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Iraq: Transition to Sovereignty

Kenneth Katzman
Foreign Affairs, Defense, and Trade Division

Jennifer Elsea
American Law Division

Summary

Amid ongoing insurgency, the United States handed sovereignty to an Iraqi interim government on June 28. The Bush Administration maintains that the handover was a success and will begin a transition to democracy and stability. Critics assert that the handover does not appear to have diminished the anti-U.S. insurgency, threatening the transition roadmap developed by the United States and United Nations. Legal issues may arise regarding the validity of laws issued during the occupation, as well as the status of U.S. troops in Iraq. See CRS Report RL31339, *Iraq: U.S. Regime Change Efforts and Post-Saddam Governance*.

Background

The Bush Administration had initially made the end of the U.S. occupation contingent on the completion of a new constitution and the holding of national elections for a new government, tasks to be completed by 2005. However, political infighting among Iraq's various ethnic and political factions, coupled with a persistent insurgency, slowed progress on setting up an elected political structure. The U.S. administrator in Iraq, L. Paul Bremer (head of the U.S.-led occupation authority, the Coalition Provisional Authority or CPA), in consultation with Iraqis appointed to a 25-seat "Iraq Governing Council (IGC)," agreed to a plan that would lead to sovereignty for Iraq by June 30, 2004. Under the plan, announced November 15, 2003, a Transitional Administrative Law (TAL) — a provisional constitution — was to be signed by February 29, 2004, followed by the holding of local "caucuses" in each province to select a national assembly (by May 31, 2004). The assembly was to choose an executive leadership. The agreement encountered opposition from the revered Shiite Muslim leader Grand Ayatollah Ali Sistani, who called for early direct elections; his views prompted the CPA to ask the United Nations to assess the feasibility of holding elections for an interim government. A U.N. team led by U.N. envoy Lakhdar Brahimi concluded in February 2004 that national elections could not be held earlier than late 2004 or early 2005. Sistani accepted that time frame.

The Transition Roadmap

Much of the Brahimi findings were incorporated into the TAL, which the IGC formally signed on March 8, 2004.¹ Its key points are as follows:

- A “transition government” is to be formed, chosen by a 250-seat National Assembly elected in a vote no later than January 31, 2005. The Assembly is to choose a “presidency council” (a president and two deputy presidents). It is expected that the president would be a Shiite, and the two deputies a Sunni Arab and a Kurd. The presidency council is to operate by consensus, including in naming a Prime Minister.
- The election law for the transition government “shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly.”
- The Kurds maintain their autonomous “Kurdistan Regional Government,” but they were not given control of the city of Kirkuk and they received some powers to contradict or alter the application of Iraqi law in the Kurdish provinces. The Kurdish militias (“*peshmerga*”) are allowed to continue to operate.
- The transition government (post-January 31, 2005) is to draft a constitution (by August 15, 2005) and put it to a national vote (by October 15, 2005). A provision, which Sistani and the Shiite Islamists oppose, allows two-thirds of the voters any three Iraqi provinces to veto the constitution, giving the Kurds (who control the three northern provinces of Dohuk, Irbil, and Sulaymaniyah) essentially a veto.
- If the constitution is approved in the national referendum, elections to a new government are to take place by December 15, 2005, and the government is to take office by December 31, 2005. If the constitution is not approved, it is to be redrafted and submitted again for approval, and if approved, elections are to take place in 2006.
- The TAL states that Islam is the official religion of Iraq and is to be considered “a source,” but not the only source, or the primary source, of legislation. It adds that no law can be passed that contradicts the agreed tenets of Islam, but neither can any law contradict the fundamental rights provided for in the TAL. Those rights include peaceful assembly; free expression; equality of men and women before the law; and the right to strike and demonstrate.

Interim (Post-June 30) Government. The TAL did not address how an interim government — which will be in office from July 1, 2004 until January 31, 2005 — would be chosen. Some options for selecting the interim government were considered, including holding a traditional assembly along the lines of Afghanistan’s *loya jirga*; holding a

¹ The text of the TAL can be obtained from the CPA website: [<http://cpa-iraq.org/government/TAL.html>].

smaller “roundtable” of Iraqi notables; or transforming the existing or an expanded IGC into the interim government. Continuing violence in Iraq contributed to the U.S. decision to give U.N. envoy Brahimi substantial responsibility for selecting the interim government.² Brahimi said he envisioned an interim government of technocrats, who presumably would not seek to use their official positions to further their chances in January 2005 national elections. However, maneuvering by IGC and cabinet members led to inclusion of many of them — or their political allies — in the interim government named on June 1, 2004. A few of the cabinet positions are held by relatively non-political personalities. The interim government began working immediately. Brahimi has said publicly that pressure by U.S. and Iraqi politicians to complete the interim government on time caused him to acquiesce to many of the appointments.

The composition and powers of the interim government are addressed in an addendum to the TAL, signed by the IGC on June 1, 2004, just before the IGC dissolved itself. The interim government has a “presidency” composed of a largely ceremonial president (former IGC member and Shammar tribal elder Ghazi al-Yawar) and two deputy presidents (Ibrahim al-Jafari of the Da’wa Party and Kurdistan Democratic Party activist Dr. Rowsch Shaways). There is a prime minister (Iraq National Accord leader Iyad al-Allawi), a deputy prime minister, 26 ministers, two ministers of state with portfolio, and three ministers of state without portfolio. The prime minister has executive power. Six members of the interim government are women. Some of the ministers were held over from the occupation period — Hoshyar Zebari, a top KDP official, remained Foreign Minister; Dr. Mehdi al-Hafidh, an independent Shiite, remained Minister of Planning; Patriotic Union of Kurdistan (PUK) official Dr. Abdul Latif Rashid stayed Minister of Water Resources; and Ms. Nasreen Berwari, a Kurd affiliated with the KDP, stayed Minister of Public Works.

Resolution 1546. Many of the powers and responsibilities of the interim government are spelled out in U.N. Security Council Resolution 1546, adopted unanimously on June 8, 2004, which endorsed the handover of sovereignty. Its major provisions are the following:

- After the handover, U.S. officials no longer have final authority on non-security related issues. The United States and United Nations intend that the interim government not make any long-term laws or decisions — its primary function is to run the ministries and prepare for national elections. The Kurds fear that the interim government will repeal aspects of the TAL that the Kurds view as protecting them from the Arab majority,³ a fear that was heightened by the omission from Resolution 1546 of any mention of the TAL. That omission was reportedly at the behest of pressure from Sistani and his Shiite allies who want to remove from the TAL limitations on majority rule. Prime Minister Allawi has tried to defuse this dispute by promising that the interim government would not undo the relevant provisions of the TAL.

² Chandrasekaran, Rajiv. “Envoy Urges U.N.-Chosen Iraqi Government.” *Washington Post*. Apr. 15, 2004.

³ Filkins, Dexter. “Kurds Threaten to Walk Away From Iraqi State.” *New York Times*, June 9, 2004.

- According to the resolution and the addendum to the TAL, later in July a conference of over 1,000 Iraqis (the 1,000 will be chosen by a 60-member commission of Iraqis) is to be held, and it is to choose a 100-seat advisory council (“Interim National Council”) to the interim government. This body will not have legislative authority but, according to the addendum to the TAL, it will be able to veto decisions by the executive branch with a two-thirds majority. Members of the IGC who are not in the interim government are to be included in the Council.
- One of the major debates in the adoption of Resolution 1546 was on security issues, particularly the relationship between coalition forces and the Iraqi interim government. The operational relationship — to be one of coordination and partnership — is outlined in an exchange of letters between Secretary of State Powell and Prime Minister Allawi annexed to the resolution. The resolution says that the coalition’s mandate would be reviewed “at the request of the Government of Iraq or twelve months from the date of this resolution,” that the mandate would expire when a permanent government is sworn in at the end of 2005, and that the mandate could be terminated at any time if the interim government so requests. The Iraqi government was not given a veto over specific coalition operations, and the coalition retains the ability to take prisoners.
- Resolution 1546 gives the interim government control over Iraq’s oil revenues and the Development Fund for Iraq (DFI), subject to monitoring for at least one year by the U.N.-mandated International Advisory and Monitoring Board. The interim government also is given responsibility for final close-out of the U.N.-run “Oil-for-Food program.”

Other Preparations for Handover. The following additional decisions or events were part of the handover:⁴

- Bremer departed Iraq on June 28, 2004, right after the handover, and the CPA ceased to exist. A large U.S. embassy opened on June 30, 2004, headed by Ambassador John Negroponte, and it is being staffed with about 1,000 U.S. personnel, including about 160 U.S. officials and representatives that will serve as advisers to the interim government. Some CPA functions, such as the advising of local Iraqi governments, local Iraqi governing councils, and U.S. military units, were retained at the U.S. embassy in the form of an “Iraq Reconstruction and Management Office (IRMO).” About 150 U.S. personnel will serve at several centers around Iraq to advise local Iraqi governments.

⁴ Information in this section was obtained from various press reports, the text of a May 11, 2004 national security presidential directive, CRS conversations with executive branch officials in May 2004, CRS conversations with journalists and other observers, and CRS participation in a congressional visit to Iraq during Feb. 28-29, 2004.

- U.S. military headquarters in Baghdad (Combined Joint Task Force-7, CJTF-7) became a multinational headquarters (Multinational Force-Iraq, MNF-I). U.S. four-star Gen. George Casey assumed command.⁵ U.S. officials say that, largely because of ongoing violence, U.S. forces will number about 140,000 into 2005 and possibly beyond. U.S. and coalition forces continue to build Iraq's security institutions, but U.S. officials say the Iraqi forces are not able to maintain security on their own.
- The Program Management Office (PMO), which reports to the Department of Defense and administers some U.S. funds for Iraq, will be replaced by a "Project and Contracting Office." The upsurge of violence since early April 2004 has reportedly slowed obligation of reconstruction funds; as of July 2004, about \$8 billion of \$23 billion in appropriated reconstruction funds had been obligated.

Legal Issues of the Handover

A number of legal issues are likely to arise. The *actual* extent of the interim government's sovereignty — or its lawful control over its own territory to the general exclusion of other states — is unclear, as are the continuing coalition responsibilities. Laws and agreements put in place during the occupation may be challenged, placing the validity of legal contracts and property interests, public or private, in some doubt. The status of coalition forces remaining in Iraq has changed somewhat, as discussed below.

Interpreting Resolutions 1483, 1511 and 1546. Two sources of international law have governed the occupation of Iraq: U.N. Security Council resolutions (in particular Resolution 1483 of May 22, and Resolution 1511 of October 16, 2003) and international treaties such as the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. Under these treaties and other sources forming the international law of belligerent occupation, an occupying power must maintain existing laws and governmental structure unless absolutely prevented by the exigencies of occupation, and any such changes are temporary. On the other hand, U.N. Resolution 1483 appears to contemplate an overhaul of Iraqi institutions, even as it reiterates the applicability of international occupation law. Resolution 1483 may be read to provide certain carve-outs from that law, allowing initiatives that might otherwise exceed the authority of an occupying power.

Resolution 1546 recognizes that the interim government has only temporary and limited power, noting that even as the interim government "assumes full responsibility ... for governing Iraq" it is to "refrain ... from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office." In effect, Resolution 1546 appears to substitute the Iraqi interim government for the CPA as temporary governing authority until an "internationally recognized, representative government is established ... ," but it appears that some of the CPA's obligations and authority do not pass to the interim government, and will remain instead with the United States as head of the MNF. Obligations that were made under explicit UN approval, such as the Oil-for-Food program or the DFI, are expressly made

⁵ Hendren, John and Richard Serrano. "Pentagon Intends to Replace Ground Commander in Iraq." *Los Angeles Times*, May 25, 2004.

binding on the interim government. If Iraq exercises full sovereignty, as that concept is ordinarily understood, the interim government could conceivably revoke or amend the TAL, notwithstanding a provision in the TAL that allows only limited amendment during the second phase of the transition. Despite language in Resolution 1511 recognizing limited and temporary sovereignty in the CPA and the IGC, both entities arguably lacked the clear authority to bind Iraq to any agreements outlasting the formal occupation of Iraq.

CPA Laws. Laws put in place by the CPA are to remain in force during the transitional period, unless rescinded or amended during the second phase of the transition. The United States does not, however, retain any authority to interpret and enforce those laws. Although Resolution 1546 admonishes the interim government to refrain from any actions that would affect Iraq's post-interim period destiny, it is not clear whether temporary laws put in place by the CPA are automatically protected. The interim government could conceivably choose to rescind such laws or agreements and decline to honor or enforce any obligations created pursuant to them. For example, if CPA orders authorizing foreign investment in Iraq were to be rescinded or modified, the interests of foreign investors could be adversely affected.

Status of Military Forces. It appears that the MNF is operating under a U.N. mandate, with the consent of the Iraqi government, rather than as "occupying forces." Resolution 1546 reaffirms, at the request of the interim government, the authorization for the MNF to "take all necessary measures to contribute to the maintenance of security and stability in Iraq ... including by preventing and deterring terrorism ..." until elections can be held. Under the letter from Secretary Powell annexed to Resolution 1546, these measures include combat operations against insurgents, internment where "necessary for imperative reasons of security," and the continued search for weapons that threaten Iraq's security. Notably, the mandate is to be ended at the request of the Iraqi government.

Although Res. 1546 recognizes the end of the occupation of Iraq, it nonetheless notes that the MNF is committed to promoting security and stability "in accordance with international law, including obligations under international humanitarian law." Ordinarily, international humanitarian law would no longer apply at the end of a military occupation. The UN resolutions leave ambiguous which of the responsibilities of an occupying power under the laws of war were to apply both during the occupation and afterward. Some observers have suggested that Iraq remains under a de facto occupation and that all relevant international continues to apply.

A status of forces agreement will not be possible until the second phase of the transition because only the Iraqi Transitional Government will have the authority to bind Iraq to treaties. At present, coalition forces in Iraq are immune from Iraqi legal process under CPA Order No. 17, which has been extended for the duration of the MNF's presence. However, a sovereign Iraq, even under an interim government, could assert the authority to revoke the immunity.