http://www.iraqbodycount.org/>

displaced Iraqis,<sup>80</sup> the impossibility of determining where Iraqis live for purposes of drawing ethno-sectarian lines becomes apparent. Without knowing where Iraqis live, no one can precisely determine which ethno-sectarian groups dominate which areas, thus making implementation of a plan to divide Iraq along ethno-sectarian lines essentially impossible.

### C. ETHNO-SECTARIAN DIVISION WILL NOT END THE VIOLENCE

The ethno-sectarian division of Iraq will not end the violence.<sup>81</sup> Those advocating for ethno-sectarian division fail to account for the extensive non-ethno-sectarian motivated violence.<sup>82</sup> The isolation of minorities following an ethno-sectarian division will present increased danger for residual minorities. Neighboring states and interested parties may either be threatened by the consolidation of

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(last visited Sept. 15, 2008) (estimating that up to 90,000 documented civilians have died in Iraq since the U.S.-led invasion began in 2003), with Gilbert Burnham et al., *Mortality after the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 THE LANCET 1421 (2006) (estimating that approximately 655,000 more Iraqi civilians have died than would otherwise have died if the U.S.-led invasion of Iraq had not occurred).

80. See UNITED NATIONS REFUGEE AGENCY [UNHCR], IRAQ SITUATION RESPONSE: UPDATE ON REVISED ACTIVITIES UNDER THE JANUARY 2007 SUPPLEMENTARY APPEAL 1 (2007), available at <http://www.unhcr.org/partner/PARTNERS/469632e32.pdf> [hereinafter UNHCR, IRAQ SITUATION RESPONSE] (noting that of the two million internally displaced Iraqis, many were displaced under Saddam Hussein's regime).

81. See Sambanis, *Partition as a Solution to Ethnic War*, supra note 6, at 84-85 (concluding that separating ethnic groups does not resolve the problem of violent ethnic antagonism). In fact, Sambanis puts forth a rival hypothesis: "if borders can be credibly and securely redrawn, then combining several large ethnic groups in a larger, multi-ethnic state may reduce the probability of new wars." *Id.* at 84; see also JAMES A. BAKER, III ET AL., IRAQ STUDY GROUP REPORT 31 (2006), available at [http://www.usip.org/isg/iraq\\_study\\_group\\_report/report/1206/iraq\\_study\\_group\\_report.pdf](http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf) (postulating that not only will the ethnic-division of Iraq not end the violence, it is only likely to make the situation worse); Rend Al-Rahim, Op-Ed., *Partition is Not the Solution . . .*, WASH. POST, Oct. 29, 2006, at B7 (analogizing a potential partition of Iraq with the problems facing India and Pakistan over the Kashmir region and concluding that the ethno-sectarian division of Iraq will not end ethnic violence but will likely lead to further conflict over greater power and control of resources and regions along the partition lines).

82. BAKER, supra note 81, at 10-11 (describing the multiple groups responsible for violence in Iraq, including jihadist groups and organized crime).

ethno-sectarian groups in Iraq, or may try to exploit it to their advantage.

### *1. Non-Ethno-Sectarian Motivated Violence*

The radical decentralization of power along ethno-sectarian lines presents the distinct danger of instigating a violent struggle for supremacy among already warring intra-sectarian factions.<sup>83</sup> Further, much of the violence occurring in Iraq today stems from profiteers masquerading as sectarian fighters, and the ethno-sectarian division of Iraq will do nothing to quash their activities.<sup>84</sup>

The predominant Iraqi ethno-sectarian groups are far from homogeneous or monolithic. Illustrations of intra-sectarian discord are readily available, as “intense political rivalries that include armed conflict, historical variables, and cultural and economic differences” make the ethno-sectarian division of Iraq a considerable challenge.<sup>85</sup> In February 2008, in the Sunni dominated al-Anbar province, Sunni tribal blocs forming the al-Anbar Salvation Council demanded that the Islamic Party (also Sunni) close its headquarters, “threatening ‘to declare war’ and to use force against the party if the party does not meet these demands within one month.”<sup>86</sup> In the predominantly Shi’a part of Southern Iraq, the Islamic Supreme Council of Iraq (ISCI) and Sadr movements are locked in a bloody power struggle, with Diwaniya, Basra, Nasriya, Samawa and many other cities witnessing “armed conflict, assassinations, and bombings attributable to the rivalry between the two factions.”<sup>87</sup> Demonstrating Sadrists accused rival Shi’a, which control Iraqi security forces, of engineering raids and detentions by U.S. and Iraqi forces to prevent them from mounting an effective campaign against their rival Shi’a parties for

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83. See Dodge, *State Collapse*, *supra* note 15, at 33 (wondering if many reverse cause with effect, associating the increased violence with ethno-sectarian differences, rather than the increased instability and violence resulting in more ethno-sectarian distrust).

84. *Id.*

85. REND AL-RAHIM FRANCKE, UNITED STATES INSTITUTE OF PEACE, POLITICAL PROGRESS IN IRAQ DURING THE SURGE 16 (2007), available at <http://www.usip.org/pubs/specialreports/sr196.pdf>.

86. Muhammad Yousef, *Sunni Internal Conflicts in al-Anbar*, NIQASH, Feb. 24, 2008, <http://www.niqash.org/content.php?contentTypeID=266&id=2161> (last visited Sept. 5, 2008).

87. FRANCKE, *supra* note 85, at 15.

the upcoming provincial elections.<sup>88</sup> Some fear that the ethno-sectarian division of Iraq would lead to a fierce battle for control between the Badr Brigade and Muqtada al-Sadr for the Shi'a region in the south.<sup>89</sup>

The Kurds have also experienced internal fighting, both within Iraq and among Kurdish populations in Iraq, Iran, and Turkey.<sup>90</sup> In Iraq, rival Kurdish factions often have conflicted or cooperated based on their political objectives.<sup>91</sup> In 1975, the Kurdistan Democratic Party (KDP) split, and Jalal Talabani formed the Patriotic Union of Kurdistan (PUK).<sup>92</sup> During the Hussein Regime's Anfal campaign against the Kurds in the late 1980s, the two parties cooperated to resist the Iraqi government.<sup>93</sup> When Hussein's control of the region weakened and the Kurdistan Regional Government formed, the parties again began fighting, often violently, to assert their presence in the region.<sup>94</sup> To be fair, however, the Kurds in Iraq have taken

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88. See, e.g., Institute for War & Peace Reporting, *Sadrists Fight On in Basra*, Mar. 28, 2008, [http://www.iwpr.net/?p=icr&s=f&o=343673&apc\\_state=henpicr](http://www.iwpr.net/?p=icr&s=f&o=343673&apc_state=henpicr) (last visited Sept. 5, 2008).

89. See, e.g., Interview by Foreign Policy with Dr. Toby Dodge, Reader in International Politics, Queen Mary University of London (Sept. 7, 2007), available at [www.foreignpolicy.com/story/cms.php?story\\_id=3982&page=1](http://www.foreignpolicy.com/story/cms.php?story_id=3982&page=1) [hereinafter *Seven Questions*] (purporting that there "is a low-level civil war between the two main Shi'a parties led by members of the Badr Brigade and al-Sadr" and partition would greatly inflame these tensions).

90. See Martin van Bruinessen, *The Kurds Between Iran and Iraq*, MIDDLE E. REP., July-Aug. 1986, at 14 (listing many of the conflicting Kurdish groups both within and outside Iraq, including the Iraqi Kurdistan Democratic Party, which clashed with the Kurdistan Democratic Party of Iran and which helped the Iranian government drive Iranian Kurds out of areas near the Turkish border).

91. See generally *id.* (discussing internal conflict as a hindrance to the Iraqi Kurdish nationalist movement).

92. See Theodore McLauclin, *Self-Interest and the National Idea in Iraqi Kurdish Politics, 1978-2003*, 13 (Feb. 28, 2007) (unpublished manuscript on file with the American University International Law Review) (citing GARETH STANSFIELD, *IRAQI KURDISTAN: POLITICAL DEVELOPMENT AND EMERGENT DEMOCRACY* 83-85 (RoutledgeCurzon 2003)) (explaining that the KDP consisted mostly of tribal leaders, while the PUK comprised "urban socialists").

93. See DAVID MCDOWALL, *A MODERN HISTORY OF THE KURDS* 368-83 (3d ed. 2004) (discussing the cooperation of Barzani, of the KDP, and Talabani, of the PUK, under the Kurdistan Front to oppose the Iraqi Government's oppression of the Kurds and to negotiate the creation of the Kurdistan Regional Government).

94. See INTERNALLY DISPLACED PEOPLE: A GLOBAL SURVEY 171-74 (2d ed. 2002) (suggesting that Kurdish infighting has led to the displacement of Kurds); see also McLauclin, *supra* note 92, at 14-27 (discussing all of the periods of

greater strides than any of the other groups toward intra-sectarian cooperation. Despite their often violent history, in January of 2006 the two main Kurdish parties reached a power sharing agreement that fostered greater unity in the Kurdish region.<sup>95</sup>

Additionally, profiteers disguised as ethno-sectarian fighters are responsible for far more of the violence in Iraq than most Westerners appreciate. According to Rend Al-Rahim, Senior Fellow at the United States Institute of Peace:

[v]iolence in neighborhoods now includes family vendettas avenging former murders and assassinations or revenge killing of former Baathists accused of criminality under the previous regime. The skein of violence is further tangled by the proliferation of gangs that are mini-mafias masquerading as sectarian or political militias. These groups are only interested in profit, and they engage in the lucrative trade of killing or evicting residents, looting their homes, and renting the houses to new residents.<sup>96</sup>

For instance, Sadr's Mahdi Army continues to exploit their fellow Shi'a in Sadr-dominated territory, gaining control of real-estate and businesses to turn a profit.<sup>97</sup> Other rogue militias, claiming to be affiliated with Sadr, carry out exploitation and "thuggery" for personal gain.<sup>98</sup> The lack of effective governing and security structures in Iraq is resulting in Iraq's "breaking down"—not into cohesive territorial units based on ethnic and sectarian identities—

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conflict and cooperation among the KDP and the PUK from 1975 to 2003 and noting that by 1996, the tensions between the KDP and PUK had escalated to open war, with each party using force, sometimes in the form of tanks, to seize the other party's stronghold positions.

95. Kathleen Ridolfo, *Iraq: Kurds Agree to Unify Administrations*, RADIO FREE EUROPE: RADIO LIBERTY, Jan. 12, 2006, <http://www.rferl.org/featuresarticle/2006/01/9d8fcdd7-2da3-4035-b63c-7676f7819b24.html>.

96. FRANCKE, *supra* note 85, at 3-4.

97. INTERNATIONAL CRISIS GROUP, *IRAQ'S CIVIL WAR, THE SADRISTS AND THE SURGE*, i (2008), *available at* <http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=48011> (underscoring the increasing ruthlessness of the Sadrists as they continued to increase their wealth).

98. *See id.*; *see also* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *COUNTRY OF ORIGIN INFORMATION: IRAQ 14 (2005)*, *available at* <http://www.unhcr.org/refworld/pdfid/435637914.pdf> [hereinafter UNHCR, *COUNTRY OF ORIGIN INFORMATION*] (indicating that kidnapping and hostage taking is prevalent, and that the kidnapers often ask for money).

but into fiefdoms controlled by militias, political parties, and shadowy local figures.”<sup>99</sup> Thus one reason for the apparent prominence of ethno-sectarian identity is profit. Iraqi’s are saying, “I’m not joining for ideological reasons, but I cannot feed my family any other way, and here people are offering money and cash.”<sup>100</sup>

None of this is to say that ethno-sectarian motivated fighting does not exist in Iraq, for it surely does. But rather, in addition to the sectarian fighting, extensive fighting within and regardless of ethno-sectarian groups exists, and as a result, the ethno-sectarian division of Iraq is not sufficiently tailored to the source of violence. Though significant numbers of Iraqis report being forcefully displaced,<sup>101</sup> the vast majority of people in all but a few ethnic groups felt that they were targeted for reasons other than their ethnicity.<sup>102</sup>

## 2. *The Not-So-Minor Affect on Minorities*

The ethno-sectarian division of Iraq may condemn residual minorities to discrimination and second-class citizenship and possibly instigate violent instability.<sup>103</sup> One empirical work studied the relationship between ethnicity and political violence and concluded that the highest propensity for ethnic violence exists at extreme polarization; i.e. the highest risk zone for violent conflict exists “when an ethnic bloc may be sufficient in size to permanently exclude others from the exercises of power.”<sup>104</sup> Robert Jervis has

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99. Marr, *supra* note 66, at 53.

100. CENTER FOR AMERICAN PROGRESS & HEINRICH BÖLL FOUNDATION, IRAQ’S DISPLACEMENT CRISIS AND THE INTERNATIONAL RESPONSE 19 (2008), available at [http://www.americanprogress.org/issues/2008/02/pdf/iraq\\_refugees.pdf](http://www.americanprogress.org/issues/2008/02/pdf/iraq_refugees.pdf) (last visited Oct. 3, 2008).

101. 2007 POLL, *supra* note 47, at 30.

102. See INTERNATIONAL ORGANIZATION FOR MIGRATION IN IRAQ, IOM EMERGENCY NEEDS ASSESSMENTS: POST FEBRUARY 2006 DISPLACEMENT IN IRAQ 3 (2008), available at <http://www.iom-iraq.net/library.html#iomIraq> (follow hyperlink for 15 March 2008 report).

103. Andreas Wimmer, *Democracy and Ethno-Religious Conflict in Iraq*, SURVIVAL, Winter 2003-04, at 111, 125 (hypothesizing that “ethnic cleansings and forced resettlements will continue” and that the less well established sects, such as Christians and Turkmen, will experience discrimination perpetrated by local government).

104. ROBERT H. BATES, HARVARD UNIVERSITY CENTER FOR INTERNATIONAL DEVELOPMENT, ETHNICITY, CAPITAL FORMATION, AND CONFLICT 28 (1999), available at <http://www.cid.harvard.edu/cidwp/pdf/027.pdf>.

also noted that in most modern civil conflicts both security and predatory motives exist.<sup>105</sup> The ethno-sectarian division of Iraq may thus exacerbate the predatory motives of majority populations against residual minorities.<sup>106</sup> If areas were formed around Shi'a, Sunni, and Kurdish populations, the minority populations located within those newly formed areas may have to conform to the ethnic and cultural persuasions of the area. The ethno-sectarian division of Iraq would prove even more problematic for nomadic minority groups or those dispersed across multiple areas.<sup>107</sup>

### 3. The Spillover Effect

The Iraq Study Group suggested the ethno-sectarian division of Iraq may encourage ethnic fighting elsewhere in the Middle East.<sup>108</sup> Indeed, Arab states have already denounced plans for ethno-sectarian division as proffering an unacceptable threat to both Iraq and the region.<sup>109</sup> Rend Francke voiced a similar concern in her public commentary, arguing that neighboring states with an interest at stake may intervene directly or increase their support to Iraqi factions.<sup>110</sup> At the very least, increased discord among Iraq's neighbors will do little to alleviate the existing tension.

For instance, Turkey and Iran have significant Kurdish regions, and increased Kurdish autonomy may create greater tension with their own Kurdish populations.<sup>111</sup> According to Donald Horowitz,

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105. Sambanis, *Partition as a Solution to Ethnic War*, *supra* note 6, at 45.

106. *Id.*

107. *See, e.g.*, Wimmer, *supra* note 103, at 125 (underscoring the plight of the "smaller, dispersed minorities" unless strong federal power implements minority rights which are in turn upheld by a reliable judiciary).

108. BAKER, *supra* note 81, at 31.

109. *See Saudi Editorial Warns Against Partitioning Iraq*, *supra* note 54 (declaring the "illusions of partition . . . [as] an escape from national responsibility and a retreat to delusions"); *see also Kuwaiti Emir Warns Against Iraq Partition*, *supra* note 54 (reporting the warnings of Kuwaiti Emir Shaykh Sabah al-Ahmad Al Sabah, that partitioning Iraq could endanger both Kuwait and the rest of the Middle East).

110. Al-Rahim, *supra* note 81 (predicting that Iran, Turkey, Syria, and Saudi Arabia would all intervene if partition occurred).

111. *See Gretel Kovach, War Pushes Turk-Kurd Tension to Breaking Point*, PAC. NEWS SERV., Mar. 20, 2003, [http://news.pacificnews.org/news/view\\_article.html?article\\_id=e0b81f415ecf72e790c34f36d9a4829a](http://news.pacificnews.org/news/view_article.html?article_id=e0b81f415ecf72e790c34f36d9a4829a) (adding that "Turkey has said it will invade if Iraqi Kurds attempt to form their own state"); *see also*



“Turkey resents support by Iraqi Kurds for the Kurdish rebellion in southeastern Turkey. The Turks could not, under any conditions, tolerate an independent Iraqi Kurdistan, which would be a beacon for its own Kurds.”<sup>112</sup> The Iraq-Turkey border has already witnessed a significant build up of Turkish troops, and Turkey has promised to retaliate against any showing of independence by Turkish Kurds.<sup>113</sup> Further, Turkish, Syrian, and Iranian concerns intensified after significant recent events affecting the greater Kurdish community, including extensive rioting by Iranian Kurds following the enactment of Iraq’s Transitional Administrative Law (“TAL”),<sup>114</sup> the end of PKK’s cease-fire,<sup>115</sup> disturbances in Kurdish-populated areas of Syria,<sup>116</sup> and the increase in violence in southeastern Turkey.<sup>117</sup>

A look at the Sunni dominated areas suggests that ethno-sectarian division would only increase the dominance of Sunni Islamist extremist groups over the Sunni insurgents and average Iraqis.<sup>118</sup> If average Iraqi Sunnis are left without oil money (a foreseeable consequence of the ethno-sectarian division of Iraq), Arab Sunni

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Michael Knights, *The Three-Way Game: Iran, Iraq, and the United States*, WASH. INST. FOR NEAR E. POL’Y, June 21, 2005, <http://www.washingtoninstitute.org/templateC05.php?CID=2345> (noting that the tension would expand to the relationship between Baghdad and Tehran).

112. Donald Horowitz, *Unifying Iraq: Partition is the Path to More War—Multiple Wars*, in *Fact*, WALL ST. J., June 19, 2007, at A16 [hereinafter Horowitz, *Unifying Iraq*].

113. *Id.* (adding that Turkey and the Iraqi Kurds currently experience flourishing commercial relations which would be undone in a flash and would likely lead to a “war between two allies.”); Cordesman, *supra* note 73, at A27 (stating that “Turkey, Iran and Syria would seek to destabilize the north and exploit the divisions between the two main Kurdish political unions.”).

114. Gary Thomas, *Protests Erupt in Kurdish Areas of Iran*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/wmd/library/news/iran/2005/iran-050805-25bd3f42.htm> (explaining that Iranian Kurds were upset that Iraqi Kurds were getting rights that they desired).

115. Jonny Dymond, *Kurds Move to End Turkish Truce*, BBC NEWS, May 29, 2004, <http://news.bbc.co.uk/2/hi/europe/3760285.stm>.

116. Bill Park, *Iraq’s Kurds and Turkey: Challenges for US Policy*, PARAMETERS, Autumn 2004, at 19, 22 (2004) (furthering that Ankara’s long held fear is that Kurdish resistance could create an independent Kurdish state which would destabilize the region as a whole).

117. Yigal Schleifer, *How Will Turkey Respond to Growing Rebel Violence*, CHRISTIAN SCI. MONITOR, at 7, Sept. 22, 2004 (revealing the growing conflicts between extremist Kurds and the Turkish people).

118. *See* Cordesman, *supra* note 73, at A27 (asserting that this would hinder the war on terrorists).

states like Egypt and Saudi Arabia, would likely feel the need to lend support, to help prevent Islamist extremists from taking over the Sunni area of Iraq.<sup>119</sup>

Turning to the south, the creation of a nine-province Shi'a region would expose it to significant Iranian influence.<sup>120</sup> Although some Shi'a leaders may be receptive to Iranian influence, many other Shi'a are hostile to Iran as they view themselves as Arabs, not Persians, and maintain the allegiances that led them to fight with the regime of Saddam Hussein during the Iran-Iraq war.<sup>121</sup> In addition to the increased role Saudi Arabia may play in a Sunni region, the Saudis object strongly to the idea of a Shi'a region in the south.<sup>122</sup> Saudi Arabia's adherence to the "ultra-strict" Wahhabi Sunni school of Islam has led to strained relations with Shi'ite Iran and even its own Shi'a population.<sup>123</sup> Saudi Arabia thus has serious reservations about another Shi'a dominated region next door.<sup>124</sup>

In the end, the ethno-sectarian division of Iraq could permeate throughout the Middle East and the Arab world, "creating a risk of local conflicts and the kind of religious tension that feeds Islamist extremism."<sup>125</sup> In the words of Syrian President Bashar al-Assad, "Iraq's disintegration will be a bomb that will blow up the Middle East."<sup>126</sup>

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119. *Id.*

120. See Horowitz, *Unifying Iraq*, *supra* note 112 (noting that the nine-province region has been pushed for by Abdul-Aziz al-Hakim's party).

121. *Id.* (asserting that a combined southern region would be a setback for both the Shi'a that view themselves as Arabs and for American interests).

122. See Juan Cole, *Partitioning Iraq*, SALON.COM, Oct. 30, 2006, [http://www.salon.com/opinion/feature/2006/10/30/iraq\\_partition/](http://www.salon.com/opinion/feature/2006/10/30/iraq_partition/) (last visited Sept. 6, 2008) (elaborating that U.S. President Bush and Vice President Cheney are particularly attentive to Saudi concerns and would therefore also view an autonomous Shi'a region as undesirable).

123. See *id.* (estimating that Shi'a form about ten percent of the Saudi population).

124. *Id.*

125. Cordesman, *supra* note 73, at A27.

126. See *Iraq Partition will Blow Mideast Up*, PRESS TV, Oct. 19, 2007, <http://www.presstv.ir/detail.aspx?id=27747&sectionid=351020201> (last visited Sept. 6, 2008) (elaborating that safeguards of Iraq's territorial integrity are needed to avoid bloodshed in the Middle East).

## D. MASS RELOCATION OF PERSONS

The ethno-sectarian division of Iraq would inevitably cause the mass displacement of persons. The Brookings Plan projects approximately two to five million Iraqis might move as a result of ethnic-sectarian partition.<sup>127</sup> While some plans side-step the issue, none deny it, and many even call for transferring groups to appropriate sides of the line so that they are “demographically separated into defensible enclaves.”<sup>128</sup> Such displacement, however, is inadvisable, because the widespread relocations would likely be “violent and impoverish those forced to move, leave a legacy of fear and hatred, and further delay Iraq’s political and economic recovery.”<sup>129</sup> Further, this relocation will only compound the on-going displacement of Iraqis, and would be inconsistent with Iraqi and U.S. obligations under international humanitarian law. Such mass displacement would also necessitate increased coalition support and resources.

*1. Displacing the Displaced*

The relocation necessary to accomplish the ethno-sectarian division of Iraq would only compound the on-going displacement. According to the United Nations High Commissioner for Refugees

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127. See JOSEPH & O’HANLON, *supra* note 2, at 19-20 (allowing that the numbers are huge but the lowest is comparable to what has already happened in Iraq since 2003).

128. Kaufmann, *Possible and Impossible Solutions*, *supra* note 6; see also Gary Bass, *Breaking up (a Country) is Hard to Do*, WASH. POST, Aug. 27, 2006, at B3 (adding that Kaufmann proposes interning civilians on the wrong side of the line to be used in a population exchange).

129. Cordesman, *supra* note 73, at A27; see also BAKER, *supra* note 81, at 31.

[D]evolving Iraq into three semiautonomous regions with loose central control [Federalism] ... could result in mass population movements, collapse of the Iraqi security forces, strengthening of militias, ethnic cleansing, destabilization of neighboring states, or attempts by neighboring states to dominate Iraqi regions. [Further], Iraqis, particularly Sunni Arabs, told us that such a division would confirm wider fears across the Arab world that the United States invaded Iraq to weaken a strong Arab state. *Id.*

*But see*, JOSEPH & O’HANLON, *supra* note 2, at 11 (“insisting that people remain in danger to prop up an illusion of political co-existence presents an even larger moral problem. If offered reasonable alternatives and secure passage, there are indications that many Iraqis, currently living in fear as vulnerable minorities, would willingly leave their homes.”).

(“UNHCR”), there are 3.7 million displaced Iraqis.<sup>130</sup> The UNHCR anticipated an increase of one million displaced persons in Iraq in 2007.<sup>131</sup> Many of the displaced have resettled in urban areas, such as Baghdad and Basra,<sup>132</sup> in addition to Kurdish regions where they experience relatively more security and increased job prospects.<sup>133</sup> Any attempt to divide those cities or the Kurdish region may therefore require the displacement of the already displaced.

Further, internally displaced Iraqis from the majority of areas overwhelmingly report their intention to return to their place of origin. The desire to return home weakens the argument that the current pattern of relocation to more ethnically homogenous areas is a permanent indicator of the voluntary fragmentation of Iraqi society along ethnic lines. In the Baghdad area where approximately sixty-five percent of all displaced Iraqis originate,<sup>134</sup> over seventy-two percent indicated their desire to return to their place of origin.<sup>135</sup>

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130. See Sudarsan Raghavan, *War in Iraq Propelling a Massive Migration*, WASH. POST, Feb. 4, 2007, at A1 (continuing that about 2 million of the displaced Iraqis have left Iraq to Jordan, Syria, and Lebanon).

131. KRISTÈLE YOUNÈS, *THE WORLD’S FASTEST GROWING DISPLACEMENT CRISIS: DISPLACED PEOPLE INSIDE IRAQ RECEIVING INADEQUATE ASSISTANCE* 10 (2007), available at <http://www.refugeesinternational.org/content/issue/detail/9915> (asserting that given the Iraqi government’s reticence in addressing this growing problem, the international community has a responsibility to respond to the humanitarian situation in Iraq).

132. CENTER FOR AMERICAN PROGRESS & HEINRICH BÖLL FOUNDATION, *supra* note 100, at 18 (continuing that less than one to two percent of displaced Iraqis are in camps).

133. Internal Displacement Monitoring Centre, *Many IDPs Seek Refuge in Kurdish Regions which are More Stable* (2007), [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/82EA9EA6AF6142BFC12572AD0028DCFA?OpenDocument#24.3.1](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/82EA9EA6AF6142BFC12572AD0028DCFA?OpenDocument#24.3.1) (adding that the region’s local economy has benefited from the migration of skilled professionals with disposable incomes).

134. INTERNATIONAL ORGANIZATION FOR MIGRATION, *IRAQ DISPLACEMENT: 2007 YEAR IN REVIEW 2* (2008), available at <http://www.iom-iraq.net/Library.html> (follow hyperlink for Iraq Displacement 2007 Year in Review, English) [hereinafter IOM, *IRAQ DISPLACEMENT 2007*]; see also Elizabeth Ferris, Co-Director, Brookings-Bern Project on Internal Displacement (Dec. 7, 2007) *The Real Challenge of Internal Displacement in Iraq: The Future*, available at [http://www.brookings.edu/speeches/2007/1206\\_iraq\\_ferris.aspx?emc=lm&m=211677&l=22&v=33934](http://www.brookings.edu/speeches/2007/1206_iraq_ferris.aspx?emc=lm&m=211677&l=22&v=33934) (placing the number of IDPs originating in Baghdad at approximately eighty percent of all IDPs).

135. INTERNATIONAL ORGANIZATION FOR MIGRATION, *IRAQ DISPLACEMENT: 2006 YEAR IN REVIEW* (2007), at 9, available at <http://www.iom->

## 2. *A Violation of International Humanitarian Law*

The mass movement of up to five million people necessary to accomplish the ethno-sectarian division of Iraq would contravene international humanitarian law. Under the Guiding Principles of Internal Displacement, which the participants at the United Nations World Summit recognized unanimously in September of 2005 “as an important international framework for the protection of internally displaced persons,”<sup>136</sup> all states have an obligation “to prevent and avoid conditions that might lead to displacement of persons.”<sup>137</sup> The Guiding Principles provide that “[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”<sup>138</sup> This prohibition includes displacement “based on policies of apartheid, ‘ethnic cleansing’ or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population.”<sup>139</sup> The ethno-sectarian division of Iraq clearly involves altering the ethnic composition of various areas within Iraq. Moving Shi’a, Sunni, and Kurdish Iraqis from their homes across the state into regions of ethnic homogeneity would thus be a displacement that is inconsistent with the Guiding Principles.

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[iraq.net/library/2006%20Iraq%20Displacement%20Review.pdf](http://iraq.net/library/2006%20Iraq%20Displacement%20Review.pdf) [hereinafter IOM, IRAQ DISPLACEMENT: 2006] (elaborating that many of these people are waiting for security to improve).

136. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 132, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

137. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39: Addendum: Guiding Principles on Internal Displacement*, Annex, Section II, Principle 5, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles on Internal Displacement*]; see also Ferris, *supra* note 134 (suggesting that the Guiding Principles serve as an international standard to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs and that they obligate the Iraqi national government to protect and assist IDPs within its jurisdiction); Walter Kalin, *A Tragedy of Increasing Proportions: Internal Displacement in Iraq*, FORCED MIGRATION REVIEW, June 2007, at 14, 15 (suggesting that the Guiding Principles obligate the Iraqi government to ensure that those who were not able to escape forced displacement and remain in Iraq are protected and assisted).

138. *Guiding Principles on Internal Displacement*, *supra* note 137, at Annex, Section II, Principle 6.1.

139. *Id.* at Annex, Section II, Principle 6.2(a).

### 3. Unrealistic Troop Requirements for Coalition Forces

The mass movement of people necessary to accomplish the ethno-sectarian division of Iraq will also require a great deal of U.S. support and involvement.<sup>140</sup> In fact, the Brookings Plan devotes several pages to a detailed proscription for the U.S. led relocation of persons,<sup>141</sup> conceding that U.S. led Coalition forces and Iraqi security units should plan for population movements that are fraught with danger.<sup>142</sup> Indeed, the Brookings Plan acknowledges that “at a minimum” international troop levels would need to be of such a size that they “did not scale back deployments in some places while helping to protect relocating populations elsewhere.”<sup>143</sup> Further, they acknowledge that “it might actually take somewhat more troops to implement the soft partition plan than are in Iraq at present.”<sup>144</sup> With coalition budgets and troop levels stretched to their limits, the ethno-sectarian division of Iraq would unquestionably require more coalition support.

#### E. THE HISTORICAL FAILURE OF ETHNO-SECTARIAN DIVISION

History demonstrates that ethno-sectarian divisions often fail to lessen the violence.<sup>145</sup> Many instances of violent conflict follow

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140. See JOSEPH & O'HANLON, *supra* note 2, at 17 (“any person who felt the need to relocate would have to be compensated fairly and assisted in finding a new life elsewhere.”).

141. *Id.* at 17-20.

142. See *id.* at 17 (adding that “[t]hose relocating might be targeted by hateful neighbors seeking a final chance to settle scores and to ensure that those departing never return. The displaced individuals themselves might be tempted to take revenge on their oppressors, with parting shots and burning of the homes of their enemies. Furthermore, as some members of a local minority relocate, those minority members remaining behind might feel particularly vulnerable and might be targeted for expulsion by thugs from the local majority. Finally, even after moving out of their neighborhoods, convoys of relocating individuals might be attacked along their departure route. Nothing about the relocation process would necessarily be easy.”).

143. *Id.* at 25.

144. *Id.*

145. See generally Radha Kumar, *The Troubled History of Partition*, FOREIGN AFF., Jan.-Feb. 1997, at 22. (arguing against a partitioning of Bosnia-Herzegovina, given the occurrences of violence associated with several historical examples of partition). *But see* JOSEPH & O'HANLON, *supra* note 2, at 11.

ethno-sectarian division, as the forced transfer of populations instigates violent conflict,<sup>146</sup> and often requires a sustained military and fiscal commitment by both the parties involved and the international community.

War in Cyprus followed its division between 1963 and 1967, and Turkish intervention in 1974.<sup>147</sup> During this time, 7,500 people were killed and over 200,000 Turkish and Greek Cypriots displaced.<sup>148</sup> A United Nations force remains in Cyprus to protect Turkish Cypriots

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The population movement and expulsions created conditions for the final recognition of Croatia's borders, but happened well before there was any overt Croat-Serb agreement. Although certainly not free from violence (the Croat commander of the operation is now on trial in the Hague for alleged war crimes), the forced movements of Serbs from Croatia in 1995 was nevertheless far less traumatizing and ultimately more stabilizing than the ferocious, unagreed ethnic cleansing meted out by the Serbs in Bosnia during 1992-5. *Id.*

However, this analogy fails when one considers that massive displacement characterized by the Balkan wars, that is not the case in Iraq: though there are certainly a great deal of displaced Iraqis, the displacement is not near the magnitude experience in the Balkans. Compare BOGDAN IVANISEVIC, LEGACY OF WAR: MINORITY RETURNS IN THE BALKANS (2004), <http://hrw.org/wr2k4/16.htm> (providing numbers of persons displaced by conflicts in the Balkans, including up to 350,000 refugees from Croatia, 2.2 million refugees and internally displaced persons from Bosnia, and 230,000 refugees from Kosovo, and noting that most displaced persons have not returned home), with HUMAN RIGHTS WATCH, IRAQ: FROM A FLOOD TO A TRICKLE 2 (2007), <http://hrw.org/backgrounder/refugees/iraq0407/iraq0407.pdf> (estimating that 2 million Iraqis have fled their homes since the United States' invasion of Iraq). When considered as a percentage of their populations, the Balkans conflict produced a displacement of approximately twenty-five percent of the population, while only about seven percent of Iraqis are displaced.

146. Sambanis, *Partition as a Solution to Ethnic War*, *supra* note 6, at 79 (concluding that to use prevention of future ethnic wars as a rationale for partition is, at best, erroneous); BRENDAN O'LEARY, CENTRE FOR INT'L BORDERS RESEARCH, WORKING PAPER 28: DEBATING PARTITION: JUSTIFICATIONS AND CRITIQUES 17-19 (2006), available at [http://www.qub.ac.uk/cibr/WPpdffiles/MFWPpdf/w28\\_bol.pdf](http://www.qub.ac.uk/cibr/WPpdffiles/MFWPpdf/w28_bol.pdf) [hereinafter O'LEARY, DEBATING PARTITION] (suggesting that past partitions actually led to more violence).

147. Sambanis, *supra* note 6, at 69.

148. See INTERNATIONAL CRISIS GROUP, THE CYPRUS STALEMATE: WHAT NEXT? 1-2 (2006), [http://www.qub.ac.uk/cibr/WPpdffiles/MFWPpdf/w28\\_bol.pdf](http://www.qub.ac.uk/cibr/WPpdffiles/MFWPpdf/w28_bol.pdf) [hereinafter THE CYPRUS STALEMATE] (noting also that prior to the partition, intercommunal violence between Turkish and Greek Cypriots led to the forced displacement of 30,000 Turkish Cypriots from mixed areas into enclaves).

from violence and to enforce the ceasefire between the two sides,<sup>149</sup> while Turkey maintains a military force of some 30,000 troops in Northern Cyprus for similar purposes.<sup>150</sup> The ethno-sectarian division of Cyprus also necessitated fiscal intervention, as Northern Cyprus, which is not recognized internationally as a sovereign state, lags behind Southern Cyprus economically and relies on annual budgetary support from Turkey.<sup>151</sup> One recent report found that the isolation of the Northern Cypriot community following the division resulted in losses of over \$112,000 (USD) for every Northern Cypriot, totaling more than \$25 billion in losses to the Northern Cypriot economy.<sup>152</sup>

The division of Palestine also did not end conflict in the region, which saw wars in 1956, 1967, and 1973.<sup>153</sup> Instead, the division of Palestine and the accompanying conflict led to over 16,000 deaths and the displacement of over 1.25 million Palestinians and Jews.<sup>154</sup> The United Nations created the United Nations Relief and Works Agency for Palestine Refugees in the Near East to alleviate the plight of Palestinians displaced by the partition. In 2006 alone, the UN spent \$598.7 million providing relief to 4.3 million Palestinian refugees.<sup>155</sup>

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149. *See id.* at 1 (acknowledging that the circumstances have changed since the force was originally deployed in 1964); *see also* Cyprus – UNFICYP – Background: United Nations Peacekeeping Force in Cyprus, <http://www.un.org/Depts/dpko/missions/unficyp/background.html> (last visited Sept. 6, 2008) [hereinafter UNFICYP] (describing the mission of the United Nations Peacekeeping Force in Cyprus as the maintenance of the military status quo).

150. *Turkey affirms anti-Cyprus stance for EU talks*, INT'L HERALD TRIB., Aug. 3, 2005, available at <http://www.iht.com/articles/2005/08/02/news/turkey.php>.

151. *See* THE CYPRUS STALEMATE, *supra* note 148, at 2 (explaining that because Northern Cyprus is so economically dependent on Turkey, it has also fallen victim to Turkey's economic inflation and instability).

152. *Research Study Reveals the Turkish Cypriots Continue to Suffer Heavily Under International Isolations*, BAYRAK RADIO TELEVISION CO., Apr. 27, 2008, <http://www.brkcc.com/index.php/cat/2/news/31160> (referring to a report by Dr. Omer Gokcekus which noted that much of this lost revenue is the result of international embargoes) (report on file with author).

153. *See* O'LEARY, DEBATING PARTITION, *supra* note 146, at 18 (describing these conflicts as part of the domino effect that occurs after a partition).

154. *See id.* at 17 (clarifying that many of the displaced Jews were expelled from surrounding Arab states).

155. U.N. Relief and Works Agency, *Report of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, ¶¶ 1, 64, U.N. Doc. A/62/13 (Aug. 1, 2007) [hereinafter UNRWA Report]



Since their 1947 partition, India and Pakistan have fought three wars, in 1948, 1965, and 1971 and maintain a contentious relationship over Kashmir.<sup>156</sup> When India was partitioned, and Pakistan created, separating Hindus and Muslims engaged in widespread communal violence, 20 million people were displaced and between 500,000 and 1 million were killed.<sup>157</sup> Since the partition, the two states have fallen into a violent dispute over the territory of Kashmir, and India has maintained an estimated 600,000 troops in its portion of the region to enforce the ceasefire between the sides.<sup>158</sup>

Following their division in 1991, Eritrea and Ethiopia launched a border war,<sup>159</sup> with tens of thousands dying.<sup>160</sup> More than 300,000 troops remain along an 800-kilometer border between the two states,<sup>161</sup> and the United Nations Mission in Ethiopia and Eritrea maintains over 1,600 peacekeeping troops to enforce the ceasefire between the two states.<sup>162</sup> In April of 2008, UN Secretary General

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(adding that the agency is one of the UN's largest programs).

156. See O'LEARY, *DEBATING PARTITION*, *supra* note 146, at 18 (noting that these conflicts are another example of the domino effect of violence following ethnic partitioning).

157. Sumantra Bose, *Decolonization and State Building in South Asia*, J. INT'L AFF., Fall 2004, at 95, 96 (adding that many of the Indian freedom fighters saw the division of the country as "the antithesis of the ideals for which they" were fighting); see also Joya Chatterji, *'Dispersal' and the Failure of Rehabilitation: Refugee Camp-Dwellers and Squatters in West Bengal*, 41 MOD. ASIAN STUD. 995, 997-98 (2007) (estimating that 15 million people were displaced in the four months immediately following the partition of India and Pakistan in 1947); O'LEARY, *DEBATING PARTITION*, *supra* note 146, at 17 (indicating that the number of killed may be as high as 2 million).

158. See *Time to Go*, ECONOMIST, Apr. 7, 2007, at 14 (arguing that India should reduce its troop presence in Kashmir because it is disproportionate to the threat of insurgency and because the troops have committed human rights violations against Kashmiris).

159. Sambanis, *Possible and Impossible Solutions* *supra* note 6, at 69.

160. *UN Fears New Ethiopia-Eritrea War*, BBC NEWS, Apr. 11, 2008, <http://news.bbc.co.uk/2/hi/africa/7341833.stm> (noting that this number represents only the border violence between 1998-2000).

161. GlobalSecurity.org, Military: Ethiopia/Eritrea War, <http://www.globalsecurity.org/military/world/war/eritrea.htm> (last visited June 29, 2008); see also INTERNATIONAL CRISIS GROUP, *ETHIOPIA AND ERITREA: STOPPING THE SLIDE TO WAR 1* (2007), <http://www.crisisgroup.org/home/getfile.cfm?id=3170&tid=5136&l=1> (estimating that Ethiopia maintains 100,000 troops on the border).

162. United Nations Mission in Ethiopia and Eritrea, Facts and Figures, <http://www.un.org/Depts/dpko/missions/unmee/facts.html> (last visited Sept. 6,

Ban Ki-Moon warned the Security Council that the withdrawal of UN forces would be accompanied by a resumption of hostilities.<sup>163</sup>

In Bosnia & Herzegovina, ethnic violence also caused the displacement of two million people.<sup>164</sup> Some trace much of this violence to the Vance-Owen plan, which proposed partitioning Bosnia into ethnically based cantons, and permitting Serbian regions to *de facto* confederate with Serbia.<sup>165</sup> The Vance-Owen plan was also the catalyst for conflict between the Bosnian-Croats and the Bosnian government, as they struggled to expand their territories, capture the land promised to them under the plan, and cleanse it of all other ethnic groups.<sup>166</sup> This cantonization process led to the commission of so many atrocities that UN Special Rapporteur for Human Rights Abuses in the Former Yugoslavia, Tadeusz Mazowiecki, resigned in July 1995 charging that the UN and International Community's failure to make any serious efforts to stop the atrocities in Bosnia made it impossible for him to continue.<sup>167</sup>

As these instances of prior state practice illustrate, historical ethno-sectarian divisions failed to mitigate violence and cost all parties involved much more in terms of military and financial

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2008) (enumerating the UN military personnel in Ethiopia and Eritrea and their tenure through January 31, 2008).

163. *UN Fears New Ethiopia-Eritrea War*, *supra* note 160 (noting that the UN has already withdrawn most of its forces after Eritrea cut off supplies to the mission).

164. See Secretary General, *Report of the Secretary-General Pursuant to Resolution 1035*, ¶ 17, delivered to the Security Council, U.N. Doc. S/1996/210 (Mar. 29, 1996) (reporting that UNHCR had formulated plans to assist Bosnia & Herzegovina with the return of its two million refugees and displaced persons).

165. PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 24 (2002) (explaining that the Vance-Owen plan sought to achieve peace by ratifying the aims of the campaigns of ethnic cleansing and legitimizing the anti-multicultural nationalism propagated by the Serbian and Croatian regimes).

166. *Id.* at 140; COLONEL BOB STEWART, *BROKEN LIVES: A PERSONAL VIEW OF THE BOSNIAN CONFLICT* (1994); LEE BRYANT, *THE BETRAYAL OF BOSNIA* 42-44 (1993), available at <http://www.wmin.ac.uk/sshl/PDF/Bryant%20-%20The%20Betrayal%20of%20Bosnia.pdf> (providing a comprehensive assessment of the cantonization proposals and implementation); see generally MLADEN KLEMENČIĆ, *TERRITORIAL PROPOSALS FOR THE SETTLEMENT OF THE WAR IN BOSNIA-HERCEGOVINA* (Martin Pratt & Clive Schofield eds., 1994) (reviewing the numerous proposals for the territorial division of Bosnia).

167. WILLIAMS & SCHARF, *supra* note 165, at 140; Balkan Action Council, *Balkan Watch Week in Review*, July 31, 1996.

support. There is no reason to expect the ethno-sectarian division of Iraq would be any different.

#### F. CONSTITUTIONAL CONCERNS

The Iraqi Constitution's provisions relating to the formation of regions is likely to make the ethno-sectarian division of Iraq nearly impossible. In order to form three ethno-sectarian based regions within Iraq, whether through partition or ethno-sectarian based federalism, Iraqis would need to assimilate multiple governorates in the desired area. The Iraqi Constitution, however, contains specific mechanisms by which one or more governorates may reorganize into autonomous regions.<sup>168</sup> Governorates may create a region by either (1) "[the] request by one-third (1/3) of the council members of each governorate intending to form a region" or (2) "[the] request by one-tenth (1/10) of the voters in each of the governorates intending to form a region."<sup>169</sup> Article 127 of the Iraqi Constitution sets the voting threshold for passing a referendum at a majority of voters.<sup>170</sup> Since most Iraqis oppose ethno-sectarian division, it seems unlikely that plans for the ethno-sectarian division of Iraq could overcome either of the tests laid out in the Iraqi Constitution.<sup>171</sup>

Additionally, a great hurdle exists to the formation of a region of more than one governorate in which competing views or visions for

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168. See IRAQ CONSTITUTION art. 115 (setting out a referendum procedure by which one or more governorates may seek organization into a region).

169. *Id.*

170. IRAQ CONSTITUTION art. 127 (qualifying the majority rule for referenda as the general rule unless otherwise stipulated).

171. See Stephen Zunes, *Support for Iraq Partition: Cynical and Dangerous*, FOREIGN POLICY IN FOCUS, Oct. 12, 2007, <http://www.fpif.org/fpiftxt/4639> (asserting that most Iraqis who support creating a federal system advocate a process based on geography rather than ethnicity and religion); see also Ned Parker & Raheem Salman, *A Divided Iraq Unites Against Partition Plan*, L.A. TIMES, Oct. 1, 2007, at A4 (reporting that Iraq's normally divided leadership unitedly denounced a non-binding U.S. resolution endorsing decentralization through the creation of semi-autonomous regions); *Iraqi TV Channels Carry Reactions to US Senate Resolution*, *supra* note 48 (quoting Iraqi political analysts, politicians and spokesmen for various groups as denouncing the U.S. call for partition as a violation of the Iraqi Constitution and misunderstanding of the country's history and current political climate.); 2007 POLL, *supra* note 47, at 13 (finding that ninety-eight percent of the Iraqi population oppose separation along sectarian lines.).

the region exist.<sup>172</sup> In such a situation, the Law on Formation of Regions provides that in the case of competing initiatives, a pre-referendum poll will be held in each governorate to decide which regional vision will be put to the vote in a referendum.<sup>173</sup> “In order to succeed, a federal initiative must win this stage in *every* governorate concerned, and then receive an absolute majority in the subsequent referendum—again in each of the governorates targeted in the regional initiative.”<sup>174</sup> With such a high standard (consensus of a majority in each governorate as to the vision of the region), the great public opposition to ethno-sectarian division, and in light of the diversity of the proposed regions, a constitutionally valid formation of three ethno-sectarian based regions is highly unlikely.

#### G. THE EMERGING PILLARS OF CONSENSUS BASED GOVERNANCE

Given the relative flood of legislation passed in February of 2008, the ethno-sectarian division of Iraq would fail to capitalize on the emerging political cooperation. As Jason Gluck of the United States Institute of Peace adeptly observed, “February 13 may . . . be remembered as the day when issue-politics rose above ethnic and sectarian ideology.”<sup>175</sup> On February 13, 2008, Iraqi politics “moved to a new level” by achieving two compromises necessary to pass three laws (Provincial Powers Law, Amnesty Law, and 2008 Budget).<sup>176</sup> First, the linking of the three laws reflected compromise from all parties. Generally speaking, the Kurds prioritized revenue distribution, the Sunnis the Amnesty law, and the Shi’a the provincial powers law (though there were conflicting positions

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172. Law of the Executive Procedures Regarding the Formation of Regions (2006) (Iraq), arts. 3, 4 *available at* <http://www.ncciraq.org/spip.php?article2422>.

173. *Id.* art. 4, Second (b).

174. Visser & Stansfield, *supra* note 63, at 18 (emphasis added); *see also* Iraq, *Law on Formation of Regions*, art. 6.

175. JASON GLUCK, UNITED STATES INSTITUTE OF PEACE, FROM GRIDLOCK TO COMPROMISE: HOW THREE LAWS COULD BEGIN TO TRANSFORM IRAQI POLITICS (2008), [http://www.usip.org/pubs/usipeace\\_briefings/2008/0319\\_iraqi\\_politics.html](http://www.usip.org/pubs/usipeace_briefings/2008/0319_iraqi_politics.html).

176. *See id.* (describing how the passage of the three independently significant laws, the result of concessions and compromise among the parties, revealed a new period in the Iraqi political dynamics).

among the Shi'a groups).<sup>177</sup> Second, by bundling the three laws together the parties found a "creative and unprecedented" means of achieving accord in Iraqi politics.<sup>178</sup>

The compromises of February 13, 2008, though momentous, are not an anomaly in Iraqi politics. Prior compromises reflect the ability of Iraqis to work together and often go unnoticed or unannounced by those proposing the ethno-division of Iraq. In October of 2006, Sunnis, Sadrists, and secularists joined to temporarily block passage of the Law on the Executive Procedures to Form Regions.<sup>179</sup> In "response to the June 13, 2007 bombing of the al-Askari Mosque in Samarra" various ethnic and sectarian leaders made unified statements "condemning the act and calling for calm."<sup>180</sup> In January 2008, a coalition of ten Shi'a and Sunni political parties formed the National Understanding Project in an effort to block certain Kurdish ambitions for decentralization.

In passing these three laws, "Iraqi politicians learned they could reach consensus on a broad range of issues where resolution of any one would have been difficult if not impossible standing alone."<sup>181</sup> Though it is conceded that these signs of political compromise and reduced friction are limited, they provide "cautious hope, that a new political culture is beginning to take root in Iraq—one based not on pure power politics, but a principled respect for the rule of law."<sup>182</sup>

#### IV. THE ALTERNATIVE: MODERN MULTI-ETHNIC FEDERALISM

Given our analysis as set forth above, our position is that the political future of Iraq is a federal structure based on existing

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177. *See id.* (detailing each of the major ethnicities' priorities: the Kurds receiving seventeen percent of the national revenue, the Sunnis obtaining the release of thousands of detainees, and the Shi'a providing limited autonomy for provinces with a deadline for provincial elections).

178. *Id.*

179. Law of the Executive Procedures Regarding the Formation of Regions (2006) (Iraq).

180. UNITED STATES DEPARTMENT OF DEFENSE, MEASURING STABILITY AND SECURITY IN IRAQ: SEPTEMBER 2007 REPORT TO CONGRESS 1 (2007), <http://www.defenselink.mil/pubs/pdfs/Signed-Version-070912.pdf>.

181. GLUCK, *supra* note 175.

182. *Id.*

political and legal structures and respectful of the complex history of Iraq. The Iraqi Constitution, despite all its failings and inconsistencies, provided Iraqis with the opportunity to rebuild their homeland from the ground up, together, and with a common vision in mind. Therefore much of what this Article proposes builds upon existing legal infrastructure, and the significant progress that has been made in ratifying the Constitution and subsequently passing the formation of regions and provincial powers laws.

The plan set forth herein asserts the fundamental position that the future of Iraq is better served by a federalist structure based upon an 18 governorate model as set forth in the Constitution. The sub-federal boundaries are already drawn; Iraqis are in a position to devolve appropriate power to these entities in an asymmetric and gradual manner. Concurrent with the power devolution, Iraq would benefit from the development of a system of resource and revenue distribution so as to ensure fair and equitable growth and prosperity across the federation. Coordination mechanisms such as framework legislation and dispute resolution committees would also be necessary. In order to respect the complex and diverse identities of Iraqis, safeguards need be established to protect the rights of sub-federal entities and Iraq's many minorities.

#### A. FEDERALIST STRUCTURE WITH EIGHTEEN GOVERNORATES

Iraq presently has a federalist structure with eighteen governorates as set forth in the Constitution.<sup>183</sup> Federations are states with multi-tiered governments that involve a combination of shared rule by central and regional government institutions as provided in the Constitution.<sup>184</sup> Each government tier rules over different matters, and neither is subordinate to the other.<sup>185</sup> Importantly, the original motivation for a federalist structure comprised of the eighteen existing Iraqi governorates was that it would ensure that no unit

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183. IRAQ CONSTITUTION art. 112.

184. *See id.* art. 110 (detailing the list of powers to be shared between the federal and regional authorities).

185. *See id.* art. 107 (listing the federal government's exclusive powers); *id.* art. 111 (reserving all powers not under exclusive federal control to the regional authorities).

making up the federation would be dominated by any one ethnic group.<sup>186</sup>

Both the 2005 Iraqi Constitution and the 2008 Provincial Powers Law establish a federal structure with a strong central government. Article 1 of the Constitution provides that, “[t]he Republic of Iraq is a single, independent federal State with full sovereignty.”<sup>187</sup> Article 106 also obligates the Iraqi government to maintain Iraq’s democratic federal system.<sup>188</sup> According to the 2008 Provincial Powers Law, which took effect following the October 1, 2008 provincial council elections, provinces may “adopt local legislation . . . in a manner that enables [them] to run [their] affairs according to the administrative decentralization principle and in a way that does not contradict the Constitution and the federal laws.”<sup>189</sup> John McGarry and Brendan O’Leary, authors of *The Future of Kurdistan in Iraq*, have described the present structure:

Iraq’s Constitution actually eschews both the one-size-fits-all preference of the integrationists and the inclination of the three-regions advocates, in favor of a bespoke, flexible, or voluntarily asymmetrical federation tailored to whatever (legitimate) preferences exist, or come to exist, among Iraq’s democratic constituencies. In this respect, the Constitution takes a liberal consociational approach that is focused on democratic preferences rather than on predetermined ethnic or communal categories.<sup>190</sup>

The goal of the Iraqi federal structure may be best served by a balance of shared and self-rule. The federal structure must accommodate the need for robust central government power and

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186. BRENDAN O’LEARY & JOHN MCGARRY, CONSTITUTION BUILDING AND FEDERAL OPTIONS IN IRAQ: THE KURDISH CHALLENGE, *available at* <http://www.reliefweb.int/rw/RWB.NSF/db900SID/LHON-6AQCGW?OpenDocument> [hereinafter O’LEARY & MCGARRY, CONSTITUTION BUILDING].

187. IRAQ CONSTITUTION art. 1.

188. IRAQ CONSTITUTION art. 106 (requiring that “[t]he federal authorities shall preserve the unity, integrity, independence and sovereignty of Iraq and its federal democratic system”).

189. Provincial Powers Law, art. 2 (Iraq), *available at* <http://www.washingtoninstitute.org/html/newsletterImages/DraftProvincialPowersLawForWeb.pdf>.

190. John McGarry & Brendan O’Leary, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT’L J. CONST. L. 679, 686-87 (2007) [hereinafter McGarry & O’Leary, *Iraq’s Constitution of 2005*].

resources to manage Iraqi diversity and avoid a self-destructing civil war. The state structure could also be designed to accommodate the territorial-based identities of most Iraqis and their legitimate desire to maintain control over local issues. According to one commentator: “[s]afety and stability are more likely to be found, not by locking in on and privileging these three communal identities, but by structuring a federation that is, as far as possible, permissive—by building a federal system that permits many forms of identity, including the national, to achieve expression.”<sup>191</sup>

As the Public International Law & Policy Group previously noted in a report jointly published with The Century Foundation, the primary advantage of a federal system is that it is appropriate for states with “a diverse and pluralistic population with a desire to maintain national unity,” such as Iraq.<sup>192</sup> “In a federal structure comprised of numerous constituent units, the diverse groups will have some stake in the central government and may be able to protect and promote their interests through effective representation.”<sup>193</sup> Federal governments also tend to promote moderate leaders who “must appeal to a broad political base because such structures group villages and municipalities into larger constituent units.”<sup>194</sup>

Iraqi federalism could relatively easily be based upon the eighteen governorate structure already provided for in the Iraq Constitution. Federations with fewer regions (two or three) are less stable than those with many.<sup>195</sup> While two-region federations are prone to collapse,<sup>196</sup> three-unit federations are also fragile, as “opportunities

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191. David Cameron, *Making Federalism Work*, in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT 153, 159 (Markus E. Bouillon, David M. Malone & Ben Roswell eds., 2007).

192. *Establishing a Stable Democratic Constitutional Structure*, 39 NEW ENG. L. REV. 53, 68-69 (2003).

193. *See id.*

194. *Id.*

195. RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 113-14 (1999) [hereinafter WATTS, COMPARING FEDERAL SYSTEMS] (explaining that federal systems with fewer regions, in particular bipolar federations, are unstable because each region is generally given veto powers over all matters, often leading to impassable deadlocks).

196. McGarry & O’Leary, *Iraq’s Constitution of 2005*, *supra* note 190, at 679 (“[A]s the experience of Czechoslovakia, pre-1971 Pakistan, and, more recently, Serbia and Montenegro suggests, because there are few opportunities for shifting



for shifting coalitions are still limited.”<sup>197</sup> According to Keith Mines, a former US Special Forces Officer and founding member of the Council on Emerging National Security Affairs “[t]he only way [Iraq] can be functional over the long term is if it is organized around a federation model for its [eighteen] governorates, which breaks down confessional groups (e.g., Shi’a, Sunni) at the local level, leading to provincial political identification that facilitates national unity.”<sup>198</sup> Under the system of eighteen governorates, Iraqis are more free to associate politically as they see fit, rather than having political identities and units forced upon them based on ethno-sectarian identities.

In implementing the eighteen governorates structure, it may be necessary to give attention to the negative connotation many Iraqis apply to the term federalism. Carole O’Leary of American University makes the point that public sentiment among Sunni and Shi’a Iraqis over Iraqi federalism is obfuscated by Kurdish efforts for increased autonomy.<sup>199</sup> According to former Prime Minister Ibrahim Jaafari, a common Iraqi perspective is that federalism is solely related to the Kurdish region in the north of Iraq.<sup>200</sup> Noah Feldman of Harvard Law School also observed that following the coalition takeover of Iraq, “federalism negotiations were always about the balance between the Kurds’ regional government and the federal authorities in Baghdad . . . .”<sup>201</sup> Federalism was thus interpreted by some as a politically acceptable way of preserving a unified Iraq while

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alliances and the two units tend to be pitted against each other on every issue.”).

197. *Id.*

198. Keith W. Mines, *After the Surge: Toward an 18-State Federation*, FOREIGN SERV. J., Mar. 2008, at 22, 23.

199. Carole O’Leary, Research Professor, American University School of International Service, Remarks at the American University International Law Review and Public International Law and Policy Group Symposium, Rethinking the Future: The Next Five Years in Iraq (Feb. 11, 2008) (transcript on file with the American University International Law Review)

200. Interview by Jane Corbin with Ibrahim Jaafari, Prime Minister in Iraq (Mar. 18, 2006), available at <http://news.bbc.co.uk/2/hi/programmes/panorama/4820858.stm> (contending that the idea of federalism in Iraq generally related to the Kurdistan region and became an agreed upon constitutional reality).

201. Noah Feldman, *Agreeing to Disagree in Iraq*, N.Y. TIMES, Aug. 30, 2005, at A19.

recognizing Kurdish autonomy,<sup>202</sup> while other saw it as a “Kurdish ploy” for independence deserving great skepticism.<sup>203</sup>

## B. DEVOLVE POWER

Critical to the sustainability of the political and economic stability of the state is for power to be transferred from the central government to the governorates. Key to maintaining this stability is ensuring that power is devolved only where appropriate, asymmetrically, and in a gradual manner that is consistent with each governorate’s ability to accept such powers.<sup>204</sup>

### *1. Devolution of Power Only Where Appropriate*<sup>205</sup>

The Iraqi Constitution already achieves a great deal in determining where devolution is appropriate. As such, the Constitution, augmented by the provincial powers law, could be the foundation for the devolution of power in Iraq. The Constitution provides for the powers of regions or governorates.<sup>206</sup> Specifically, Article 111 provides that any powers not clearly granted to the federal government are reserved for the regions or governorates.<sup>207</sup> Additionally, Article 110 provides for concurrent powers between the federal government and sub-federal governments including customs management, electric energy and its distribution,

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202. *Id.*

203. Nimrod Raphaeli, *Kurdistan – The Quest for Statehood*, KURDISTAN TIMES, Mar. 27, 2008, (reporting that the new political leaders who had previously promised to support the Kurdish cause while serving as opposition to the Saddam Hussein regime, reneged on their promises and viewed the issue of federalism as it pertained to the Kurdish region as one in need of “multiple revisions”).

204. Abdel Salam Sidahmed, *Islamism, Nationalism and Sectarianism, in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT* 71, 84 (Markus E. Bouillon, David M. Malone & Ben Roswell eds., 2007) (noting that the devolution of power in Iraq should be done in a way that is “consensus-based, accommodative, participatory, and equitable in terms of power and resource sharing for the various Iraqi communities and regions.”).

205. See PAUL R. WILLIAMS, MATTHEW T. SIMPSON & CHRISTINA J. SHEETZ, PEACE AGREEMENT DRAFTING GUIDE: DARFUR (Public International Law and Policy Group 2007), available at <http://ssrn.com/abstract=1078714> (providing a more thorough consideration of the core elements of political devolution).

206. IRAQ CONSTITUTION arts. 107, 111.

207. *Id.* art. 111.

environmental policy, development and planning policies, public health policy, public education policy, and water resource policy.<sup>208</sup> Though Article 110 describes these powers as concurrent (to be shared between the federal government and the sub-federal entities), Article 111 provides that in the event of a dispute over these concurrent powers, the governorate or region's law shall receive priority.<sup>209</sup> This implicitly gives the regions or governorates not organized into a region control over the Article 114 powers. The Provincial Powers law augments the Constitution by granting governorates direct authority over local security,<sup>210</sup> allowing governorate officials to "oversee and inspect public facilities in the province (other than courts, military units, universities, colleges, and institutions)" and giving the officials of the governorate limited "input into the appointment of senior ministry officials in the province . . . allows them to dismiss such officials by an absolute majority vote in the provincial council."<sup>211</sup>

Though devolving a good deal of power to the regions and governorates, the Iraqi Constitution also provides the federal government in Baghdad with relatively robust controls. The authority provided to the central government in Article 109 to "preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system" is broad and provides a foundation for a federalist system with a strong central government.<sup>212</sup> Several of Article 110's exclusive federal powers (national security, fiscal policy, national budget, interstate commerce) support a strong national government within a federation.<sup>213</sup> Consistent with this strong central government, the Provincial Powers Law grants the Council of Representatives the power to remove provincial

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208. *Id.* art. 110.

209. *Id.* arts. 110, 111.

210. Provincial Powers Law, art. 31 (Iraq) (authorizing the Governor of each governorate to control local security agencies and departments charged with protection, conservation and order); *see also* IRAQ CONSTITUTION art. 117(5) (granting regional governments the power to organize their own security forces and other regional administrative matters).

211. GLUCK, *supra* note 175. *See* Provincial Powers Law, 2008, art. 31.4 (Iraq) (imparting section over most public facilities with the Governor of the region); *see also* Provincial Powers Law, 2008, art. 7.9 (Iraq).

212. IRAQ CONSTITUTION art. 109; Cameron, *supra* note 191, at 163.

213. Cameron, *supra* note 191, at 163.

governors and dissolve provincial councils, and allows the Council of Ministers to remove other senior provincial officials.<sup>214</sup> Provincial revenue is also derived largely from allocations from the federal budget.<sup>215</sup> Additionally, the prohibition against contradicting federal laws protects the strength of the central government, as any provincial attempt to modify federal ministerial regulation is voidable as contradicting federal law.<sup>216</sup>

Federal control over foreign affairs (including the armed services and national security), monetary policy, customs and duties, communications, interregional transportation, debt management, immigration and naturalization, and management of the national economy is consistent with state practice.<sup>217</sup> Likewise, providing for sub-federal control over education, health, social welfare, police powers, local taxes, and regional transportation is also consistent with state practice.<sup>218</sup> Article 111 of the Iraqi Constitution reserves

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214. GLUCK, *supra* note 175; Provincial Powers Law, 2008, art. 20.2 (Iraq) (stating that “[t]he Council of Representatives may dissolve the Council by absolute majority upon the request of the Governor or one third of the Governorate Council”).

215. Provincial Powers Law, art. 44 (Iraq) (stating that the Governorates financial resources consist of, *inter alia*, the budget granted by the Federal Government); GLUCK, *supra* note 175 (observing that “[t]he Provincial Powers Law bestows no tax power upon the provinces, but does grant undefined authority to levy local fees and fines, and generate revenue from services and investment projects, as well as grants and donations.”).

216. *See* GLUCK, *supra* note 175 (asserting that the proscription against adopting local legislation that contradicts federal laws is a key limitation on provincial authority, as almost every federal ministry has or will have statutes granting them authority to regulate within their respective spheres, thereby limiting provincial ability to modify ministerial regulations).

217. Internationally, many nations have taken a similar approach to federal control. *See, e.g.*, CONST. OF BOSNIA AND HERZEGOVINA, 1995, art. III; Bougainville Peace Agreement (Papua N.G.), Aug. 30, 2001, *available at* <http://rspas.anu.edu.au/Melanesia/documents/bougainville/PDF/BougainvillePeaceAgreement29Aug01.pdf>; CONSTITUTION § 51 (Austl.); GRUNDGESETZ [GG] [Constitution] art. 73 (F.R.G.); COSTITUZIONE [COST.] [Constitution] art. 117 (Italy); CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO art. 19; Bundesverfassung der Schweizerischen Eidgenossenschaft [BV] [Constitution] Apr. 18, 1999, arts. 54, 58, 60, 61, 65 (Switz.).

218. Regional governments are delegated similar powers in many nations. *See, e.g.*, Bougainville Peace Agreement (Papua N.G.); CONST. (1987), Art. X, (Phil.); S. AFR. CONST. 1996 Schedule 5. The Constitution of South Africa also specifically lists concurrent powers. *Id.* Schedule 4.

unnamed powers to the regional and governorate governments.<sup>219</sup> The architects of the Iraqi Constitution designed a power sharing structure that is effective and sufficiently nuanced to account for the diversity of the eighteen governorates and their people.

## 2. *Asymmetric Devolution*

Often following violent conflicts, provinces lack the ability to govern effectively, yet creation of provincial governments seems necessary for political stability. A phased and asymmetric approach to the assumption of powers by sub-federal governments thus provides crucial time to build capacity and infrastructure.<sup>220</sup> In states

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219. IRAQ CONSTITUTION art. 111; Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C. No. 5 (Appendix 1985), art. 91 (Can.) (“... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say . . . [cl. 29] Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”); INDIA CONST. art. 246, cl. 97 (“Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”); LAWS OF MALAYSIA [Constitution] art. 77 (“The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.”). *But see* BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] art. 15(1) (Austria) (“Insofar as a matter is not expressly transferred by the Federal Constitution to the legislation or also the execution of the Federation, it remains in the independent competence of the *Länder*.”); Constituição Federal [C.F.] [Constitution], art. 25(1) (Braz.) (“Powers not forbidden to them by this Constitution are reserved to the States.”); GG art. 70(1) (F.R.G.) (“The *Länder* [States] shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.”); COST. (Italy) art. 117 (“The regions have the legislative power with respect to any matter not expressly reserved to the legislation of the State.”); CONSTITUTION Art. 4(7) (2005) (Nig.) (“The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say: (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.”); KONSTITUTSIJA ROSSIJSKOI FEDERATSII [Konst. RF] [Constitution] art. 73 (Russ.) (“Outside the limits of authority of the Russian Federation and of the powers of the Russian Federation on issues falling under the joint jurisdiction of the Russian Federation and subjects of the Russian Federation, the subjects of the Russian Federation shall possess the plenitude of State power.”).

220. For example, the 2001 peace agreement between Bougainville and Papua New Guinea provides for a gradual devolution of powers from the central government to the autonomous Bougainville government “taking full account of needs and capacity.” Bougainville Peace Agreement (Papua N.G.) art. 101. Also,

where different sub-federal governments assume different powers over time, the characteristics of gradual devolution vary in terms of the criteria applied and evaluation of progress.<sup>221</sup>

The devolution of power in Iraq described above provides for the asymmetrical allocation of power and responsibility to ensure fair participation of each of the eighteen governorates and to respect the Kurdish region's constitutionally-provided status as a region.<sup>222</sup> Article 114.4 of the Iraqi Constitution also provides for the asymmetric distribution of revenue to the governorates and regions based upon their resources and needs.<sup>223</sup>

Given the varied governorate capacity levels, each governorate is in a different position to provide services and assume powers devolved from the federal government. Similarly, the governorates have different priorities, with some concerned with control of oil fields and others concerned with control of electric power grids.<sup>224</sup> Devolving power asymmetrically allows the central government to accommodate the governorates' differing preferences, while ensuring that the governorates' power and control of resources are shared among them. Of course, the determination of the share of each power allocated to each governorate will be challenging, but the ability of Iraqi legislators to craft solutions to difficult problems was evidenced by their ability to simultaneously pass three key pieces of benchmark legislation on February 13, 2008.<sup>225</sup>

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in Spain, the Autonomous Communities can elect which powers they want to have within constitutionally-defined limits. CONSTITUCIÓN [C.E.] art. 148 (Spain). Further, if the Autonomous Communities cannot meet their obligations, the central government may take steps to compel the Autonomous Communities to fulfill their obligations. *Id.* art. 155.

221. See, e.g., C.E. art. 148 (Spain) (outlining some twenty-two categories over which Autonomous Communities may have jurisdiction including municipal boundaries, planning and housing within townships, recreational ports, airports, woodlands, agriculture, inland fishing, local fairs, museums, and social assistance).

222. See VIJAYA SAMARAWEEA, USAID, LAW ON THE EXECUTIVE PROCEDURES FOR REGION FORMATION: AN ANALYSIS (2007), available at <http://www.lgp-iraq.org/publications/index.cfm?fuseaction=throwpub&ID=163> (suggesting that the unique consideration of the Kurdish area as its own region is reflective of the asymmetrical federalism enshrined in the Iraqi Constitution).

223. See IRAQ CONSTITUTION art. 109 (stating that resources will be distributed proportionate to the population).

224. See *infra* Part IV.D (discussing the tension between governorates over natural resources in Iraq).

225. See *supra* Part III.G (recognizing the significance of the agreements

## C. RESOURCE DISTRIBUTION

Iraq's natural resources must be distributed equitably to allow prosperity throughout the nation.<sup>226</sup> The Iraqi Constitution recognizes this need to allocate resources fairly,<sup>227</sup> and Iraq's leaders could build upon the constitutional framework to develop a strong resource distribution scheme. The current situation in Iraq is unfortunate, with intra-governmental infighting over control of oil, water and electricity.<sup>228</sup>

The Iraqi Constitution provides that oil and gas resources belong to all the people of Iraq in all the regions and governorates,<sup>229</sup> and that the revenues shall be distributed in a fair manner in all parts of the country to ensure balanced development throughout Iraq.<sup>230</sup> The federal government, in cooperation with the oil producing governorates and regions, is charged with managing oil and gas extracted from current fields, provided that it allocates the wealth "in a fair manner in proportion to the population distribution in all parts of the country."<sup>231</sup>

Currently, the Ministry of Electricity oversees the production and distribution of Iraq's electric power.<sup>232</sup> However, the production of electricity requires oil to fuel its generators, so the Ministry of Electricity must work with the Ministry of Oil. However, the two ministries do not always cooperate, and the Ministry of Oil's focus

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reached by the Iraqi legislators over issues that have been the source of tension between the governorates).

226. See Nicholas "Fink" Haysom, *Forging an Inclusive Social Contract*, in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT 143, 146 (Markus E. Bouillon, David M. Malone & Ben Roswell eds., 2007) (arguing that the Iraqi constitution should reflect the country's need to distribute natural resources fairly).

227. See IRAQ CONSTITUTION art. 117.3 ("Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their own resources, needs and size of their population.").

228. See Mohammed A Salih, *Iraqis Fight Over Oil Spoils*, ASIA TIMES, available at [http://www.atimes.com/atimes/Middle\\_East/HJ26Ak01.html](http://www.atimes.com/atimes/Middle_East/HJ26Ak01.html) (last visited Sept. 15, 2008) (emphasizing the crisis over control of oil and other resources by the segregated regions in Iraq).

229. See IRAQ CONSTITUTION art. 108.

230. See *id.* art 117.3.

231. See *id.*

232. See Ministry of Electricity Official Website, [http://www.moelc.gov.iq/default\\_en.htm](http://www.moelc.gov.iq/default_en.htm) (last visited Sept. 7, 2008).

on exporting oil to raise Iraqi revenues has led to a shortage of oil available in Iraq to fuel power plants,<sup>233</sup> causing power plants to shut down.<sup>234</sup>

Furthermore, even when power plants in the governorates are operating, the electricity that they generate must be transmitted to Baghdad.<sup>235</sup> In the past, Saddam Hussein redirected much of Iraq's electricity into Baghdad, leaving much of rural Iraq without power.<sup>236</sup> Now that the governorates have more control over the amount of electricity that they produce, many refuse to share their electricity with Baghdad, particularly those governorates in the Shi'a-dominated South.<sup>237</sup> In addition to depriving Iraqis of electricity, government infighting and the governorates' failure to cooperate has impacted Iraq's water supply.<sup>238</sup> Electricity is necessary to run water treatment facilities and to pump water through pipes in homes.<sup>239</sup> With Iraqis having only limited amounts of

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233. See Glenn Zorpette, *Oil and Electricity Ministries Won't Mix*, INT'L HERALD TRIB., Mar. 10, 2008, at 6 (discussing the strained relations between the Ministers of Oil and Electricity, and explaining that the Minister of Oil has strong ties to the Supreme Council for the Islamic Revolution in Iraq, a dominant Shiite party, while the Minister of Electricity has little political clout).

234. *C.f.* Greg Bruno, *Council on Foreign Relations: Rebuilding Iraq*, COUNCIL ON FOREIGN RELATIONS, Jan. 17, 2008, [http://www.cfr.org/publication/15019/rebuilding\\_iraq.html](http://www.cfr.org/publication/15019/rebuilding_iraq.html) (outlining the wide disparities in the availability of electricity in different parts of Iraq, with residents of Kirkuk having up to twelve hours of electricity per day and residents of some rural areas having only four hours of electricity per day).

235. See James Glanz & Stephen Farrell, *Militias Seizing Control of Grid, Starving Baghdad of Electricity*, N.Y. TIMES, Aug. 23, 2007, at A1 (explaining that there is no central electricity switching station in Iraq, so the governorates have to share their electricity by flipping a switch that would transmit power to Baghdad).

236. See *id.*; Alexandra Zavis, *It's a Power Struggle Every Day*, L.A. TIMES, Mar. 24, 2008, at A4 (comparing Baghdad's electricity availability and consumption during Hussein's regime with current trends).

237. See Glanz & Farrell, *supra* note 239 (noting that Sadr's Mahdi Army has had control of the electric power plant in Basra and shut off the power in strategic places in Basra as part of his offensive against U.S. and British forces in May 2007).

238. See Iraq: Water Shortage Leads People to Drink from Rivers, <http://www.irinnews.org/Report.aspx?ReportId=70243> (last visited Sept. 7, 2008) (explaining that corruption and insecurity among the municipalities is the cause of the water shortages in Iraq).

239. See Bruno, *supra* note 234 (noting that although Iraqis' access to potable water has surpassed prewar levels overall, there are still wide disparities in access to potable water in different areas of Iraq because of unavailability of electricity).



electricity per day, most do not have running water in their homes, and much of the water that is available to Iraqi citizens is untreated.<sup>240</sup>

A successful federal structure in Iraq thus requires strong resource distribution mechanisms to combat government infighting and to ensure that the fairness and equality called for in the Constitution can be achieved. One such mechanism is a joint natural resources authority charged with regulating the distribution of resources between the central and governorate governments. Joint resource authorities promote sub-federal participation in the control of certain resources within a state as they encourage power sharing between the federal and sub-federal governments. A joint natural resource authority could include representatives of the federal and governorate governments such that it will allow for governorate participation and encourage equitable and responsible regulation.<sup>241</sup>

#### D. REVENUE SHARING

A successful federal structure needs fair mechanisms for sharing the revenue generated from Iraq's resources. The need for robust, fair and flexible revenue distribution mechanisms is compounded by the current economic environment in Iraq. Iraqis face a void of economic trade,<sup>242</sup> an unemployment and underemployment rate that some

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240. See OXFAM INTERNATIONAL, RISING TO THE HUMANITARIAN CHALLENGE IN IRAQ 3 (2007), available at <http://www.oxfam.org/files/Rising%20to%20the%20humanitarian%20challenge%20in%20Iraq.pdf> (reporting that seventy percent of Iraqis lack access to clean water, and claiming that much of Iraq's water is contaminated from the dumping of sewage into rivers).

241. See Petroleum (Submerged Lands) Act, 1967, c. 8(a) (Austl.) (outlining the authority of one of Australia's multiple joint resources authorities, each composed of representatives from the federal government and one province); see also Canada-Nova Scotia Offshore Petroleum Resources Accord art. 12.03, Can.-N.S., Aug. 26, 1986, available at <http://www.cnsopb.ns.ca/regulatory/pdfs/Accord.pdf> (describing the Canada-Nova Scotia Board of Petroleum Resources as one that issues discovery and production licenses, approves development plans, and makes decisions regarding operating licenses and authorizations for work). The Board of Petroleum Resources has considerable power over certain responsibilities but its decisions over other matters are subject to challenge and review by representatives of the federal and provincial governments. *Id.* art. 13. In some instances, the provincial minister may alone veto particular decisions of the board. *Id.*

242. See UNITED STATES DEPARTMENT OF DEFENSE, *supra* note 180, at 10.

estimate may be as high as forty percent,<sup>243</sup> inflation running over seventy percent,<sup>244</sup> and fifty-four percent of the population living on less than one dollar (U.S.) per day.<sup>245</sup> Add to this the fact that more than ninety percent of Iraq's government revenue comes from oil exports, but not all governorates have access to oil deposits,<sup>246</sup> and the picture becomes quite clear: Iraqis need revenue sharing that is fair and effective.

Currently, regions and governorates are entitled to "an equitable share of the national revenues sufficient to discharge its responsibilities and duties . . . having regard to its resources, needs and the percentage of its population"<sup>247</sup> A constitutional obligation exists to pursue a balanced development strategy through which revenues from current fields are distributed fairly.<sup>248</sup> Also, as this constitutional provision makes clear, the territorial status of the Kirkuk governorate has been decoupled from the oil revenues that flow from its oilfields. As Kirkuk's oil comes from currently exploited fields, its revenues are to be redistributed across Iraq.

To augment the constitutional provisions for fair and effective revenue distribution, Iraq may consider establishing a fair mechanism for the calculation of revenue distribution,<sup>249</sup> and

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243. See UN ASSISTANCE MISSION FOR IRAQ, HUMANITARIAN BRIEFING ON THE CRISIS IN IRAQ 3 (2007), available at <http://www.uniraq.org/documents/UN-Iraq%20Humanitarian%20Briefing%20Fact%20Sheet%20May%202007.pdf> (reporting unemployment between twenty-five and forty percent).

244. *Id.*

245. *Id.*

246. See Cordesman, *supra* note 73 (stating that while the vast majority of Iraq's government revenue comes from oil exports, the Sunni west has no claim to oil revenues because they lack developed oil fields).

247. IRAQ CONSTITUTION art. 117.

248. See Vanessa Jimenez, *Iraq's Constitutional Process: Challenges on the Road Ahead*, 13 HUMAN RIGHTS BRIEF 21, 23 (2005) (explaining that the Iraq constitution contains "mechanisms" aimed at ensuring equitable and fair distribution of the economic benefit of the country's natural resources).

249. See, e.g., DEPARTMENT OF TREASURY AND FINANCE GOVERNMENT OF WESTERN AUSTRALIA, SPECIFIC PURPOSE PAYMENTS (SSPs), available at [http://www.dtf.wa.gov.au/cms/tre\\_content.asp?id=1909](http://www.dtf.wa.gov.au/cms/tre_content.asp?id=1909) (last visited Sept. 7, 2008) [hereinafter SPECIFIC PURPOSE PAYMENTS] (explaining the variables of the formula used to distribute Australia's Special Purpose Payments). In Australia, the federal government collects most of the tax revenue and disburses large transfers to the provinces. See DEPARTMENT OF TREASURY AND FINANCE GOVERNMENT OF WESTERN AUSTRALIA, COMMONWEALTH GRANTS, available at <http://www.dtf.wa>

procedures for adjusting federal-governorate financial arrangements in recognition of the volatility of commodities markets.<sup>250</sup> As PILPG Senior Peace Fellow Vanessa Jimenez suggested in 2005, “if properly implemented and interpreted,” a reformed revenue calculation and distribution scheme would allow Kurds and Shi’a “to exercise the self-governance that they desire,” while assuring Sunnis of their fair share of the national wealth.<sup>251</sup>

#### E. COORDINATION MECHANISMS

The political instability affecting Iraq presents a challenge for implementing a successful federal structure. Disorganization and distrust permeate throughout all levels of government. To tackle this challenge head on, Iraqis could develop several coordination mechanisms including framework legislation to transparently and clearly delineate governmental responsibilities, committees to address government coordination and to settle disputes between

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[.gov.au/cms/tre\\_content.asp?id=1917](http://www.gov.au/cms/tre_content.asp?id=1917) (last visited Sept. 7, 2008) [hereinafter COMMONWEALTH GRANTS]. The Commonwealth Grants Commission recommends the amount of general-purpose transfers from the federal government to specific provinces using a horizontal fiscal equalization principle, which considers the differing costs of providing services in each province. *See id.* In India, the President considers the recommendations of a Finance Commission each year before determining what percentage of the net proceeds of any tax each provincial government will receive. *See* INDIA CONST. arts. 269, 270, 275. A consideration of which provincial governments paid the tax greatly influences this determination. *Id.* In Austria, the federal government distributes revenue to the regional governments based on tax revenue criteria, (regional or local revenue of a tax) and demographic criteria (the number of inhabitants of a province). *See* FEDERAL MINISTRY OF FINANCE AUSTRIA, FISCAL EQUALIZATION SYSTEM IN AUSTRIA 2, available at [http://english.bmf.gv.at/Budget/IntergovernmentalFi\\_252/Fiscal\\_Equalisation\\_System.pdf](http://english.bmf.gv.at/Budget/IntergovernmentalFi_252/Fiscal_Equalisation_System.pdf).

250. *See* Ronald L. Watts, *Forum of Federations, Processes for Adjusting Federal Financial Relations: Examples from Austria and Canada*, in FISCAL RELATIONS IN FOUR COUNTRIES: FOUR ESSAYS 17, 21 (Paul. M. Boothe ed., 2003) [hereinafter Watts, *Forum of Federations*] (noting that the federal governments in Australia, India, and South Africa establish different forms of standing or periodic commissions to analyze their respective distributive formulas, making recommendations to parliament when appropriate); *see also id.* (recognizing that Germany, Switzerland, Austria, and Belgium have parliamentary committees that determine financial transfers to the regions).

251. *See* Jimenez, *supra* note 248, at 23 (interpreting Article 117 of the Iraq constitution as a means of providing harmony between the governorates while fairly distributing the wealth of the nation).

government entities, and finally a mechanism to ensure cross-government and sectarian dialogue.

### *1. Framework Legislation Delineating Governmental Responsibilities*

In order to minimize friction between various government institutions, Iraq could benefit from a framework of governance that will clearly identify the role of the regional and central institutions.<sup>252</sup> Such framework legislation would allow the federal government to set forth those powers that are within its exclusive competence and/or those powers that may be shared with the governorates.<sup>253</sup> Consistent with this guiding framework, the governorates may then adopt implementing policies and legislation.<sup>254</sup> Framework legislation differs from other federally-enacted laws in that it typically provides only a guiding principle or goal that governorate governments must adhere to when adopting implementing legislation.<sup>255</sup> Framework legislation therefore ensures a unified federal policy while providing flexibility to the governorates in carrying out that policy.

### *2. Coordination and Dispute Resolution Committees*

Iraqi federalism could also benefit from the development of mechanisms that foster cooperation between the central government and governorates in the administration of their exclusive and shared

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252. See Haysom, *supra* note 226, at 146 (advocating a more balanced division of powers between the federal and regional levels).

253. See generally B-VG (Aust.) art. 12 (differentiating the powers delegated to Austria's federal from those delegated to the regional governing bodies).

254. See GG (F.R.G.) art. 75 (providing the federal government the power to define broad framework legislation which the regions are responsible for implementing through their own detailed legislation). Although Article 75 of the German Constitution was abrogated in 2006, the provision still establishes a feasible framework for Iraq. *Id.* (mentioning, briefly, the abrogation of Article 75 during the constitutional reform in 2006). See also B-VG (Aust.) art. 11-14 (listing policy areas in which the federal government is responsible for enacting framework legislation, while the *Länder*, or provincial governments, are responsible for enacting implementation legislation).

255. See B-VG (Aust.) art. 14 (demonstrating that Austria's constitution provides the federal government the power to enact framework legislation but limits that power by providing regional bodies the power to implement the framework laws).

powers, and help increase the level of interaction and connection between the levels of government.<sup>256</sup> Two such mechanisms may include: (1) formal and ad hoc coordination committees;<sup>257</sup> and (2) joint entities tasked with resolving disputes outside the formal judicial system.<sup>258</sup> Such committees are within the boundaries of the Constitution,<sup>259</sup> and would allow the federal and sub-federal

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256. While the Spanish Constitution allows the National Government and the Autonomous Communities to legislate in areas of exclusive competence, the National Government also may appoint a representative to serve in the government of an Autonomous Community to coordinate administration of National Government policies with those of the Autonomous Community. *See* C.E. art. 69; *see also id.* art. 69 (providing that the Senate, one house of the *Cortes Generales* (the Spanish national legislature), shall represent the interests of the provinces and the Autonomous Communities).

257. *See, e.g.,* Act on Autonomy of Åland, Ch. 8, available at <http://www.finlex.fi/fi/laki/kaannokset/1991/en19911144.pdf> (providing for the Åland Delegation, a joint council that facilitates coordination between the central Finnish and Åland Island governments); The Northern Ireland Peace Agreement: The Agreement Reached in the Multi-Party Negotiations, 1998, available at <http://www.usip.org/library/pa/ni/ni4.html#BIIC> (creating the British-Irish Intergovernmental Conference); Canadian Intergovernmental Conference Secretariat (CICS) Website, [http://www.scics.gc.ca/35years\\_e.html](http://www.scics.gc.ca/35years_e.html) (describing Canada's annual First Ministers' Conference that brings together the Canadian Prime Minister and the premiers of the provinces).

258. *See* S. AFR. CONST. § 76 (requiring a Mediation Committee consisting of both national and provincial delegations to address legislation involving the provinces when the two chambers of parliament disagree). If the disagreement is not resolved in the Mediation Committee, the legislation in question can only be passed by a two-thirds majority in the National Assembly. *See id.*; Bougainville Peace Agreement (Papua N.G.) arts. 263-67 (creating an intermediary between Papua New Guinea and Bougainville to resolve disputes prior to mediation and arbitration). If mediation and arbitration fails, the parties can submit their dispute to the courts. *See id.*; The Greenland Home Rule Act, Act No. 577, ch. 1, 1978, available at <http://www.stm.dk/Index/dokumenter.asp?o=71&n=1&d=1059&s=2&str=stor> (establishing an ad hoc mediation committee designed to address conflicts between the central Danish government and Greenland's provincial governments); Interim Agreement for Peace and Self-Government in Kosovo, ch. 4, 1999, available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/MHII-6599VZ?OpenDocument> (developing a Commission which addresses disputes regarding resource ownership and allocation); *see also* Matthew T. Simpson, *Iraqi High Court Authority: A State-Practice Review of the Source of High Court Authority and an Assessment of the Iraq Constitution*, ISLAMIC L. & L. OF MUSLIM WORLD, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1061101#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1061101#PaperDownload) (providing a thorough analysis of the provisions relating to Iraqi High Court authority).

259. *See* IRAQ CONSTITUTION art. 105 (providing that "other independent commissions may be established according to need and necessity by a law.").

governments to communicate with each other. In the event that a dispute were to arise, the dispute resolution committee would provide Iraqis with a means for resolving the dispute before sending it to the judicial branch.

#### F. FEDERAL SAFEGUARDS

In recognition of the asymmetries of power and diversity that exist in modern day Iraq, Iraqis could benefit from the development of several safeguards to ensure respect for the rights of both sub-federal entities, and the minority populations in those areas.

##### *1. Commission to Protect the Rights of Regions and Governorates*

The establishment of a commission to protect the rights of regions and governorates is essential to stabilizing the political climate in Iraq. Article 102 of the Iraq Constitution provides for the establishment of a public Commission “to guarantee the rights of the regions and governorates that are not organized in a region.”<sup>260</sup> This Article stipulates that the Commission should include representatives from the federal government as well as representatives from the governments of the regions and governorates not organized in a region.<sup>261</sup> According to the Constitution, the Commission’s structure and responsibilities are to be defined by law.<sup>262</sup>

In establishing this Commission, the Iraqi legislature could look to several relevant precedents including those found in South Africa, Australia, Bahrain, Kenya, Thailand, Lebanon, Yemen, and the United Kingdom.<sup>263</sup> Comprehensive and realistic objectives for the Commission can ensure that its members, the National Government, and the Iraqi citizenry have confidence in the Commission’s

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260. *See id.* art. 102 (requiring the establishment of a commission that will be the voice of regions that are not organized in a manner similar to the governorates).

261. *See id.* (requiring the participation of not only individuals from the region, but also representatives from the federal government).

262. *See id.* art. 102-03 (identifying the purpose of the Commission, the individuals that will partake in the Commission, and the Commission’s roles).

263. It should be noted that these examples often refer to the rights of “local governments” (such as district and sub-district governments) rather than higher orders of government such as those of the region and governorates. Nevertheless, these structures and precedents can be applied to the Commission and the interests of Iraq’s regions and governorates not organized in a region.

activities. Possible objectives include: (1) supporting democratic governance; (2) representing the interests of the governments of the regions and governorates not organized in a region at the national and international level; (3) improving the capacity of regional and governorate government bodies; (4) providing a forum for information-sharing; and (5) building relationship with the citizenry.

*2. Commission for the Protection of Minority Rights and Minority Rights Ombudsmen*

The Iraqi Constitution provides that, "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, creed, belief or opinion, or economic and social status,"<sup>264</sup> and acknowledges that Iraq is "a country of many nationalities, religions and sects."<sup>265</sup> Minority groups, including the Armenian, Assyrians, Caldeans, and Turkmen, are guaranteed specific political, cultural, and educational rights.<sup>266</sup>

Despite these protections, the political instability in Iraq presents a high risk of disenfranchisement and isolation for Iraq's minorities and abuse of their rights. Therefore, efforts should be made to ensure that Iraq's many minorities will be protected regardless of future changes to the structure of Iraqi governance and the extent to which political and fiscal powers are devolved. As mentioned above, the diversity and intermingling of Iraq's many ethnic populations places the Sunni, Shi'a and Kurd in the minority in certain governorates.<sup>267</sup> Minority protections are therefore necessary not only to protect those groups currently considered minorities by the Constitution, but also those groups that experience majority status in one governorate, and minority status in another.

The government therefore needs mechanisms to ensure the representation and protection of minorities. Two of these mechanisms include a commission for the protection of minority rights and a minority rights ombudsman. Article 99 of the Iraqi

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264. IRAQ CONSTITUTION art. 14.

265. *Id.* art. 3; *see also* Jimenez, *supra* note 248, at 23 (assessing several of the key provisions of the 2005 Iraq Constitution).

266. IRAQ CONSTITUTION art. 121.

267. *See supra* Part III.B.2 (discussing the vast ethnic disparity within the governorates and urban areas of Iraq).

Constitution mandates a High Commission for Human Rights (“High Commission”).<sup>268</sup> Within this High Commission, a Council or Commission for Iraqi Minorities could be established. The purpose of a High Commission includes promoting laws aimed at protecting human rights and establishing a system of receiving complaints for rights violations.<sup>269</sup> Similarly, a Commission for Iraqi Minorities could focus on promulgating legislation and receiving complaints,<sup>270</sup> as well as ensuring restitution for violations by enumerating the rights of oppressed or abused minorities to regain property or pursue other forms of redress.<sup>271</sup>

In addition to, or as part of, an Iraqi commission for the protection of minority rights, Iraq may also consider building upon the concept of a Minority Ombudsman first articulated in the TAL.<sup>272</sup> Article 50 of the TAL provides for a National Commission for Human Rights,

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268. See IRAQ CONSTITUTION art. 99 (creating multiple “High Commissions” for the regulation of human rights and public integrity, monitored by the Council of Representatives).

269. See The Law of Administration for the State of Iraq for the Transitional Period [TAL], art. 50 (stating the purpose of the High Commissions and principles on which it should be based); see also PUBLIC INTERNATIONAL LAW & POLICY GROUP, THE IRAQ FEDERATION COUNCIL: LEGISLATIVE DRAFTING GUIDE (2006), available at <http://www.pilpg.org/areas/peacebuilding/simulations/iraq/PILPGIraqFedCouncilGuide.pdf> [hereinafter LEGISLATIVE DRAFTING GUIDE] (explaining the various functions that the High Commission could possibly fulfill).

270. See, e.g., National Commission for Minorities Website, <http://ncm.nic.in/> (last visited Sept. 8, 2008) (identifying the need for a commission in a country with a similarly diverse ethnic composition).

271. See generally The Secretary-General, Preparatory Comm., *Preparatory Meetings and Activities at the International, Regional and National Levels*, U.N. Doc. A/Conf.189/PC.1/8 (Apr. 26, 2000), available at <http://www.un.org/WCAR/1.8e.pdf> (describing an organization that provided remedies for human rights and minority rights violations). The actions taken by the South African Human Rights Commission included a counseling hotline, a racism audit by an independent evaluator required by all public and private institutions, increased public awareness about rights, a media fairness inquiry, and efforts to provide a judicial forum for redress. See *id.* ¶¶ 62-64. The report also stated that exemplary countries were taking actions to provide remedies through “recourse to national institutions, reporting of violations to law enforcement officials, prompt and effective action by bodies responsible for the administration of justice, educational activities that focused on curbing and eliminating racial discrimination, and the activities of the media, which should promote understanding and tolerance.” See *id.* ¶ 16.

272. See TAL art. 50 (establishing the Office of the Ombudsman, which inquires into complaints lodged by citizens against governmental authorities).



under which there is an Office of the Ombudsman to receive, initiate, and investigate complaints of government actions that are “arbitrary or contrary to law.”<sup>273</sup> The purpose of the Ombudsman is to guard protection of minority rights through investigation of abuse and initiation of legal methods of redress for rights violations.<sup>274</sup>

## CONCLUSION

Despite the concerns of the ethno-sectarian divisionists, the way forward for Iraq is not one of entrenched ethno-sectarian divide and mistrust, but rather the creation of a modern federal state that builds upon Iraq’s existing political and legal structures in a manner consistent with Iraq’s complex historical identity.

A stable political future for Iraq begins with the fundamental position that Iraq requires a federal structure based upon an eighteen governorate model as set forth in the Constitution. With the sub-federal boundaries already drawn, Iraqi political leaders are in a position to devolve appropriate power to these entities in an asymmetric and gradual manner. With this power devolution, Iraq would benefit from the development of systems of resource and revenue distribution to promote fair and equitable economic growth across the federation. Coordination mechanisms such as framework

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273. *Id.*; see also IRAQ CONSTITUTION art. 138 (annulling the TAL and its Annex, except for Articles 53(A) and 58). The TAL remains relevant in this instance, however, because the National Commission for Human Rights was formed under the TAL.

274. See Zsuzsanna Antal, *Introduction to Hungarian Law Research*, GLOBALEX (2005), <http://www.nyulawglobal.org/globalex/Hungary.htm> (last visited Oct. 15, 2008) (describing the role of the Hungarian Ombudsman for the Protection of National and Minority Rights elected by a two-thirds parliamentary vote); see also Maxine Sleeper, Note, *Anti-Discrimination Laws in Eastern Europe: Towards Effective Implementation* 40 COLUM. J. TRANSNAT’L L. 177, 196, 198 (2001) (explaining that the Hungarian Ombudsman has been especially active in ensuring educational opportunities for minorities); Istvan Riba, *Minority Self-Governments in Hungary*, HUNGARIAN Q., Vol. XL, No. 155, Aug. 1999, at 80, available at <http://www.hungarianquarterly.com/no155/080.html> (stating the effectiveness of the Hungarian Ombudsman in providing assistance to minorities whose self-governance in regions was challenged by the majority population). Other countries with Ombudsman offices include Greece, Macedonia, Kosovo, Albania, Bosnia and Herzegovina, Bulgaria, Serbia, and Montenegro. See Ombudsman Worldwide Offices, <http://www.law.ualberta.ca/centres/oi/Links/Worldwide-Offices.php> (last visited Sept. 8, 2008).

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legislation and dispute resolution committees are also necessary to ensure that the transition to viable federalism occurs with minimal encumbrance. To respect the complex and diverse identities of Iraqis, safeguards need to be established to protect the rights of sub-federal entities and Iraq's many minorities.

Thus, the political future of Iraq is not a return to failed approaches of division, but rather the construction of a viable modern federal state that promotes unity, political compromise, and consensus building.