

**Iraq and the 2006 Constitution<sup>1</sup>:**  
**Lessons for post-conflict constitution-making**

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<sup>1</sup> While many refer to the new Iraqi permanent constitution as the ‘2005 Constitution’ because of its approval in 2005, some have insisted on the importance of ‘[retaining] the Iraqi usage of dating constitutional documents from the year of their coming into force, in this case 2006.’ See al-Istrabadi, 2009 (fn.7) and al-Ali, 2011 (fn.2)

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### **I. Summary**

What follows is a critical assessment of the international community's role during the process of constitution-drafting in Iraq post-2003. The central argument is that the principal failures of the Iraqi constitution-making experience lie not in the weaknesses of the final document itself. Neither should they be attributed to a lack of available constitutional expertise during the drafting process. Rather, the most important lesson is that the whole process was undermined by the imposition of an unrealistically short timetable. Determined by the tremendous political pressures that arose during the process, the unrealistic delays led to a constitution-writing process which focused too much on the production of a sophisticated yet 'inorganic' legal document that adhered to international standards and norms without sufficiently accommodating the unique challenges of Iraq's local context. View from this perspective, the failures of the Iraqi constitution provide powerful support to the argument that constitution-making, particularly in post-conflict settings, must be an extended and inclusive collective exercise that serves to build a broad national consensus around a negotiated blueprint for a new political order that is perceived as legitimate and organic.

### **II. Objectives**

Following the American-led invasion of Iraq in March 2003 and the subsequent dismantling of the existing regime, the international community became actively involved in a concerted effort to reconstruct a stable and inclusive political order governed by legitimate and efficient state institutions. In light of the constant violence and political dysfunction that have plagued Iraq over the past decade, there is a growing consensus that these efforts have largely failed. In fact, there are signs that international

actions may have, to some degree, undermined rather than strengthened the legitimacy of Iraq's emerging political order.<sup>2</sup>

This memo focuses on the role and impact of the constitution-writing process which lasted until late 2005 and served as a crucial component of this state-building project. Representatives of the U.S government, with periodic support from the United Nations, played a central role as administrators and advisors of the constitutional-drafting process. Since 2006, the institutional configuration and governance structures that have evolved on the basis of the new constitution have failed to secure the resolution of violent internal conflict, or to support the development of a functioning government capable of delivering essential services to the Iraqi population.

In light of the vast resources and international expertise mobilized for the writing of this constitution between 2003 and 2005, it is extremely important to ask what factors contributed to the failures that have become so tragically apparent since. The urgency of this task is heightened by the critical situation in neighboring Syria, where the country's political system stands on the verge of collapse due to the violent conflict between the regime of Bashar al-Assad and a broad yet fragmented popular insurgency. Given the likelihood that some form of intervention will be asked from international actors in the post-conflict reconstruction of Syria, what lessons need to be drawn from the recent failures in Iraq?

### **III. Context**

While the conditions under which the Iraqi constitution was drafted were extremely difficult, the overall situation nonetheless remained in many ways characteristic of the complications that often afflict constitution-making processes in post-conflict countries. Prior to 2003, more than three decades of uninterrupted authoritarian rule by an increasingly repressive regime<sup>3</sup> had left Iraqi society deeply fragmented and consumed by a legacy of fear and mistrust.<sup>4</sup> This legacy was compounded by the complexities of a society historically divided along tribal, ethnic (Arab-Kurdish-Turkoman) and religious (Shiite-Sunni; Muslim-Christian) lines – divisions which the previous regime had increasingly exploited as it struggled to maintain power.<sup>5</sup> In the political and security vacuum that followed the American invasion of 2003,<sup>6</sup> struggles for political power and domination were therefore exacerbated by both recent and historical grievances. Whereas a strong Iraqi national identity had traditionally dominated sub-national identities, early outbreaks of violence generated a vicious cycle whereby mounting levels of insecurity contributed to hardening social divides and fueled identity politics that further reduced the likelihood of national dialogue and reconciliation. Crucially, the stakes behind the political struggles were heightened by the prospect of securing privileged access to the tremendous wealth to be generated from the country's vast hydrocarbon resources. Finally, the American-led occupation quickly lost most of the goodwill it had earned from the overthrow of a dictatorial regime, primarily due to significant failures in

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<sup>2</sup> Al-Istrabadi, 2009: 1629

<sup>3</sup> After a decade of power struggles following the overthrow of the Hashemite monarchy in 1958, the Baath leadership remained in power between 1968 and 2003, with Saddam Hussein taking over from Ahmad Hassan al-Bakr in 1979. ICG, 2002: 4-6

<sup>4</sup> ICG, 2005: 1

<sup>5</sup> ICG, 2002:11. See Map in Appendix for a geographic representation of Iraq's complex society.

<sup>6</sup> ICG, 2003: 5-6

its management of the immediate transition.<sup>7</sup> The result was a growing distrust of, and insurgency against, not only the military occupation but also international actors more generally.

#### **IV. Critical Assessment of the constitution making process in Iraq**

It is in the midst of this dramatic context that the Iraqi constitution was prepared. A basic timeline of the process can be found below (Appendix 1) for a general overview of how events unfolded. Between 2003 and 2005, nominal power was passed from the American **Coalition Provisional Authority (CPA)**, to an appointed **Interim Government** (June 2004), and finally to an elected **Transition National Assembly** (May 2005) from which was formed the **Constitution Drafting Committee (CDC)** that was charged with drafting the constitution. Crucially, due to delays the U.S.-imposed deadlines left the CDC with little more than 2 ½ months (from May 24<sup>th</sup> to August 15<sup>th</sup>) to draft a national constitution.<sup>8</sup> This time span was further reduced by: **i)** measures undertaken to re-balance the Committee's representation by appointing Sunni Arab members to join the Committee in July<sup>9</sup>, and **ii)** the transition of talks, after the 1<sup>st</sup> week of August, from the general CDC to a much smaller and unrepresentative group of leaders.<sup>10</sup> Finally, after some brief delays, a final draft permanent constitution was submitted to the Transitional National Assembly on September 13<sup>th</sup>.<sup>11</sup>

From beginning to end, the entire process was dominated and dictated by the United States. First exercised directly via the Coalition Provisional Authority (CPA), American control was then maintained more indirectly after the transfer of sovereignty to the appointed Interim Government in June 2004. For instance, the Transitional Administrative Law, the interim constitution that governed Iraq from March 2004 until the enforcement of the permanent Constitution, was largely written by the U.S.<sup>12</sup> Moreover, despite widespread consensus among Iraqi politicians that first the January 2005 elections, and then the August 15<sup>th</sup> deadline for the permanent constitution, should be delayed, it was because of significant pressure of the U.S. that the original timetable was maintained.<sup>13</sup> Finally, the American Ambassador Zalmay Khalizad was present and actively involved all the way into the final stages of negotiations in August 2005 mentioned above, even when many Iraqi members of the original drafting committee were excluded.<sup>14</sup>

The impact of American political domination extended beyond a capacity to impose a strict timetable. Starting as early as 2003, the leading role of American politicians and legal experts in guiding Iraq's political transition is believed to have culminated in a significant influence over the cultural and normative aspects of the permanent constitution.<sup>15</sup> Despite the nominal transfer of sovereignty in June 2004, the reality of this foreign control was always keenly understood by the Iraqi population,<sup>16</sup> with all the effects that this control could be expected to have on the legitimacy of the process.<sup>17</sup> It is presumably

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<sup>7</sup> ICG, 2003: 6

<sup>8</sup> Babbitt, 2010: 71

<sup>9</sup> ICG, 2005: 2; Babbitt, 2010: 72

<sup>10</sup> ICG, 2005: 3-4

<sup>11</sup> ICG, 2005: 2

<sup>12</sup> Babbitt, 2010: 71

<sup>13</sup> Al-Istrabadi, 2009: 1637, 1639-40; Morrow, 2005: 10

<sup>14</sup> ICG, 2005: 3-4; al-Istrabadi, 2009: 1639-40, 1642

<sup>15</sup> Morrow, 2005: 5

<sup>16</sup> ICG, 2005: 5

<sup>17</sup> Morrow, 2005: 14-15

in order to overcome the growing problems created by its own illegitimacy that the U.S periodically welcomed United Nations support, though there is little evidence that the international organization's advice ever carried much weight against often domineering American interventions.<sup>18</sup>

Moreover, the constitution-drafting process was also severely undermined by a lack of transparency and a lack of public participation. The United Nations, as well as international (USIP, NDI) and local NGOs, sought to conduct education and awareness campaigns.<sup>19</sup> They also sought to facilitate direction participation by supporting an Outreach Unit which had been created within the Constitutional Drafting Committee. However, these efforts to create a more open and inclusive process finally proved futile given the extremely short drafting period imposed by the Americans, as well as a lack of resources and the rapidly declining security situation.<sup>20</sup>

## **V. Lessons: Emphasizing process over content**

In the case of Iraq, there are reasons to believe that it would be dangerously misleading to focus on a textual analysis of the 2006 Constitution in an effort merely to identify the text's omissions, ambiguities and contradictions. Taking the text as a point of departure, one might conclude that, had the drafters only benefited from more expertise, and had a better document been written, Iraq's subsequent political problems might have been avoided. There are two main reasons to reject this type of conclusion:

- *First*, a majority of the lessons one might draw from the failures observed in Iraq were already well documented prior to 2004, and the legal advisors assembled by the United States and the United Nations were unquestionably well acquainted with these lessons.<sup>21</sup>
- *Second*, even those sections of the constitution that were well-written (and there are many<sup>22</sup>) have often, in practice, later been either disregarded by Iraqi politicians and legislators, or subjected to politically-motivated manipulation via questionable legal interpretations.<sup>23</sup>

Thereafter, two critically important conclusions can be drawn from these observations:

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<sup>18</sup> Morrow, 2005: 13-14

<sup>19</sup> UN, 2005

<sup>20</sup> Morrow, 2005: 18-20

<sup>21</sup> Benomar, 2004. The author, who served as a leading advisor during the drafting process through the U.N. Office for Constitutional Support, draws on numerous case studies to offer a list of lessons that, if applied in Iraq, would almost certainly have secured a better outcome. Moreover, there are many reasons to believe that American political leaders and legal advisors were very much aware of the potential benefits of an extended drafting process. (ICG, 2005: 6)

<sup>22</sup> Ghai and Cottrell, 2005. For example, the authors write that the constitution includes "one of the most comprehensive bills of rights that we know." (8) Similarly, the authors also write: "one aspect of the public service does receive an extended treatment—the armed and security forces (which is understandable in view of Iraq's history). The basic principles for the armed forces are that (a) their composition must all reflect all components of the people; (b) recruitment should be without discrimination or exclusion; (c) be under the control of civil authorities; (d) must not take part in politics nor interfere in political affairs, and (d) defend Iraq and 'shall not be used as an instrument of oppression against the Iraqi people' (art. 9(1) (A) to (C))." (22)

<sup>23</sup> For examples, see Visser, 2011 and Visser, 2012. Moreover, in direct reference to the mentions made in above footnote, one can see the report "Mechanisms of deteriorating civil liberties in Iraq" published by the NGO Coordination Committee for Iraq for numerous examples of the constant violation of constitutionally-defined human rights, and the New Yorker article *American Viceroy: Zalmay Khalilzad's Mission*, in which the author describes how state security forces have systematically been used as tools for politically-motivated targeted repression.

- *First*, the mistakes that were committed during the drafting of the constitution were not caused by a lack of understanding of constitutional matters. Rather the failures resulted from flaws in the way that the process was structured and managed by international actors. These flaws left the whole project vulnerable to the tremendous political pressures that arose in favor of an accelerated process. It is important to not simply place the blame on American policy makers either. Pressures originated as much from an Iraqi population eager for a rapid transition to sovereignty,<sup>24</sup> as from a political establishment in Washington eager to reap the benefits of a quick exit from a ‘democratized’ Iraq.<sup>25</sup>
- *Second*, an extended period of political transition was necessary in order to gradually generate higher the levels of trust and good will between Iraqi political elites. More time was also needed for the creation of a political commitment among elites to the enforcement of a constitution that they perceived as organic and legitimate. Absent this trust, good will, and political commitment among elites, even the most sophisticated constitutions can easily be disregarded or circumvented.<sup>26</sup> Therefore the most important benefit from extensive deliberations and negotiations would not have been a constitutional design and institutional arrangements that somehow better reflect international norms for good governance.

Both of the conclusions articulated above lead to lessons that support the importance of focusing on the process of constitution-making. This approach reflects a growing shift in the study of post-conflict constitution-making, away from a strict focus on the content of constitutional texts and towards a broader look at the impacts of *how* constitutions are made.<sup>27</sup> During earlier attempts at ‘democratization’ (starting with the earliest postcolonial transitions and stretching through the 20<sup>th</sup> century to affect countries in Africa, the Arab world, Central Asia, and the Caucasus) the focus had been more limited to the legal technicalities of final constitutional texts.<sup>28</sup> Driven by an underlying faith in the universal applicability of Western models of constitutionalism and liberal democracy, both scholars and practitioners were primarily preoccupied with ensuring that the political structures and legal framework prescribed in constitutions adhered to high standards in areas such as the protection of civil rights and the division of state powers.<sup>29</sup> “As a result, democratic constitutions were enacted even by countries where the political class had little commitment to democracy and where the incumbent government had enough power and little enough competition to disregard with impunity the documents' provisions.”<sup>30</sup> This importance of carefully designed constitutions, of course, should in no way be discarded. Constitutional experts

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<sup>24</sup> “The occupying powers’ inability to put an end to the chaos that erupted following the collapse of the Iraqi regime and its institutions in April 2003 prompted its decisions to set up the Interim Governing Council in July and triggered a sharp debate over the need to hand over full sovereign power to Iraqis much more rapidly than U.S. officials, who had been discussing a two-year timeframe, were initially willing to contemplate. On one side of the debate, the CPA was seeking to hold the line: there should be no rushing of the process. On the other, a broad spectrum [of Iraqis, foreign governments, and Americans] was pressing for a much swifter restoration of full Iraqi sovereignty. (...)” ICG, 2005: 6

<sup>25</sup> “The Americans (...) are more concerned with their timetable than with stabilising Iraq. They want to disengage politically and become less visible militarily.” (ICG, 2005: 5)

<sup>26</sup> Ottaway, 2004: B11

<sup>27</sup> Miller, 2010: 601; Babbitt, 2010: 69; Ottaway, 2004: B11

<sup>28</sup> Ottaway, 2004: B11

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

continue to find that some institutional configurations, if properly embedded in the design of a constitution, can play a decisive role in defusing the conflicts that often plague and derail post-conflict reconstruction efforts.<sup>31</sup>

However, during the last quarter of the 20<sup>th</sup> century, a succession of transitions towards constitutional democracies in many countries has contributed to a significant shift in the understanding of the challenges of post-conflict constitution-making.<sup>32</sup> These experiences have gradually demonstrated the importance of *the process* of constitution-drafting. The tremendous complexity and political pressures that characterize constitution-making in post-conflict settings generally make the process far more chaotic, unstructured, and conducive to continued conflict than it should be.<sup>33</sup> Stressing the damage caused by procedural flaws that impede constructive negotiations, reconciliation, and careful planning, constitutional expert Donald Horowitz writes: “Many constitutions have been constructed, but few have been designed.”<sup>34</sup> Increasingly, constitution-drafting is no longer seen as a process whereby the rapid adoption of a new constitutional text allows countries to swiftly adopt a more sophisticated legal framework and political structures. Instead, experience has increasingly shown that the process of writing a constitution must absolutely be an extended and inclusive collective exercise in order to build a broad national consensus around the blueprint for a country’s new political order.

## **VI. Recommendations**

From the perspective of outcomes, the constitution-drafting process in Iraq, as it was structured and managed by the international community (primarily the U.S and to some extent the U.N.), failed for two reasons. First, because it exacerbated rather than attenuated the fear and distrust that defined (and as a result continue to define today) Iraqi politics post-2003.<sup>35</sup> Second, because those ‘institutional configurations’ and extensive human rights guarantees which were included in the constitution were mostly imposed by foreign legal experts rather than emerging from drawn out domestic processes of negotiation and deliberation. As a result, these elements were at once disconnected from the realities of Iraq’s local context, and not supported by sufficient political commitment on behalf of Iraq’s political elite. The consequence is that these constitutional provisions, while perhaps well-designed and well-intentioned, later proved ineffective during, in some cases even detrimental to, the development of Iraq’s new political order.<sup>36</sup>

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<sup>31</sup> See Horowitz, 2008: 1215-1226, wherein the author details the advantages and disadvantages of different constitutional approaches and associated governance models when applied to transitions in post-conflict states.

<sup>32</sup> Benomar, 2004. The author refers to numerous cases, including Spain 1975, Zimbabwe 1980, Cambodia 1991, post-apartheid South Africa, Colombia 1991, Bosnia and Herzegovina 1995, and East Timor 2001-2002.

<sup>33</sup> Horowitz, 2008: 1226-1231

<sup>34</sup> Horowitz, 2008: 1231

<sup>35</sup> “Clearly, the constitutional process has further entrenched ethnic-sectarian identities in ways that bode ill for the country’s future.” ICG, 2005: 5

<sup>36</sup> See fn. 22-23. Moreover, this case is also powerfully made by Zaid al-Ali in his article *Constitutional Legitimacy in Iraq: What role for local context?* To cite one key example, the author writes: “The COR was granted a wide range of powers, establishing what is perhaps the Arab region’s strongest parliamentary system of government. (...) And yet, although the constitutional drafters in 2005 sought to protect and defend that function, they unintentionally caused its decline, which in turn contributed to the sense of impunity felt by government ministers and senior officials alike.” (2011: 631-32;635)

In light of these observations, the obvious recommendations for any future internationally-driven process of post-conflict constitution-drafting might seem to be rather straightforward. As early as 2000 (if not in practice much earlier), constitutional experts were already keenly aware of the crucial importance of ensuring the safeguard of certain key principles, including<sup>37</sup>:

- 1) Publicity – allowing for extensive public discussion;
- 2) Consensus – rather than relying on majority rule for decision-making during the drafting process;
- 3) Legal Continuity – maintaining some elements of the old legal order to prevent new political leaders from taking unlimited control;
- 4) Plurality of Democracies – using different forms of democratic participation at different stages of the drafting process, presumably to forestall control by any one group;
- 5) Veil of Ignorance – introducing some uncertainty in the drafting process so no one interest group can dominate the design;
- 6) Reflexivity – learning from past and present experience (and from the experience of others) during the drafting process.

Unfortunately, even though the lessons just cited were already well understood by constitutional experts prior to 2003, this did not prevent the process in Iraq from becoming yet another example of how likely such ambitious state-building projects are to fail dramatically. Indeed, the recognition of the importance of these principles must be accompanied by a few critical considerations. First, these principles cannot simply be applied uniformly – the particular characteristics of some situations might require drafting processes that are less transparent, inclusive and deliberative than others.<sup>38</sup> Moreover, there is always a persistently large gap between the theoretical prescriptions of experts and the actions undertaken in practice by politicians and policymakers whose decisions and priorities are often shaped by a multitude of different factors. The realities of this disconnect were clearly observed in Iraq, as in too many other circumstances,<sup>39</sup> and extend far beyond the field of constitution-drafting and state-building.

What is absolutely certain is that the international community must, to the extent possible, act in a coordinated and concerted manner under the leadership of one representative body that can be perceived as legitimate by the country itself. The management of the process in Iraq was powerfully distorted by the lack of legitimacy of the U.S. and insufficient cooperation between the U.S. and the U.N. Moreover, this representative international body (it could be a one-time, temporary structure) should be shielded from political pressures that might be imposed by internal actors or powerful external actors with vested interests in shaping the outcomes of the process. International visibility, a transparent and clearly-defined mission, and overall legitimacy should go a long way in facilitating this resistance to political pressures. One option would be to secure a more prominent role for regional actors. In the case of Syria, this would mean involving the Arab League to reduce any suspicion that might come from a purely Western-led initiative. The administrative weaknesses and the paralyzing politicization of the Arab League have undermined its contributions in the past – however, only by forcing this body to take on more responsibilities can it be brought to a point where it can play an active and constructive role in regional crises that require international intervention.

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<sup>37</sup> This list of principles is drawn from Arato, Andrew 2000. *Civil Society, Constitution, and Legitimacy*. Lanham: Rowman and Littlefield, as cited in Babbitt, 2010: 70.

<sup>38</sup> The full implications of this important consideration are explained and delineated in Horowitz, 2008:1231-1239

<sup>39</sup> Babbitt, 2010: 73



A politically neutral international body (if such a thing is possible) would not only bring critically-important international legal expertise to post-conflict political transitions where it is too often dearly missed;<sup>40</sup> such a body could also create the deliberative space needed to defuse tensions between competing groups and hopefully pave the way for national reconciliation and subsequent cooperation in the drafting of a new constitution.

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<sup>40</sup> Horowitz, 2008: 1227-1228

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**Appendix A.** This timeline represents an extended and more detailed version of the one found on page 2 of Morrow, 2005. All additional information was collected from various sources cited in the References list.

### Timeline

2003	MAR	American invasion
	APR	U.S declares the end of combat operations; dismantles most Iraqi state institutions; and creates the Coalition Provisional Authority (CPA), the American ruling administrative body
	JUL	U.S Ambassador Bremer appoints 25-person Iraqi Governing Council (IGC)
	OCT	UNSC Res. 1511 recognizes US-UK occupation until permanent constitution is adopted and elected government is formed accordingly
	NOV	Amb. Bremer instead imposes 'November 15th Agreement', setting timeline for transfer of sovereignty by mid-2004 to an appointed Interim Government
2004	JAN FEB	
	MAR	<b>Transitional Administrative Law (TAL, interim constitution)</b> adopted, calling for elections for Transitional National Assembly by Jan. 2005 and final constitution approved by Aug. 2005, 7 months later
	APR MAY	
	JUN	<b>Iraqi Interim Government</b> is appointed by the CPA, the IGC and the UN; the CPA and the IGC are dissolved
	JUL AUG SEP OCT NOV DEC	
	2005	JAN
FEB MAR APR		
MAY		<b>May 3:</b> Transitional National Assembly formed (under PM <i>Ibrahim al-Ja'fari</i> ) <b>May 10:</b> 55-member <b>Constitution Drafting Committee</b> formed (without Sunni Arab representation) <b>May 23:</b> Committee Chair appointed, Committee can start working
JUN		<b>Jun 16:</b> Decision to expand Committee membership to include Sunni Arab representation
JUL		<b>Jul 8:</b> Constitution Drafting Committee work begins: Sunni Arabs attend first Committee meeting <b>Jul 19:</b> Sunni Arab Committee member assassinated; other members suspend participation <b>Jul 25:</b> 15 Sunni Arabs rejoin Committee
AUG		<b>Aug 1:</b> Deadline to request Art.61(F) extension <b>Aug 8:</b> Constitution Drafting Committee no longer convenes, negotiations are moved to a restricted group, the 'Leadership Council' <b>Aug 15:</b> Deadline for draft constitution; National Assembly amends Transitional Authoritative Law for ad hoc one-week extension <b>Aug 22:</b> Ad hoc three-day extension <b>Aug 25:</b> Ad hoc unlimited extension <b>Aug 28:</b> Draft submitted to National Assembly
SEP		<b>Sep 18:</b> Draft submitted to United Nations for printing
OCT		<b>Oct 15:</b> Referendum
NOV DEC		<b>Dec 15:</b> Elections for Iraqi parliament, Council of Representatives
2006		MAR

**Appendix B. Map of Iraq showing distribution of religious and ethnic groups**

