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# CONSTITUTION-MAKING AFTER CONFLICT: LESSONS FOR IRAQ

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The adoption of a new constitution marks a special moment in a state's history when political discussion must go beyond everyday concerns and to grapple with the very nature and future of the polity. Questions of consent, legitimacy, key institutions, methods of apportioning and controlling power, and respect for rights come to the fore as basic options are weighed, and then chosen or rejected. Should the state be federal, unitary, or confederal? Should it be parliamentary, presidential, or some hybrid of the two? What will be the duties and powers of its law courts? How should all those with a stake in the country be represented both in the process of forming the constitution (the "ground rules of the game," so to speak) and in the regular "game" of politics itself? Are popular elections necessary at every step of the way? If so, how can they be made feasible in countries struggling in the wake of war and dictatorship? How can the majority's right to rule be balanced against the rights of minorities and individuals to be free from oppressive majority dictates? How can the government be made both strong enough to govern effectively and yet not so strong that it threatens to smother human rights?

Over the past three decades, dozens of countries have passed through such founding or refounding moments, which in many cases have coincided with the ending of long and bitter armed conflicts. Societies emerging from conflict face the difficult task of keeping political contestation within the regular channels and peaceful bounds of civil institutions. This arduous work must often go forward, moreover, despite lingering distrust, scant desire for reconciliation, and weak or

shattered state institutions. The process of constitution-making, while rightly focused on the long-term goals of promoting human rights, strong state institutions, and stability, may also—with proper handling—aid the more immediate causes of conflict resolution and peace. But the converse is also true: An ill-conceived or otherwise faulty constitution-making process can harm the prospects for stable democracy even in countries that offer promising protodemocratic conditions.

The present essay, which focuses on the process of creating a permanent constitution, begins by drawing lessons from the experiences of 19 transitional countries, most of which have emerged from armed conflict over the past three decades. These experiences formed the focal point of a project sponsored by the United Nations Development Programme and the United States Institute of Peace. The project recruited experts—often with practical as well as theoretical knowledge of constitution-making—to write case studies of constitution formation and conflict resolution in postconflict societies. The lessons, both positive and negative, come from Albania, Bosnia and Herzegovina, Brazil, Cambodia, Colombia, East Timor, Eritrea, Ethiopia, Fiji, Ghana, Kenya, Liberia, Namibia, Nicaragua, Portugal, South Africa, Spain, Venezuela, and Zimbabwe. All told, they span a period from 1975 to almost the present.

After listing and briefly commenting upon these lessons, I will lay out a practical framework for constitution-making in Iraq, as things stand at the time of this writing in early March 2004. Throughout, I shall attempt to take into account not only the lessons learned from other countries and the conditions obtaining in Iraq, but also the opinions and observations that I have gleaned firsthand from a wide range of Iraqi academic experts and political participants.

### Lessons Learned: A Brief Compendium

During the constitution-drafting process must come decisions about the limits and practices of the new regime as well as the rights and duties of citizens. The goal is to build on a solid flooring of democratic and constitutional principles. Democracy ensures that powerholders will alternate in office as majority preferences shift, while constitutionalism sets limits that majorities must respect. The constitution-making process must pursue the sometimes-divergent goals of representing the people's will, forging a consensus regarding the future of the state, and ensuring respect for universal principles such as human rights and the basic norms of democratic governance. The lessons that follow should help to optimize pursuit of all these aims.

***1) It is generally best to keep peace talks and constitutional deliberations separate.*** The negotiations leading to a peace agreement are concerned with the short-term issue of conflict termination. Combining

them with the drafting of a constitution can compromise long-term concerns regarding the nature of state institutions. Ideally, the end of armed strife and a peace accord will come *before* the process of crafting a constitution begins. In other words, constitutions should be less about war-ending and more about the broader, future-oriented work of peace-building. The troubled former Yugoslav republic of Bosnia and Herzegovina may serve as a cautionary example in this regard. Coming after three years of bitter fighting and ethnic cleansing, the exclusively elite-based Dayton talks of 1995 focused on satisfying the interests and demands of the best armed and most warlike. The emphasis was on stopping the shooting war, not on getting the contending parties to agree on a common future in a single state. The result was a constitution that entrenched rather than resolved disagreements and fortified existing power relations among Serbs, Croats, and Muslims. As a result, the constitution does not have the capacity to preserve the current political system, which relies heavily on outside forces to hold it together.

In Zimbabwe, likewise, the 1980 constitution is the result of a process that was as much about peacemaking as it was about drafting fundamental legislation. Over the long term, this constitution has not proved conducive to the resolution of conflicting interests. For instance, the deeply entrenched protection of white-owned farms was necessary for peace, but has since become an occasion of much trouble.

***2) Address security issues that inhibit meaningful debate, consensus-building among all stakeholders, and transparency.*** In Ethiopia, a turbulent security situation hampered the constitution-making process. There was no legally constituted national army or police force to ensure the security necessary for elections, nor was there enough time to create good conditions for effective local participation.

In Cambodia, the main parties agreed to a comprehensive, UN-brokered political settlement, the Paris Agreements. Although the Agreements failed as a peace accord (there was no disarmament or demobilization, and ceasefire violations kept happening), the UN took the calculated risk of pushing ahead with elections for a constituent assembly. Although the elections were free and fair and enjoyed massive participation, the continued flaring of political violence became an excuse for a brief and secretive constitution-making process.

In Nicaragua, the process of constitution-making and the 1987 constitution contributed to resolving the armed conflict, which ended only in 1990. The continuation of the conflict during the process meant that the 1987 constitution left many issues undecided. The need to make extensive compromises prevented substantive consensus on the nature of the state and the type of democracy to be adopted. When the conflict ended, these issues remained, and the constitution had to be amended.

In Colombia, the 1991 constitution was an attempt to mitigate an

ongoing violent conflict. But the refusal of the two large leftist guerrilla groups to take part dealt the constitution's prospects of fostering peace a heavy blow. Internal conflict, narcotics trafficking, and a weak state have left Colombia's democratic institutions hard-pressed, and violence reigns across large swaths of the national territory.

**3) *Involve as many key stakeholders as possible in drafting the new constitution.*** To endure and promote peace, a constitution must reflect a compact acceptable to those who have political power and capital in the wake of war. In countries raked by civil strife the losing side may find itself excluded from the constitution-making process, as in Cambodia. In other lands, even parties of questionable moral standing (consider the National Party of apartheid-era South Africa) have been included in this process on pragmatic grounds.

This is a delicate question. On one hand, if a postconflict agreement is to survive, ignoring powerful players is not an option. How could any settlement in the Balkans have had a chance without guaranteeing to all major antagonists some permanent political representation, decision-making power, and autonomous territory?

On the other hand, however, adding participants is risky. Too much worry about accommodation can produce an agreement that contains no common vision of the state's future, or a short-term accord that serves elites at the expense of strong democratic institutions and long-term stability, and may even trade away key points of international law and human rights. The process should be a principled discussion about the future of the society and the state, and not a round of dickering over narrow interests.

For purposes of war termination, it will usually help to have an initial or interim agreement guaranteeing all parties representation and a share in decision making. Such an agreement should be short-term, and should lead to a flexible process of democratic dispute resolution rather than the rigid marking out of group guarantees. This process can go on within the context of a centralized state, moreover, meaning that power sharing need not always imply federalism or other forms of decentralization.

In South Africa, a culture of power sharing and bargaining existed from the early stages of the transition to democratic government. The 1993 interim constitution was a power-sharing agreement meant above all to forestall a possible backlash by still-powerful apartheid-era bureaucratic and security forces. Potential spoilers received concessions and a share of power in the resulting national-unity government. Crucially, the agreement included a five-year "sunset clause," and did indeed give way to the modified majority-rule democracy that holds sway in South Africa today.

In Namibia, all interested parties agreed in 1981 on principles concerning the constituent assembly and the constitution of an independent

Namibia. After an election in 1989, the constituent assembly unanimously adopted these principles as a framework for drawing up a constitution. Broadening the elite group participating in the process was necessary for the successful final phase of the constitution-making process.

In Spain after the death of dictator Francisco Franco in 1975, all but a tiny yet vocal minority of groups chose to take part in the transition rather than creating obstacles, showing a general willingness to move closer to the political center in order to create a democratic regime.

The Ethiopian opposition resented its exclusion from the transition and the constitution-drafting process, and denied the legitimacy of the country's closed-door constitutional commission. The paucity of public debate left important issues of ethnicity, self-determination, and federalism inadequately addressed, which later fed secessionist trends within Ethiopia.

Venezuela's 1999 constitutional process facilitated the takeover of the state by a single group. With the constituent assembly dominated by the party of populist president and onetime coup leader Hugo Chávez, inclusion went by the boards. Many political forces were shut out, popular participation was limited, and central concerns of the Venezuelan people such as decentralization and party reform went unaddressed. The Venezuelan political system, now deadlocked in a feud between pro- and anti-Chávez forces, cries out for major reform. In Colombia, as we have seen, the constitutional process has not brought peace because the two large rebel groups did not take part.

**4) *Make sure the constitution rests on a substantive consensus regarding fundamental principles.*** The Nicaraguan process emphasized conflict resolution. The ruling Sandinista party could have imposed a constitution, but instead accommodated key opposition concerns. This broadening move, however, meant papering over rather than actually resolving key disputes, and the resulting fundamental law was full of contradictions and ambiguities, reflecting a consensus that was at best superficial.

Brazil's 1998 constitution was the product not of a specially chosen panel or assembly, but instead of the country's regular legislature. With no single party or faction dominant in Congress, protracted bargaining to cobble together majorities produced a needlessly complex document that lacks consistency, organic unity, or a coherent vision. Although Brazil's democratic transition must be rated a success, political institutions remain weaker than they should be.

**5) *Do substantial preparatory work before choosing a constituent assembly.*** This lesson is important because the constitution-making process itself is not really the beginning. Rather, the process must be mapped out before it can start, and everyone knows that process affects

outcomes, so the methods and timetables according to which the new constitution is to be written, discussed, and approved may readily become bones of contention. It matters what types of institutions are chosen (an appointed drafting committee or an elected constituent assembly, for example), and it matters how the timing and sequencing of the drafting stages are arranged. Whoever makes decisions about “process questions” should make them with an eye toward preventing any one group from dominating the process, and toward boosting legitimacy through public participation.

Elections for constituent assemblies often leave the victors riding high, ready to dominate the process with their mandate. As elected officials, moreover, these winners may already be thinking a great deal about their own prospects under the very system that they are entrusted with designing.

Appointed constitutional committees may not achieve the legitimacy of an elected body, but have several advantages nonetheless. They are probably more likely to promote an informed drafting process and give all sides equal access to information. Ideally, such a committee should be independent, considering the long-term interests of state and society, instead of the short-term interests of political factions. Combining an appointed committee with an elected assembly or a referendum might help to fill the legitimacy gap.

South Africa’s interim constitution was born out of intense negotiations among key stakeholders. It set out the principles governing the election of a constituent assembly through a system of proportional representation. While the interim constitution was in force, a government of national unity ensured that no one group would dominate the process of transition.

In Namibia, substantial and long-term discussions among all actors resulted in an agreement that elections would select a constituent assembly, which would then adopt the constitution. Preparatory work in many countries has included civic-education campaigns as well as consultation and debate among all stakeholders before any voting takes place.

**6) Do not let one political force dominate the constitution-drafting body.**

In Nicaragua’s 1984 constituent-assembly elections, the Sandinistas won 67 percent of the vote, yet proved willing to offer concessions to the opposition and to elicit extensive public participation over the two-year constitution-drafting period.

In Colombia, a referendum opted for an elected constituent assembly. In choosing the members of that assembly, a third of the electorate voted for independent political forces, breaking Colombia’s long two-party tradition of Liberal and Conservative dominance. But this was an exception. Most often, the reigning political forces dominate the constituent assembly. In East Timor’s first postindependence election, one

party won a sweeping victory and then decided that its hefty mandate gave it a warrant to dispense with separate public consultations on the draft constitution. In Ethiopia, the decisive victory of one political party in early elections had the unfortunate effect of stifling both broad popular discussion and elite-level debate with the opposition. A variety of institutions and conferences sprang up before the drafting and ratification of the 1994 constitution, but this emphasis on appropriate consultative measures came late.

In Venezuela, the ruling presidential party dominated the 1999 constituent assembly by flagrantly violating the existing constitution and the principles of dialogue and collaboration, shutting out all the traditional parties. The assembly then became a runaway body, usurping the powers of other governing bodies and assuming powers for which it had no mandate. The constitution-making process was therefore not one of reconciliation and consensus-building, and Venezuelans are paying the price, as their country's turbulent history under the 1999 constitution attests.

**7) *See to it that talks among key stakeholders are unhurried and thorough.*** Substantial deliberation promotes the durability of the constitution and the political system by encouraging a culture of multiparty consultation and cooperation, and by giving all actors a sustained opportunity to commit themselves to the constitution-making process as a way of managing contending visions and interests so as to foster rather than destroy national comity and reconciliation. Namibia held a constitutional debate that lasted several years and influenced all political developments. All interested parties agreed on a list of constitutional principles—among them the proposition that “Namibia will be a unitary, sovereign and democratic state”—which shaped the discussion.

A further advantage of fairly conducted and substantial deliberation is its potential to promote national accord—something that is particularly desirable in cases where peacemaking and constitutional creation are unavoidably entangled. In South Africa, initial talks on the constitutional future among key stakeholders let each party know everyone's position and range of options. The path to democracy was paved with political pacts that established informal institutions for negotiation and power sharing and led up to a November 1992 “record of understanding” and then an interim constitution seven months later.

In post-Franco Spain, the initial phase of the constitution-drafting process, in which seven prominent political leaders participated, created the framework for the new constitution. During this phase a “consensual coalition” of highly diverse interests emerged as the main driver of the process, addressing such core issues as the outlines of the



new polity, territorial organization, fundamental freedoms, and the reform or abolition of Franco-era political institutions.

In contrast, Bosnia and Herzegovina's constitution was adopted under extreme time pressure. The constitution elaborated at Dayton did not reflect stakeholder agreement on the nature of the state and of the political system, and therefore does not reflect a vision of a common future within a shared state.

**8) *Promote legitimacy by encouraging popular participation.*** Constitution making is an exercise in democratic empowerment and can contribute significantly to nation-building. But the constitution and the legal order may lose legitimacy if people come to feel that they have had too little say in making them. Laws and institutions must reflect a broad consensus about the terms of common life. Public participation allows citizens to claim the constitution as their own. National dialogue and civic education can address underlying causes of conflict and help citizens to define a national identity and a shared vision for the future.

Although international law does not spell out rules for drafting constitutions, emerging norms call for broad participation by civil society and the public. Most of the constitution-making processes of the past two decades have attempted this, though in diverse ways. Preparatory civic education—teaching both large constitutional principles and the finer details of the drafting and adoption processes—will make public participation more effective by boosting citizens' confidence and competence.

South Africa's experience of violent conflict made for high-stakes, elite-led negotiations in the period leading up to the interim constitution. Once the basic principles were agreed upon, the process became open to extensive public participation. The elected constituent assembly held two years of transparent deliberations with ample public input. All constitutional debates were published and broadcast, citizens could tune in to educational radio programs, and all parties carried out consultations right down to the village and neighborhood levels. Citizens at large submitted two million proposals and suggestions to the assembly. As a result, the constitution of postapartheid South Africa enjoys extraordinarily high legitimacy.

Namibia also had intense and long-term public participation. The public was well informed about constitutional issues through the election campaigns of political parties, and the national radio network helped school the public on key issues.

The Eritrean process's initial public-education phase included seminars conducted at the village level by more than four hundred specially trained instructors. The second phase included a popular consultation regarding the constitutional commission's proposals. The third phase brought comments from regional assemblies, localities, members of pro-

fessional and civic organizations, and individual citizens. The constitution today enjoys a high degree of legitimacy.

**9) Public participation should lead to formal mechanisms such as inviting submissions on a draft constitution or a referendum.** In Nicaragua, the Sandinista government supported an elaborate process of public participation. After the election of the constituent assembly, a constitutional commission wrote a draft, invited comments from civic groups, and then gave both the draft and the collected comments to the assembly, which distributed 150,000 copies throughout the country. About a hundred thousand people attended 73 townhall-style meetings around the country to make their views known. Radio carried the meetings live; newspapers and television covered highlights. Based on the comments received, a second draft was prepared for the assembly to debate. Yet citizen involvement could not bring elite consensus, and key groups continued to differ strongly over the nature of the state and key constitutional principles.

The Colombian process also included substantial public participation, with more than 1,500 working groups set up countrywide to receive proposals from diverse social sectors. Yet this could not overcome the refusal to participate of the two main guerrilla groups, and Colombia's government remains weak despite the new constitution.

In Brazil, the central role of Congress meant that interest groups wielded strong influence despite an unprecedented display of popular participation, during which 61,000 amendments were proposed. Proposals by civic organizations automatically went to subcommittees that were required to hold public hearings. While this did not lead to a coherent constitution, it did help Brazil to achieve its successful transition to democracy.

**10) Constitutions produced without transparency and adequate public participation will lack legitimacy.** In Cambodia as in South Africa, violence prior to negotiations led to hesitation about opening the process to the public. Unlike in South Africa, the Cambodian public never got access to the constitution-drafting sessions and had no input into the text. Critics argue that the continuation of political violence did not justify the secrecy of the process, and that Cambodia's constitution established a weak democratic structure. Nonetheless, human rights organizations—with significant assistance from the UN mission on the scene—engaged in civic education, raising public awareness of the constitution's significance and its importance for human rights. Buddhist clergy were especially helpful at reaching people in remote areas. NGOs hosted members of the constituent assembly at public meetings. Approximately 120,000 people were reached directly by these education and training efforts, with millions more reached indirectly through leaflets, brochures, stickers, posters, and broadcasts.

In Ethiopia, the closed process had even less justification than it did in Cambodia. Public participation came too late, permitting a single party to bestride the process, thereby harming legitimacy. Other factors working against meaningful grassroots involvement included poverty, poor communications and transport, and a political tradition inimical to broad participation. The East Timorese assembly had a mere ninety days to deliberate on a constitution. Civil society groups, the Catholic Church, and international organizations lacked the time to prepare adequate submissions. While the local UN mission and others did their best to make the process transparent, the assembly ignored these efforts and the public showed little awareness of the constitutional draft.

Fiji's constitutional commission declined either to present a draft for public discussion or to undertake any civic education. The process was closed and revolved around the views of the two main parties. The public was handed a *fait accompli* that nobody has even bothered to translate into local languages.

**11) Make sure the constitution incorporates principles of universal human rights, including the rights to participation and democratic governance.** Most of the postconflict constitutions adopted over the past decade and a half have been deeply influenced by the centrality of human rights and universal principles in international law, and properly so. The human rights provisions of East Timor's constitution reflect international law as regards civil and political rights and many economic, social, and cultural rights. The Nicaraguan constitution explicitly acknowledges the importance of international law in safeguarding human rights, and incorporates the Universal Declaration of Human Rights and the two main UN human rights conventions, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights.

**12) Seek help from international and domestic experts as needed, and look abroad for lessons.** Since participants in constitution-making must understand what a constitution is and does, trusted constitutional advisors and expert committees may make valuable contributions. In Namibia, the participants engaged in serious debate among themselves on the meaning and importance of democratic institutions. Lectures, seminars, discussions, and workshops were held on a wide range of topics pertaining to constitutions, systems of government, the role of political parties in a multiparty democracy, and the international protection of human rights. In South Africa, the expertise of the parties made a preconstitutional commission or group of experts unnecessary. The constitutional specialists in the two main political parties grew to respect each other's expertise. The Asia Foundation sent constitutional

experts to East Timor to give technical advice to various assembly committees on drafting the constitution. Nicaraguan leaders traveled to study various constitutions, and met with experts at home and abroad.

It is particularly important to try to mobilize as much national expertise as possible during the constitution-making process. Foreign advisors may be helpful as well, but should not effectively replace the local participants in the process. Such advisors can usefully offer counsel or lay out options, but under no circumstances should they act on behalf of any local political party or group.

### **Crafting a Constitution for Iraq**

While not all the experiences and lessons outlined above are equally applicable to Iraq, we can still learn much from them. And we need to, given the impasse that has developed over the process for creating a new permanent constitution to govern the future sharing out of power, rights, and obligations in Iraq. The durability and precise character of this impasse remain less than fully certain at the time of this writing in early March 2004, but tentative analysis is possible, and is offered accordingly. Given the history and current circumstances of Iraq, what is the most promising framework for forming a stable and at least relatively successful democratic constitution there?

Above all, Iraq needs a constitutional framework that can help to accommodate the country's serious internal tensions and contradictions. Some observers worry that democracy understood as sheer majoritarianism will allow the Shi'ite Arabs—who may form as much as 60 percent of the population—to dominate. Many Sunni Arabs and Kurds will want to curb or will even flatly oppose a majority-rule system. Other difficult questions are those of federalism, the status and integration of the Kurdish areas in the national polity, and the relation between religion and the state. How such questions are addressed in the short term (when easing the process is the main goal) will influence how they are resolved in the long term.

Some Iraqis argue that if constituent-assembly elections are held prematurely, the two most likely outcomes will be: 1) a highly fragmented assembly—there are reportedly more than sixty political parties active in Baghdad alone—in which no single agenda predominates; or 2) domination by religious parties (the best-organized groups and the only ones with name recognition) or by other existing parties that do not reflect popular preferences.

A period of discussion and consolidation will allow new leaders to emerge, political platforms to crystallize, and coalitions to gel. In Iraq, many Sunni Arabs, Shi'ite Arabs, and Kurds subscribe to a broad spectrum of political ideologies and affiliations, many of which have little if anything to do with religion. If these alternative political groupings

are given time to emerge and get organized, consensus and clarity regarding the rules of the game could benefit.

How do things stand in Iraq at the time of this writing in early March 2004? On 15 November 2003, the Coalition Provisional Authority (CPA), headed by U.S. diplomat L. Paul Bremer, and the 25-member, CPA-appointed Iraqi Governing Council (IGC) signed an agreement on the political process for transferring authority from the CPA to Iraqi leaders. The agreement set 30 June 2004 as the date upon which Iraqis will formally resume sovereignty, at which time the CPA is to dissolve itself, as a transitional assembly and a provisional government take over.

The November 15 agreement also went into detail on constitutional issues such as federalism versus centralism, the separation and specification of powers, and a bill of rights. The pact outlined a federal state prior to any deliberations on federalism by Iraqis. Although the pact said that the fundamental law would set the timetable for the move to a permanent constitution and full Iraqi self-rule, the November 15 agreement actually fixed several key dates on its own.

Also, and most controversially, the agreement stipulated that a complex system of regional caucuses would select the members of the transitional assembly. Yet key Iraqi figures—in particular the highly influential Shi'ite cleric Ali al-Sistani—firmly opposed caucus-style elections for the transitional assembly and demanded direct popular voting and an eventual constitutional referendum. Some IGC members sought to meet these demands, but others accepted the November 15 plan and called direct elections unfeasible. A confrontation was becoming likely. This deadlock has now been resolved through the work of a UN mission, led by Undersecretary-General Lakhdar Brahimi, which offered a timetable for elections that all sides have found acceptable. (For excerpts from the mission's report, see pp. 180–81.)

At least through Brahimi's arrival in early February 2004 (at the head of a fact-finding team requested by the CPA, the IGC, and Sistani), the CPA had been managing the political process in general, much to the chagrin of many Iraqis, Shi'ite and otherwise, who did not see the CPA as a neutral arbiter. The CPA's initial constitutional proposals were for a convention in which a select group of 130 to 150 Iraqis would draft a constitution within three months. As long as the particulars of choosing participants and providing for public consultation remained in the CPA's hands, the CPA was guaranteed a pivotal role in determining the outcome of this convention. By giving U.S. clients more legitimacy, power, and opportunity to influence the future governance of Iraq than they could gain through popular elections, the November 15 plan risked a number of dangerous outcomes, including the institutionalization of a Lebanese-style system of ethnosectarian apportionments and divisions.

In keeping with the November 15 agreement, the CPA and the IGC on 8 March 2004 signed a transitional "Law of Administration for the

State of Iraq for the Transitional Iraq.” While it is encouraging to see Iraqis discussing important issues concerning their country’s governance, there are serious problems with the process that detract from the credibility and legitimacy of the document which has emerged. In time, these problems could have destabilizing effects. First, this interim constitution emanated from negotiations between the CPA and the IGC: an occupying power and its appointed body. Neither has the popular legitimacy to undertake this task. Second, the CPA played a major role in the drafting of this document, eroding its credibility further. In doing so, the CPA went beyond its obligations as an occupying authority under international humanitarian law. Third, until the final few days, this document was elaborated almost in secrecy by a small group drawn from the IGC. No constituency outside the IGC was involved; neither was the public consulted. Fourth, this document—while officially set to expire upon the promulgation of a permanent constitution—is in fact a full-fledged constitution that commits Iraqis to many important decisions that should have been left to the debate on the permanent constitution in a legitimate elected assembly. Provisions in interim constitutions have often found their way in to permanent constitutions and then proved hard to amend. It will be difficult in any future consensual process not to build most of this document into the final result. Fifth, this *fait accompli* constitution undermines the effort to find consensus on interim governing arrangements and should have been at least presented as a draft to an inclusive national dialogue before being finalized. Finally, in a post-decolonization era, it will be hard for many Iraqis to accept that their interim constitution is partly drafted and officially approved and signed into law by their occupiers.

Instead of a detailed interim constitution, it would have been wiser to have developed consensus among all Iraqi stakeholders before producing a general set of principles, consistent with international law, to guide the transition.

The interim constitution calls for civic education and public consultation, but offers no plan for making them happen. They are to begin with the election of the assembly, yet the schedule now in force allows just eight months for these tasks. Nor does the interim document specify how a large elected assembly is to prepare its draft or bring the fruits of public consultation to bear on the work of deliberation and drafting. To address these needs, the appointment of a Constitutional Preparatory Commission (CPC) should be considered. An interim government or a national dialogue could name such a body and lay down its mandate, structure, and methods of proceeding.

Composing the CPC will demand particular care. As a forum for reflection and debate, it must include the country’s different political outlooks, with members operating on an equal footing and not on the basis of the relative weight of the groups that they represent (the elected

assembly will reflect those weights). The CPC should form before the assembly is elected, should remain independent, and should have sufficient resources to organize and track the progress of public educational and consultative activities, prepare instructional materials, and study relevant international experiences.

Ideally, the CPC should be an autonomous, term-prescribed body with legal standing and clearly identified responsibilities. Obviously, it should not be a drafting or advisory body. Its mandate should include: 1) fleshing out a detailed constitution-making process; 2) fostering consensus on key constitutional principles and stimulating civil debate on constitutional issues and basic features of government; 3) conducting research on relevant foreign constitutions and international experiences with constitution-making; and 4) educating all Iraqis about both the constitutional history of their country and the current constitution-forming process.

During the public-education campaign that the CPC is to orchestrate, the CPC should collect submissions from citizens and report their views to the provisional government, and later, to the elected assembly. In addition, the CPC should publish briefing papers discussing core constitutional principles on such issues as the relationship between religion and the state; the rights of women and minorities; and international standards of human rights. Other papers could explore models of government. In sum, the elected assembly cannot be the starting point of the process. Rather, the assembly's deliberations should follow a first round of open debate that could start soon. Once the assembly is established, this preparatory work could prove valuable to such follow-up bodies as the assembly may create in order to manage public consultation during the second phase.

### **Ensuring a Legitimate Process**

Respected Iraqi figures such as Kurdish leader Mahmoud Othman have called for a national dialogue representing all political and social constituencies, including those that are currently being left out of the political process. This idea deserves serious consideration. While such a national dialogue would not be fully democratic, it could be made relatively inclusive, transparent, and participatory, and would offer a chance to set forth principles to guide the transition. Equally important, it would not be externally imposed or controlled, giving it a legitimacy that the November 15 agreement lacks.

So that new political parties may freely form and fairly compete, Iraq needs an electoral law. During this period, it will be crucial to find ways to restrain or at least counteract spoilers on all sides who wish to stir up hatred and set Iraqis against one another through incitement, war-mongering, terrorism, and the currying of sundry chauvinisms. The

proliferation of newspapers and other publications since the fall of Saddam, though a welcome response to regained freedom of speech, will not in and of itself guarantee balanced and moderate coverage of the platforms of political parties and candidates.

Clearly, security is an important precondition for free and fair elections. Coalition troops and Iraqi police and civil-defense forces will need to ensure that voting is uncoerced; that election workers, voters, and monitors are protected; and that incitements to violence are squelched.

These first elections can also furnish an occasion for democratic-empowerment efforts through which local groups can learn how to serve as media and polling monitors. Efforts to promote public understanding of and participation in the constitution-forming process should not stop with the constituent-assembly elections, but should be extended right through the assembly's period of deliberation. Adopting measures such as these could have obviated the need for a referendum. Extensive public consultation followed by an elected assembly debating and ratifying the new constitution should render it legitimate in the public's eyes.

A truly legitimate process that leads to an acceptable and sustainable constitution cannot be rushed. In some successful cases, it took two years or more. Struggling with the nightmares and twisted legacies bequeathed by more than three decades of despotic rule, torn by tensions and acts of terror, bereft of even the basics of the rule of law, and with its state institutions in a condition of collapse, Iraq faces daunting hurdles indeed. It suffers from both low- and high-intensity forms of the standard ills that beset countries still groping their way toward more-democratic governance: poverty, little if any experience with democracy, and a history of uneasy order maintained through rations of oppression and fear. This is no time for reckless optimism about the likely pace and prospects of reform; time will be needed to allow for wide-ranging consultation and consensus-building on challenging constitutional issues.

If the international community and the Coalition are committed to the legitimacy of a new Iraqi constitution and to the future of democracy in Iraq, they should recognize the absolute necessity of a thorough, unrushed, and consultative constitution-making process that takes account of (but is not wedded to) lessons learned in other countries.

A legitimate and credible process, through which Iraqis can draft, own, and determine their own permanent constitution, urgently needs to be established. Forming a national consensus around a constitution and a framework for accountable and participatory governance will help to stabilize Iraq, build democracy, and restore a sense of agency and confidence to Iraqi officials and citizens. The handling of the constitution-making process could determine whether Iraq falls deeper toward chaos, reprises some form of authoritarianism, or takes its first shaky but real steps toward peace and free self-government.