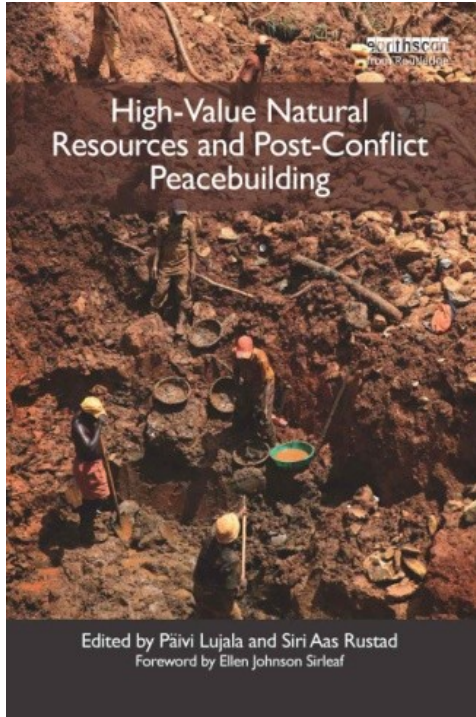


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**The legal framework for managing oil in post-conflict Iraq: A pattern of abuse and violence over natural resources**

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# The legal framework for managing oil in post-conflict Iraq: A pattern of abuse and violence over natural resources

*Mishkat Al Moumin*

In 2005, observers were optimistic about the prospects for the new Iraqi constitution, which was intended to strengthen democracy, create oil revenues and distribute them fairly to the Iraqi people, and achieve sustainable peace.<sup>1</sup> Instead, the oil provisions of the constitution have created a vague and conflicting legal system that has pitted government agencies, levels of government, and religious and ethnic groups against one another, threatening the entire peacebuilding process. Specifically, the constitution failed to clearly and explicitly address three key issues:

- Who owns the oil.
- How the oil reserves are to be managed.
- How the oil revenues are to be distributed.

Transparent and equitable oil management and revenue sharing are crucial for peacebuilding in resource-rich states.<sup>2</sup> Oil exports generate more than 90 percent of Iraq's government revenue (Blanchard 2009), but the national budgetary process lacks a detailed legal framework for revenue sharing and distribution. In the current system, "sovereign expenditures" (supporting expenses for a range of government functions, including the production of oil exports and the administration

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<sup>1</sup> Although natural gas is also important in Middle Eastern economies, this chapter deals solely with oil resources.

<sup>2</sup> Under the constitutions of Kuwait and the United Arab Emirates, for example, the state and the emirates, respectively, serve as trustees, with both the legal authority and responsibility to preserve and exploit the resources for the good of their national economies and national security (Bunter 2004). Thus, the state's "ownership" of the oil resources is limited, not absolute, and the state is required to ensure that the oil revenues are used for the benefit of all (Maitland 1905).

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of the National Cabinet, the Ministry of Foreign Affairs, and the Ministry of National Defense) are allocated first. From the remaining funds, 17 percent are allocated to the Kurdistan Regional Government (KRG), and the rest are distributed to the other governorates. The allocation among the governorates is based on population, need, and political negotiation (Blanchard 2009; Kane 2010; *Revenue Watch* 2005). In the absence of a specific legal framework, this default arrangement has fostered a sense of inequity among various groups—and, ultimately, fierce disputes over oil resources.

This chapter is divided into seven parts: (1) a brief review of Iraq's oil endowment, population, and governance structure; (2) a description of oil management under the 1970 Iraqi constitution; (3) a description of the oil provisions of the 2005 constitution; (4) a discussion of conflict over the authority to manage oil; (5) a discussion of disputes over the distribution of oil revenues; (6) a consideration of recent developments in oil management; and (7) a brief conclusion.

### BACKGROUND: IRAQ'S OIL, POPULATION, AND GOVERNANCE STRUCTURE

Including both proven crude reserves of 115 billion barrels and the potential for an additional 45 to 100 billion barrels of recoverable oil, Iraq has the fourth-largest endowment of oil in the world (EIA 2009). The most significant oil fields are in the north, in Kirkuk Governorate near the Kurdish semi-autonomous region, and in the south, in Shiite areas (see figures 1 and 2). As of 2006, only seventeen of Iraq's eighty oil fields had been developed; the most significant are in Kirkuk Governorate, in the north, and in the Rumaila field near the Basra Governorate (Kumins 2006).

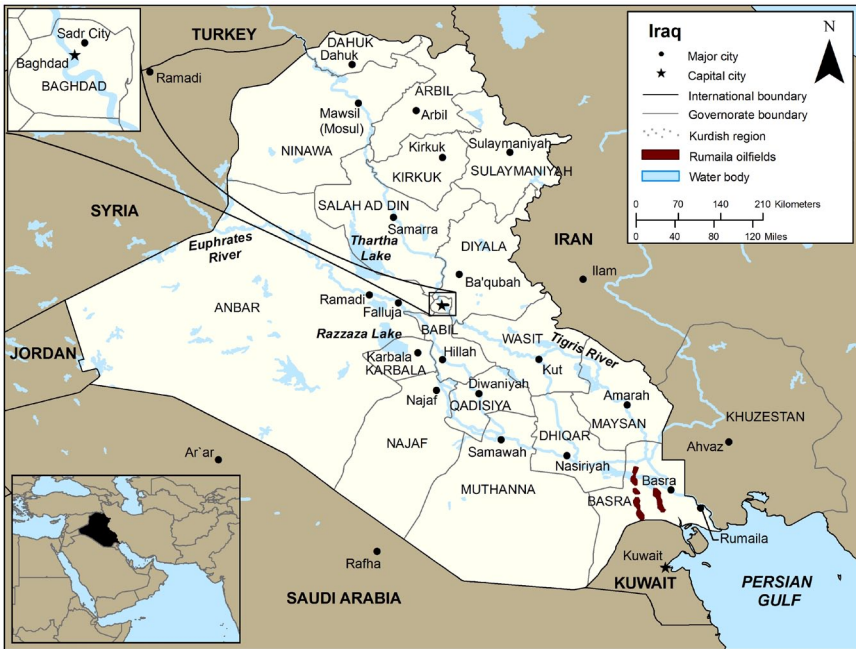
Iraq is dominated by two ethnic groups: Arabs make up 75 percent of the population and Kurds 20 percent. (Turkmen and other groups make up the remaining 5 percent). Approximately 97 percent of Iraqis are Muslim. The two main Muslim groups are the Shiites, who make up two-thirds of Iraqi Muslims, and the Sunnis, who make up one-third; the majority of Kurds are Sunni Muslim (O'Leary 2002). A small portion of the population consists of Christians and other religious minorities (World Almanac Books 2009).<sup>3</sup> As can be seen in figure 1, Shiite Arabs live to the south and east of Baghdad, Sunni Arabs live in the northwestern part of the country, and the Kurds live the north.

Iraq is a federal state that consists of the central government, the parliament, and the supreme court. At the subnational level, Iraq has one autonomous region (the KRG) and eighteen governorates.<sup>4</sup>

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<sup>3</sup> Because the Iraqi government has never conducted a survey to determine the precise percentages of ethnic or religious groups, these numbers are estimates. See Kassim (2010) and Mahdi (2010).

<sup>4</sup> Under article 119 of the constitution, one or more governorates can combine to form a region. After the 1990–1991 Gulf War, the Arbil, Sulaimaniyah, and Dahuk governorates combined to create the Kurdistan Regional Government.



### OIL MANAGEMENT UNDER THE 1970 IRAQI CONSTITUTION

The 1970 Iraqi constitution reflected an effort on the part of the Ba’ath Party to formally concentrate its control over oil resources. According to article 13 of the 1970 constitution, “natural resources and basic means of productions are owned by the people. The central government will manage these resources directly according to the national plan” (ROI 1970). Despite granting ownership of oil to all Iraqis, this provision failed to detail the means by which “the people” would participate in managing the resource; thus, the grant of ownership was essentially meaningless.

In 1979, Saddam Hussein became president of Iraq; using a narrow interpretation of article 13, the Ba’ath Party claimed legal authority to centralize and manage oil resources on behalf of the Iraqi people, instead of relying on a participatory process that would have (1) given all Iraqis a role in decision making about oil and (2) held leaders accountable for their actions. Having centralized power over oil resources, Hussein’s regime ultimately used its control over oil revenues to wage war against Iran (1980–1988) and Kuwait (1990–1991) (Revenue Watch 2005). The intent of these wars was to gain further oil reserves, but they caused considerable damage to Iraq’s oil sector, infrastructure, and overall economy.

With the invasion of Iran, Hussein hoped to regain control over Iran’s oil-rich Khuzestan region, which is along the southeastern border of Iraq and the southwestern border of Iran. But the resulting damage to oil facilities limited Iraq’s ability to produce oil: production fell from three million to less than one million



**Figure 1. Ethnic groups in Iraq**  
 Source: University of Texas libraries (1978).

barrels per day (Alnasrawi 2001a). Although production rebounded to 2.5 million barrels per day toward the end of the war, oil prices remained low when compared with the historic highs of 1980 and 1981. The result was a significant drop in revenues, from US\$26 billion in 1980 to US\$11 billion in 1988 (Alnasrawi 2001b).<sup>5</sup>

One source of the drop in oil prices was overproduction on the part of Kuwait and Saudi Arabia (Krupa 1997), both of which had been producing more oil than was allowed by the quotas set by the Organization of the Petroleum Exporting Countries (OPEC) (Alnasrawi 2001a). But because both nations had supported Iraq in its war against Iran, Iraq initially ignored the overproduction. Among the sources of Kuwait’s overproduction was the Rumaila field, which is located under both Kuwait and southern Iraq (Hayes 1990). In May 1990, at an emergency meeting of the Arab League, Saddam Hussein’s regime claimed that the Kuwaiti violations of the OPEC quota had cost Iraq US\$14 billion per year since 1988 (Hayes 1990). Iraq also accused Kuwait of “slant drilling” across the Iraqi border to extract more oil from the Iraqi side of the field (Alnasrawi 2001a; Hayes 1990).

<sup>5</sup> The high oil prices of 1980–1981 were attributable, in large part, to global anxiety about the oil supply, which had been triggered by a series of events: the 1979 Iranian Revolution, the Iran hostage crisis, arbitrary price increases imposed by the Organization of the Petroleum Exporting Countries, and the start of the Iran-Iraq war.



**Figure 2. Oil in Iraq**  
 Source: EIA (2003).

When it invaded Kuwait, in August 1990, the Hussein regime cited the slant drilling as the reason; in other words, Hussein was once again prepared to go to war to obtain oil-rich territory (Terrill 2007). Hussein hoped that the Kuwait war would help end Iraq’s economic crisis, assist with paying back Iraq’s foreign debt, and restore the regime’s credibility with the Iraqi people. Instead, the invasion—which ended with the 1990–1991 Gulf War—resulted in restrictive sanctions and brought about a humanitarian crisis (Alnasrawi 2001a).<sup>6</sup> Under the sanctions, Iraq was forced to shut down 97 percent of its oil exports. Moreover, it was unable to buy the spare parts to maintain oil exploration and production, further hindering oil development (Alnasrawi 2001a; UNSC 2000). In 2000, a group of UN experts reported that

the decline of conditions of all sectors of the oil industry continues, and is accelerating in some cases. This trend will continue, and the ability of the Iraqi oil industry to sustain the current reduced production levels will be seriously compromised, until effective action is taken to reverse the situation (UNSC 2000, 11).

<sup>6</sup> Under United Nations Security Council (UNSC) Resolution 661, passed in August of 1990, Iraq was placed under an oil embargo, and its financial assets were frozen (UNSC 1990). Because Iraq imports between 70 and 80 percent of its food, these sanctions caused a food shortage, and food prices increased from 200 to 1,800 percent (Provost 1992).

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In April 1995, to address the dire humanitarian situation, the UNSC adopted Resolution 986, which established the legal basis for the Oil-for-Food Programme (UN 2010). Under this program, which operated from December 1996 through March 2003, Iraq was permitted, under UN supervision, to sell oil in exchange for food and medicine.<sup>7</sup>

After the fall of Hussein's regime, Iraq was engulfed by a civil war that some analysts attribute solely to religious conflict. Other observers, however, have called attention to conflict between ethnic groups and various levels of government over how power is to be shared, how Iraq's "massive energy reserves" are to be managed (Holland and Jarrar 2007), and how oil revenues are to be distributed (Cockburn 2006).<sup>8</sup> In theory, the constitution should have resolved such conflicts, but the vague and ambiguous language with which it addresses the key and contentious issue of oil prevents it from playing the role that was envisioned for it—as a legal document that describes how wealth and power will be shared, and thereby contributes to peacebuilding.

### THE 2005 CONSTITUTION AND ITS APPROACH TO OIL

A month after the March 2003 invasion of Iraq by a U.S.-led coalition of thirty countries (U.S. Department of State 2003), Saddam Hussein's regime fell. The U.S.-appointed Coalition Provisional Authority oversaw Iraq until June 2004, when the Transitional Administrative Law (TAL) came into force (CPA 2004;

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<sup>7</sup> During the seven years of its implementation, the Oil-for-Food Programme helped deliver food rations to Iraqi residents, resulting in a large reduction in the malnutrition rate among Iraqi children (UN Office of the Iraq Programme Oil-for-Food 2003). However, as the result of two problems—the UN Security Council's failure to clearly define the parameters of the program and the Hussein regime's ability to shape the program's design and implementation—the regime was able to collect an estimated US\$10 billion from the program through illegal surcharges and commissions (UN Office of the Iraq Programme Oil-for-Food 2003; Hsieh and Moretti 2006; IIC 2005; Botterill and McNaughton 2008). Ultimately, corruption led to the disbandment of the program in 2003, at which point control was transferred to the Coalition Provisional Authority. Between March 20, 1996, and November 21, 2003, the Iraqi government spent US\$31 billion on humanitarian operations and US\$1.6 billion on spare parts and equipment for oil operations. Although the Oil-for-Food Programme formally ended in March 2003, over US\$6.9 billion in additional oil sales occurred before 2005. During the life of the program, approximately 3.4 billion barrels of oil, worth about US\$65 billion, were exported. After December 2000, about 72 percent of the funds were allocated to humanitarian needs: 25 percent to pay for damages caused by the Iraqi invasion of Kuwait, 2.2 percent to UN operations, and 0.8 percent to weapons inspections in Iraq (UN 2010).

<sup>8</sup> According to the Iraq Body Count project, civilian deaths increased from 10,751 in 2004 to 14,849 in 2005, and violence continued to increase during 2006 and 2007. Beginning in 2008, however, violence began to decrease (Iraq Body Count 2008, 2010).

U.S. Institute of Peace 2005).<sup>9</sup> The TAL provided for the creation of a transitional national assembly and the establishment of a timeline for the development of a new constitution (CPA 2004, arts. 30–34, 60, 61). In 2005, countrywide elections were held to create the National Assembly, and a thirteen-member constitutional committee, drawn from the newly elected representatives, began to draft a new constitution. Among the committee’s charges was to bring together rival ethnic groups to form a united government (CPA 2004; U.S. Institute of Peace 2005).<sup>10</sup>

Most of the drafters of the constitution believed that any system with strong central power would lead to the kind of authoritarian rule that had existed under Hussein. The Kurds, in particular, felt that the new government should vest more power in the governorates. Other groups, including members of Sunni and Shiite Arab Communities, suggested granting authorities to the governorates under the umbrella of the federal government (Blanchard 2009; CPA 2004, art. 52).<sup>11</sup> The new political system that was ultimately created—a federal-style, decentralized system that favors regional governments—represents a dramatic shift for Iraq, and particularly for its state agencies, which had no experience with decentralization and are still adjusting to the change.

Although the constitutional committee had the opportunity to create a legal framework for the equitable and transparent management of oil reserves and revenues, political feasibility dictated the use of vague language. In the short term, this language made it possible to sidestep thorny problems, such as how to define “fair compensation” for damage from past wars.<sup>12</sup> But it also led to new problems, and ultimately created opportunities for disenfranchised ethnic and religious groups to incite violence.

## **AUTHORITY TO MANAGE OIL: CONSTITUTIONAL ORIGINS OF CONFLICT**

Under the 2005 Iraqi constitution, oil ownership and management are governed primarily by articles 111 and 112 (the annex to this chapter includes selected

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<sup>9</sup> The purposes of the TAL (officially, the Law of the Administration for the State of Iraq for the Transitional Period) were (1) to establish state structure and protect human rights in the period before “the formation of an elected Iraqi government pursuant to a permanent constitution” and (2) to define the parameters of a future, permanent constitution (CPA 2004).

<sup>10</sup> To protect minorities during the development of the constitution, article 61(c) of the TAL stated that no permanent constitution could be ratified if it were rejected by two-thirds of the voters in three or more of Iraq’s eighteen governorates (CPA 2004).

<sup>11</sup> The Iraqi parliament is a mix of Shiites, Sunnis, Kurds, Christians, and Turkmen; its members have a range of political orientations and differing views on the role of the state.

<sup>12</sup> Compensation for damage from past wars is to be paid from oil revenues. The controversy surrounding the allocation of compensation is discussed in more detail in “Conflict over the Distribution of Oil Revenues,” a later section of this chapter.



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articles from the 2005 constitution). Under article 111, “oil and gas are owned by all the people of Iraq in all the regions and governorates.” This language is somewhat similar to that of article 13 of the 1970 constitution, which stated that “natural resources and basic means of production are owned by the people,” but the 2005 constitution specifically mentions “regions and governorates.” It is unclear why article 111 includes this phrase—perhaps to leave open the possibility of regional and governorate ownership? In any case, the vague language has led to tension—and, in some cases, to violence.

Article 112 of the 2005 constitution describes how decisions will be made about oil management and revenue sharing:

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenue in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

Thus, article 112 vests authority for the management of oil in both the federal government and the regional and governorate governments, but it fails to specify how the various levels of government are to work together to achieve (or even to establish) their chosen aims. To further complicate matters, other articles in the constitution can be interpreted as granting significant authority to the regions and governorates. Article 115, for example, which addresses the distribution of authority between the regional, governorate, and federal governments, notes that “all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.” Similarly, the first paragraph of article 121, which also addresses the distribution of authority, grants the regional governments “the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.” Furthermore, the second paragraph of article 121 states that when there is “a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.”

There are two key controversies regarding oil management: (1) how the federal and the subnational governments will determine oil investment procedures and (2) who has the authority to award oil contracts.

It is not difficult to see how the wording of the constitution has created conflict over the role of various levels of governments in the management of oil resources. Because articles 115 and 121 grant considerable authority to regions and governorates, these levels of government would appear to have a legitimate and genuine argument for asserting control over oil reserves found within their boundaries. A number of other arguments have been marshaled in support of this view:

- Article 110, which lists the exclusive powers of the federal government, does not include oil development or management (Deeks and Burton 2007).<sup>13</sup>
- The third and sixth paragraphs of article 114 list the areas of “shared” competency between federal and regional governments, including environmental policy making and public educational policy.
- Finally, although article 112 does not use the word *shared*, as articles 114 and 115 do, it does appear to contemplate shared power over oil resources.

In sum, articles 115 and 121 do appear to grant significant authority to regions and governorates, which is further bolstered by articles 110, 112, and 114. A number of observers, however, have raised counterarguments—claiming, for example, (1) that the provisions for the management of oil in article 112 were set off separately from article 114, which specifically addresses areas of concurrent authority, and (2) that article 112 represents a “careful compromise on oil”—which, according to Ashley Deeks and Matthew Burton, is not to be disrupted by articles 115 or 121 (Al-Adhath 2008; Deeks and Burton 2007, 65–66).

### **Disputes over oil management at the federal level**

Under Hussein’s regime, the Iraqi oil ministry administered oil exploration and production. Although the new constitution does not specify which governmental institution is responsible for managing oil on behalf of the Iraqi people, article 111 does state that all Iraqi people own the nation’s oil resources. Since article 49 designates parliament as the entity that represents the Iraqi people, these provisions can be interpreted as favoring a parliamentary role in oil management—if not absolute control, then at least oversight.

The silence of the 2005 constitution on the question of which federal institution—parliament or the oil ministry—has authority over oil contracts has

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<sup>13</sup> Ashley Deeks and Matthew Burton note, however, that article 115 could be interpreted to mean that the federal government has the power to legislate outside the areas listed, in article 110, as exclusive to the federal government. One of their arguments is that a number of other articles in the constitution “contemplate that the federal legislature will enact laws” (Deeks and Burton 2007, 67).

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led to conflict between the executive and legislative branches (Jiyad 2010). On June 30, 2009, without consulting parliament, the Iraqi Ministry of Oil awarded an oil development contract for the Rumaila oil field to an oil consortium led by BP (British Petroleum) (Al-Zubaidi 2009; Blanchard 2009). After the contract was issued, 140 members of parliament (out of 275 at the time) submitted a petition requesting the oil minister to come to parliament to answer questions about oil contracts (Carlisle 2009).<sup>14</sup> Although the minister did not face a vote of no confidence, the formal questioning was indicative of the seriousness of the concern (Blanchard 2009).

Parliament based its objection on Law No. 97 of 1967, which had been issued by President Abed Alrahman Araf before the Ba'ath Party took power (Al-Zubaidi 2009; Donovan 2010). Under Law No. 97, the parliament must adopt all oil contracts with foreign companies by passing a law. Thus, the oil ministry would not have had the authority to sign the 2009 BP contract without parliamentary action (Guardian 2009; Macalister 2009). In defense of his action, the Minister of Oil stated that, as an elected figure, he represents the Iraqi people as a whole and can therefore sign the contract on their behalf (Baxter 2009). Nonetheless, some members of parliament continue to question the award of the contract, as well as the minister's authority to award oil contracts in general. In the absence of a clear allocation of responsibilities in the legal framework governing oil management, this dispute is likely to arise again, creating confusion and uncertainty for the federal government and oil investors.

### Disputes between the federal government and the governorates

The Rumaila contract has also led to disputes between the federal government and the governorates. Arguing that article 111 of the constitution—"oil and gas are owned by all the people of Iraq in all the regions and governorates"—means that oil and gas are owned by the residents of the regions and governorates from which the oil is being extracted (Ahmed 2009), the Governorate Council of Basra, where the Rumaila field is located, has taken the position that the oil ministry cannot award oil contracts without consulting with the elected bodies of the producing governorates, and that the BP contract should therefore be void. To further support its assertion, the council has cited the second paragraph of article 112, which states that "the federal government, *with* the producing regional and governorate governments *shall together* formulate the *necessary strategic policies* to develop the oil and gas wealth in a way that achieves the *highest benefit* to the Iraqi people" (emphasis added) (Ahmed 2009; Aswat Al Iraq 2009).

Indeed, article 111 could arguably be interpreted to favor local over federal ownership of oil. Specifically, the phrase "in all the regions and governorates," which modifies "people of Iraq," suggests an emphasis on the inhabitants of

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<sup>14</sup> As of 2010, the parliament had 325 members, having increased in size with the Iraqi population.

particular regions and governorates. At the same time, however, article 111 refers to ownership “by *all the people of Iraq*” (emphasis added), not necessarily by any governmental authority. Moreover, in article 112, the federal government is described as making decisions in consultation with the regions and governorates and not vice-versa, which may argue in favor of federal management, if not ownership. And yet, article 115 favors the laws of the regional governments and governorates in the case of a dispute.

In failing to consult with the Governorate Council of Basra, the oil ministry awarded a contract that may have violated article 112 and may therefore be unconstitutional. In July 2009, the Basra council submitted an unsuccessful plea to Prime Minister Nouri al-Maliki, requesting that he acknowledge the council’s right to award contracts in accordance with the constitution. The council has also asked the federal government to pay the governorate 3 percent of the price the federal government receives for each barrel exported from Basra (Ahmed 2009).

### **Disputes between the federal and regional governments**

In August 2007, relying on articles 111 and 112 of the 2005 Iraqi constitution, the KRG amended Iraqi oil laws by passing the Petroleum Act of the Kurdistan Region of Iraq, then awarded over twenty contracts to a variety of small companies to explore for oil in the Kurdish region (Khalil 2009; KRG 2010).<sup>15</sup> Iraq’s oil ministry evaluated these contracts and ruled them illegal. The federal government backed the ministry’s actions and blacklisted the companies in question, prohibiting them from competing for future Iraqi oil contracts—a move that sent a strong message to other oil companies hoping to operate in Iraq (Khalaf, Mahtani, and Negus 2008). Later that same month, the dispute led to clashes between the Iraqi National Guard and the *peshmerga*, the defense forces of the Kurdistan region. The clashes occurred near the Green Line, which separates the Kurdish region from the rest of Iraq (Shadid 2009). The dispute quieted briefly in August 2008. One year later, the federal government agreed to approve the contracts, provided that the KRG would agree not to seek an increase in Kurdistan’s share of government-provided oil revenues (Chorev 2007).

Although the Kurdish Petroleum Act attempts to clarify the ambiguity over whether the central or subnational governments have the authority to award oil contracts, it has created a parallel approval process for oil contracts (KRG 2006). Oil companies seeking to do business in Kurdistan now need to sign two separate contracts and adhere to the laws of two governments: the Kurdish government in Arbil and the central government in Baghdad (Khalaf, Mahtani, and Negus

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<sup>15</sup> The text of the Petroleum Act cites articles 111 and 112 of the 2005 Iraqi constitution as authorization: “Petroleum in the Kurdistan Region is owned in a manner consistent with article 111 of the Constitution of Iraq. The Regional Government shall share Revenue derived from Petroleum with all the people of Iraq, pursuant to Article 112 of the Constitution of Iraq and this Act.”

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2008). Nor does signing a contract with one government necessarily grant or facilitate the approval of the other government (Peters 2010). The existence of two separate approval processes adds to the cost of doing business in Iraq and may deter international oil companies from bidding on contracts. Moreover, it is unclear which government should be approached first, the KRG or the federal government. Moreover, procedural missteps can lead to harsh consequences, such as blacklisting (Khalaf, Mahtani, and Negus 2008).

### CONFLICT OVER THE DISTRIBUTION OF OIL REVENUES

Iraqi political parties are founded on ethnic and religious identities, with specific parties representing Shiites, Sunnis, Kurds, and other religious and ethnic groups. Thus, in the January 2005 transitional elections, the representatives to the National Assembly were elected on the basis of religion or ethnicity: Sunnis elected Sunnis, Shiites elected Shiites, and Kurds elected Kurds, regardless of political platform.

Because religious and ethnic distinctions have a profound effect on the Iraqi political system, they have equally profound implications for the distribution of oil revenues. Since the removal of the Ba'ath Party, which had monopolized oil revenues for thirty-five years, Iraq's ethnic and religious groups have been fighting for as large a share of the revenues as possible. And because relations between Shiites and Sunnis and between Kurds and Arabs are largely hostile, each group fears that the other will dominate oil revenues.

Like the disputes discussed earlier in the chapter, disagreements over revenue distribution stem from ambiguity in article 112 of the Iraqi constitution, which fails to clarify (1) which institution will determine which group or region should receive how much revenue from oil and (2) which criteria should be applied in making these decisions. The use of the phrase "present fields"—which could be interpreted to mean only currently operating fields, not future fields—creates further room for conflict (Baker et al. 2006).

Although the first paragraph of article 112 states that oil and gas revenues shall be distributed "in a fair manner" with special consideration to "damaged regions which were unjustly deprived" of revenues by the former regime, it does not clarify how this is to be achieved. The subjective criterion of fairness has created room for various political parties to mobilize their constituencies in the quest for their fair share of oil revenues.<sup>16</sup>

Kurds and Shiites, for example, who were systematically deprived of oil revenues under Saddam Hussein's regime, should be compensated for their losses. But how much, and for how long? Until Iraq can agree, as a whole, on what

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<sup>16</sup> Because of the wording of the first paragraph of article 112, both the Shiites and the Kurds, which are historically neglected groups, are eager to lay claim to the status of "damaged regions." The Sunnis, too, refer to their region as underdeveloped, neglected, ignored, and without oil reserves (Al-Fadhal 2010).

amount of oil revenue is just compensation, ethnic and religious groups, with their corresponding political parties, will continue to compete for the biggest share, denouncing other parties' claims and hindering the reconciliation process. By provoking a debate on fairness and by failing to provide a methodology, guidelines, or criteria that would allow the reconciliation of divergent views, the constitution leaves the issue of distribution vulnerable to political rhetoric and offers no means of progress toward peace.

In the absence of constitutional guidance, the governorates or distribution of oil revenues has been relegated to the political arena, where the regions that believe they are being treated unfairly feel that they have only one option: standing against the government. In a post-conflict environment, where there is widespread access to weapons, such opposition can quickly become violent: both the Sunni and the Shiite insurgencies came from cities such as Fallujah and Sadr City that had been given less priority in the federal government's distribution of oil revenues (Chiarelli and Michaelis 2005; Al-Hashimi 2009). Furthermore, the regions and governorates where the oil is located have an incentive to expand their boundaries.

Kirkuk Governorate offers an example of the connections between religion, ethnicity, the management of oil reserves, and the distribution of oil revenue. The conflict over Kirkuk, an oil-rich governorate located 150 miles north of Baghdad, is one of the main threats to peace in Iraq (Borger 2008; ICG 2008). Kirkuk's inhabitants belong to a number of different ethnic groups (Kurds, Arabs, Turkmen, and Shabaks, among others) and adhere to a variety of different religions, including Christianity, Islam—both Sunni and Shiite—and Mandaism (Thaler 2007). On the surface, the Kirkuk dispute concerns whether Kirkuk is part of the Kurdish region. But the real issues are the ownership and management of Kirkuk's large oil reserves and the distribution of the associated revenues.<sup>17</sup>

As noted earlier, article 111 of the Iraqi constitution grants ownership of oil and gas to "all the people of Iraq in all the regions and governorates"; and under article 112, "the federal government, with the producing governorates and regional governments," has a say in the management of oil. But neither article provides a framework for ensuring that the various religious and ethnic groups within a region or governorate receive their fair share of oil revenues; nor do the articles specify how much influence governorates have in relation to the federal government.

If the constitution is interpreted to mean that oil and its associated revenues are owned by the region or governorate in which the oil is found, then controlling Kirkuk Governorate is equivalent to controlling all of Kirkuk's oil. Control of Kirkuk and its oil by one ethnic or religious group is likely to provoke internal disputes over the control of the governorate. But if the constitution is interpreted to mean that both oil management and revenue distribution will be shared by the

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<sup>17</sup> According to the U.S Energy Information Administration, as of 2009 Kirkuk Governorate had 8.6 billion barrels of oil reserves (EIA 2009).

federal government and the regions and governorates, then Kirkuk Governorate will likely attempt to strengthen its position in relation to the federal government—which may, in turn, create more unity within the governorate. One option for Kirkuk is to advocate for de facto control of the resource (e.g., by controlling the contracting process); another is to seek an extra share of the revenues, on the grounds that the governorate of origin should receive preferential treatment. A third option is to join the KRG, which already receives preferential treatment with respect to the distribution of oil revenues. For its part, the KRG would probably welcome the addition of Kirkuk to the region, because obtaining control over Kirkuk’s oil would increase the KRG’s direct revenues from oil.

The stakes are high, and the absence of a clear legal framework has created fierce competition—and violent conflict—between the city’s two largest communities: the Kurds and the Arabs (Shadid 2009). It is not clear which group makes up the majority. The Kurds claim that they make up the majority of the population, and that Kirkuk should therefore be part of Kurdistan. The Arabs claim that they make up the majority of the population, and that Kirkuk is an Iraqi governorate subject to the control of the central government. Both sides believe that whichever ethnic group is larger will receive a larger share of oil revenues (Anderson and Stansfield 2009), and each has accused the other of attempting to change the demographics of Kirkuk to gain an advantage (Mackey 2005; Varner 2008; Williams 2009). The Kurds claim that under an “Arabization” policy implemented by Saddam Hussein’s regime, thousands of Kurds and Turkmen were expelled from Kirkuk, while Arabs from central and southern Iraq were encouraged to migrate to the region. Similarly, the Arabs claim that the Kurds took advantage of the period following the fall of Hussein’s regime to relocate more Kurds in Kirkuk (Khalil 2009).<sup>18</sup>

## RECENT DEVELOPMENTS IN OIL MANAGEMENT

Despite the obvious need to do so, the Iraqi parliament has yet to pass an oil and gas law to address the ambiguities in the constitution. In February 2007, members of the Iraqi cabinet drafted a hydrocarbon legislative package that included provisions for oil and gas management and revenue sharing. But because of disagreements over key parts of the law, the legislation was still pending at the time of

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<sup>18</sup> At the end of the 1990–1991 Gulf War, Hussein’s regime focused on “Arabizing” Kirkuk. For example, Kurds, Turkmen, and Assyrians were pressured to sign “ethnic correction forms” renouncing their ethnicity and registering as Arabs. Those who refused received formal expulsion letters and were forced to leave government-controlled areas of northern Iraq (see Human Rights Watch 2004). In 2003, after the fall of Hussein’s regime, the *peshmerga* crossed the Green Line and entered Kirkuk, in order to strengthen Kurdish claims that Kirkuk is part of Kurdistan. Arabs and Turkmen sought protection from the federal government, and in August 2008, Prime Minister Maliki deployed Iraqi army troops to Kirkuk, in an effort to push back against the Kurdish influence (ICG 2009).

writing. Three areas of particular contention are (1) authority to award oil contracts, (2) division of authority between the national and subnational governments, and (3) the extent of foreign participation in Iraq's oil and gas production (Blanchard 2009; Kane 2010). Although all ethnic and religious groups in Iraq would seem to have a common interest in the development of specific formulas and mechanisms for revenue sharing, that is not the primary focus of the law.

In an attempt to reduce tensions over revenue distribution, the Iraqi parliament has approved an annex to the 2010 national budget under which all governorates (but not the KRG) will receive US\$1 for each barrel of oil produced by oil fields within their territory (*Al-Mada* 2010; *Shab Al Yomia* 2009). But the policy fails to specify a methodology for collecting and distributing the funds (*Freedom Space* 2010).<sup>19</sup> For example, it is unclear how the additional funds will be distributed in governorates whose populations are a mix of ethnicities and religious groups.<sup>20</sup> Despite its progressive intentions, the ambiguity of the policy could undermine efforts to achieve equity.

## CONCLUSION

Oil exports account for more than 75 percent of Iraq's gross domestic product (EIA 2009). This level of dependence makes it imperative to create a positive business environment—one that will encourage foreign companies to invest in Iraq's future and help support the reconstruction process. However, the confusion generated by the constitutional framework for oil management has the potential to reduce the funds available for reconstruction, and ultimately undermine peacebuilding.

For the long term, Iraq needs to determine the practical implications of articles 111 and 112 and find answers to the following questions:

1. Under article 111, do all Iraqis own oil, or do the regions and governorates from which the oil is extracted have a special ownership status?
2. Under article 112, how should the federal and subnational governments work together to formulate policies for oil management and distribution of its revenues?
3. Which authority, national or subnational, supercedes the other?

Efforts to interpret articles 111 and 112 must be undertaken against the backdrop of other articles in the constitution. For example, article 115 which vests

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<sup>19</sup> At the time of writing, the Ministry of Finance was attempting to develop such a methodology.

<sup>20</sup> For example, the Kurds who returned to Kirkuk after the fall of Hussein's regime are suffering from lack of basic services. Since they all live in one part of the governorate, it is easy to deprive them of such services, while providing services to other ethnic groups (Hassan 2010).



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regions and governorates with all powers not vested exclusively in the federal government, heavily favors local autonomy. Since oil management is not an exclusively federal domain, the implication could be that regions and governorates have broad powers over oil management. Furthermore, with respect to “other powers shared” between the national and subnational governments, article 115 states that in case of dispute, “priority shall be given to the law of the regions and governorates not organized in a region.” Similarly, in areas outside exclusive federal authority, the second paragraph of article 121 explicitly allows regional governments to amend federal laws that contradict regional laws. Taken together, articles 115 and 121 allow regional and governorate governments to override federal laws that are not constitutionally mandated.

By failing to address key questions, articles 111 and 112 foster inevitable conflicts between the oil laws of the national and subnational governments. These conflicts need to be resolved soon, if the constitution is to fulfill its aim of serving as the foundation for a peaceful, cohesive country.

Some senior members of the Iraqi oil industry have suggested that establishing a national oil company could reduce political tension. Under such an arrangement, management authority would be vested in an independent technical body instead of being under the control of a political body. Regional leaders are suspicious of this proposal, arguing that local communities should have direct access to the flow of oil revenues (Baker et al. 2006).

Ultimately, no matter who is granted oil management authority, all sides must recognize that the constitution grants *all* Iraqis ownership of the nation’s oil. However, that is not enough. Iraq urgently needs a legal and regulatory framework that incorporates detailed mechanisms for exercising and enjoying the ownership of oil and its associated revenues. Until such a framework is adopted, Iraq is likely to experience continued conflict over oil.

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### ANNEX

#### Excerpts from the 2005 Iraqi Constitution

##### **Section One: Fundamental Principles**

Article 1:

The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.

##### **Section Three: Federal Powers**

Article 49:

First: The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people. They shall be elected through a direct secret general ballot. The representation of all components of the people shall be upheld in it.

##### **Section Four: Powers of the Federal Government**

Article 110:

The federal government shall have exclusive authorities in the following matters:  
First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.

Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.

Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.

Fourth: Regulating standards, weights, and measures.

Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.

Sixth: Regulating the policies of broadcast frequencies and mail.

Seventh: Drawing up the general and investment budget bill.

Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its distribution inside Iraq in accordance with international laws and conventions.

Ninth: General population statistics and census.

Article 111:

Oil and gas are owned by all the people of Iraq in all the regions and governorates.

Article 112:

First: The federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields, provided that it distributes its revenue in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.

Second: The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

Article 114:

The following competencies shall be shared between the federal authorities and regional authorities:

First: To manage customs, in coordination with the governments of the regions and governorates that are not organized in a region, and this shall be regulated by a law.

Second: To regulate the main sources of electric energy and its distribution.

Third: To formulate environmental policy to ensure the protection of the environment from pollution and to preserve its cleanliness, in cooperation with the regions and governorates that are not organized in a region.

Fourth: To formulate development and general planning policies.

Fifth: To formulate public health policy, in cooperation with the regions and governorates that are not organized in a region.

Sixth: To formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organized in a region.

Seventh: To formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by a law.

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Article 115:

All powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region. With regard to other powers shared between the federal government and the regional government, priority shall be given to the law of the regions and governorates not organized in a region in case of dispute.

### ***Section Five: Powers of the Regions***

Chapter One: Regions

Article 116:

The federal system in the Republic of Iraq is made up of a decentralized capital, regions, and governorates, as well as local administrations.

Article 117:

First: This Constitution, upon coming into force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.

Second: This Constitution shall affirm new regions established in accordance with its provisions.

Article 119:

One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:

First: A request by one-third of the council members of each governorate intending to form a region.

Second: A request by one-tenth of the voters in each of the governorates intending to form a region.

Article 121:

First: The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this Constitution, except for those authorities stipulated in the exclusive authorities of the federal government.

Second: In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.

Third: 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 resources, needs, and the percentage of their population.

Fourth: Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs.

Fifth: The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.

Article 140:

First: The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law.

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

*Source:* ROI (2005).