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# SPECIAL REPORT

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## ABOUT THE REPORT

The elections that have just taken place in Iraq are not simply for an ordinary legislative body; the elected National Assembly will also have the responsibility of drafting a constitution for the nation. That constitution-making process can be elite-driven and subject to external interference, or it can be transparent, participatory, and truly Iraqi, leading to greater legitimacy and stability.

The Institute's Rule of Law Program, together with the United Nations Development Program (UNDP), is finishing a three-year project that has examined constitution making in eighteen countries, most of which have undergone postconflict transitions. At the same time, the Rule of Law Program, through extensive consultations in Iraq, has analyzed Iraqi hopes and ambitions for the constitutional process. This report, written by the Rule of Law Program staff, addresses the questions: What lessons for Iraq might there be from other postconflict constitution-making processes? How can members of Iraq's new National Assembly work with civil society groups and use the constitutional process to set the country on a new, more hopeful path, and to ensure that Iraq is both inclusive and stable? What role might there be for the international community in supporting this Iraqi sovereign process? The recommendations in this report are directed both to the international community and to the elected assembly as it begins its important constitution-making work.

**The views expressed in this report do not necessarily reflect those of the United States Institute of Peace, which does not advocate specific policy positions.**

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## CONTENTS

|   |    |
|---|----|
| Introduction                                    | 1  |
| Iraqi Constitutionalism: Background             | 2  |
| Rules to Govern the Constitution-Making Process | 3  |
| Organizational Structure                        | 5  |
| Judicial Review                                 | 6  |
| Transparency and Negotiations                   | 6  |
| Public Participation and Ownership              | 7  |
| Public Education and Consultation               | 7  |
| Linking Consultation to Drafting                | 9  |
| Timing of the Process                           | 9  |
| Democratic Representation                       | 10 |
| Party Drafting versus Consensus Drafting        | 11 |
| The Role of the International Community         | 12 |
| Constitutional Implementation                   | 13 |
| Recommendations                                 | 13 |

## Iraq's Constitutional Process

### Shaping a Vision for the Country's Future

## Summary

- The process by which constitutions are made matters. In countries such as Iraq, the constitution-making process can be a transformational one that facilitates peace and stability. If not organized transparently and with public participation, however, the constitutional process runs the risk of further fracturing the country.
- From the time of the overthrow of Saddam Hussein's regime, there have been various positions advanced on the terms of a future Iraqi constitution, but little attention paid to the process by which this constitution will be made.
- The challenge will be for the elected National Assembly to organize this process, ideally through a set of interim rules to ensure transparency and to articulate fundamental constitutional principles, as done in many other countries.
- A constitutional commission for Iraq, composed of National Assembly members and supported by a secretariat of Iraqi professionals, should conduct civic education, broadly consult the population, and compile a draft constitution. There are many models from around the world for such a commission.
- The constitutional commission's education and consultation should reach out to all Iraqis, and should be given adequate time. The commission should engage in consensus drafting, and avoid relying on existing drafts.
- If invited to do so, the international community can play a beneficial role, which should be supportive of the commission's work, and could consist of providing neutral advisers to the commission. Governments should respect what is a sovereign Iraqi process.

## Introduction

In countries such as Iraq, success in national constitution making is measured not only by the final document that emerges, but also by the way the document was produced and adopted. The constitution-making process can be a transformational one

## ABOUT THE INSTITUTE

The United States Institute of Peace is an independent, nonpartisan federal institution created by Congress to promote the prevention, management, and peaceful resolution of international conflicts. Established in 1984, the Institute meets its congressional mandate through an array of programs, including research grants, fellowships, professional training, education programs from high school through graduate school, conferences and workshops, library services, and publications. The Institute's Board of Directors is appointed by the President of the United States and confirmed by the Senate.

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for societies, if properly organized and given adequate attention and resources. These are among the lessons that emerge from a three-year project conducted by the United States Institute of Peace and the United Nations Development Program (UNDP) on "Constitution-Making, Peacebuilding, and National Reconciliation." Through an examination of eighteen case studies of constitution-making processes that have occurred over the past twenty-five years around the world, focusing primarily on postconflict transitions, the project has explored the role of the constitution-making process in relation to conflict resolution and prevention, and the maintenance of stable peace. As Iraqis begin to chart a new course for the country through the drafting and adoption of a new national constitution, the basic message of the project is the following: the *process* by which constitutions are made matters. In the case of Iraq, the importance of good constitutional process will be greater than ever; indeed, this process provides perhaps the only nonviolent opportunity for a workable compromise to be reached as to the shape of the Iraqi nation. This report summarizes the lessons that have emerged from the U.S. Institute of Peace–UNDP constitution-making project that have particular relevance for consideration by members of a postelection Iraqi National Assembly and the Iraqi public.

## Iraqi Constitutionalism: Background

From the time of the overthrow of Saddam Hussein's regime, the terms of a future Iraqi constitution have attracted much commentary and debate, both inside and outside the country. A range of issues, particularly competing models of federalism, the relationship between mosque and state, and the status of Kirkuk, have been repeatedly analyzed by those wishing to determine or predict the identity of a future Iraqi state.

In its terms, the "Law of Administration for the State of Iraq for the Transitional Period"—commonly known as the "Transitional Administrative Law," or "TAL"—foreshadows some outcomes on these issues. The TAL was executed on March 8, 2004, by the Coalition Provisional Authority (CPA) to establish a state structure and human rights protections in the period before "the formation of an elected Iraqi government pursuant to a permanent constitution," and to define the parameters of a future, permanent constitution. The TAL provides for a federal system of government, with no law to be enacted during the transitional period that contradicts the "universally agreed tenets of Islam." Article 58 of the TAL contemplates a deferral of the permanent resolution of the status of the multiethnic, disputed city of Kirkuk until after a process of resettlement, restoration, and compensation has taken place.

Less attention has been paid to the question of constitutional process. The text of the TAL itself, a creature of a CPA-appointed Governing Council, was not the subject of extensive consultation within Iraq. Earlier attempts by the CPA in 2003 to begin broader constitutional discussions and drafting exercises—at a time when the CPA considered that a permanent constitution might be made by an unelected body—were not successful, and indeed prompted calls from the majority Shia community for constituent elections. In 2004, brief discussions regarding the possibility of constitutional consultations being organized by the new Interim National Council convened in August of that year soon gave way to a consensus among key Iraqi and foreign groups that the council lacked the political legitimacy to undertake such an effort.

The TAL elaborates a timetable of events leading to a permanent constitution for Iraq: elections for a National Assembly by January 31, 2005; the writing by the Assembly of a draft permanent constitution by August 15, 2005, to be presented for general referendum no later than October 15, 2005; and elections for a permanent government by December 15, 2005, to assume office by December 31. Article 61(c) of the TAL provides that no permanent constitution can be ratified if it is rejected by two-thirds of the voters in three or more of Iraq's eighteen governorates, a provision thought to

protect the political and religious interests of regional minorities, including the Kurds. UN Security Council Resolution 1546 endorses the January 31 election date, the formation of a "Transitional National Assembly" to draft a constitution, and the December 31, 2005 date for an elected government to assume office.

Beyond a timetable, the TAL and Resolution 1546 do not go into detail as to constitutional process. They do, however, express a central guiding principle of popular participation: Article 60 of the TAL states that the National Assembly shall carry out its constitution-writing responsibility "in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq." Resolution 1546 states that the Special Representative of the UN Secretary-General and the United Nations Assistance Mission for Iraq, "as requested by the Government of Iraq," shall promote national dialogue and consensus building on the drafting of a national constitution by the people of Iraq.

Regrettably there is little in Iraq's recent history—either during the postintervention period, or under the former Baathist regime—that has encouraged or indeed permitted a culture of broad public participation in constitutional processes. A number of Iraqi nongovernmental organizations (NGOs), however, are currently pioneering constitutional civil society discussions. Consultations conducted by U.S. Institute of Peace staff throughout 2004 with senior representatives of many Iraqi political parties and civil society groups reveal a sophisticated recognition of the opportunity presented by the constitutional process to build consensus and legitimacy in Iraq, and an intention to seize this opportunity. The challenge will be for these individuals and groups to turn this intention into a plan of action through the elected National Assembly.

## Rules to Govern the Constitution-Making Process

The crafting of a new constitution is the single most important opportunity for Iraqis to determine the nature and structure of the Iraqi state and the relationship between the state and the people. This process also provides the pivotal opportunity to develop a unified national vision for the future of the country. In any country that has undergone or is undergoing conflict, the framing of a new constitution can facilitate peace and stability in the way it articulates a vision for a new society, defines the fundamental principles by which the country will be reorganized, and redistributes power within the country between branches of government and between national and local authorities. Given the enormously high stakes involved in Iraq, it is crucial that all parties have confidence in the validity of the process by which these critical decisions are made.

To provide the best chance of success in this vital endeavor, there should be broad national agreement as to the constitutional process. This is generally accomplished through the adoption of a set of rules to govern the process—frequently characterized by two elements, as seen with increasing regularity in the constitutional processes of a variety of postconflict or transitional countries.

The first is an articulation of the details of the constitutional process. Having such a framework from the outset facilitates greater transparency and public credibility with respect to the steps in the constitutional process. It enables all actors—including not only the members of a constituent assembly or constitutional commission, but also civil society organizations, the media and the general public—to know what to expect, how to monitor the process, and how and when they can provide input.

The second element is a set of fundamental principles to guide the nation during the constitutional process and to be enshrined in the new constitution. These principles typically include human rights guarantees, including freedom of religion, expression, and assembly; nondiscrimination on the basis of gender, religion, nationality, or belief; the guarantee of a range of rights in the criminal justice system; and may also include principles on the organization of the state and the relationship between the branches

### ***The U.S. Institute of Peace— UN Development Program Constitution-Making Project***

The United States Institute of Peace, in partnership with the United Nations Development Program, has conducted an 18-country study on "Constitution-Making, Peacebuilding, and National Reconciliation," which explores the options and limitations of using the constitution-making process as a means of conflict resolution and peacebuilding. The project, which is near completion, will incorporate an assessment and synthesis of lessons learned, identify obstacles to be avoided, and articulate practical guidelines for consideration in the design of postconflict constitution-making processes in a comparative study that seeks to maximize the potential of these processes for the consolidation and maintenance of peace. A key lesson emerging from the project is that the process by which constitutions are made in postconflict and transitional countries affects the sustainability of newly designed governments and can become a vehicle for national dialogue and the consolidation of peace.

The project examines the design and implementation of the constitutional process in the following countries: Albania, Bosnia and Herzegovina, Brazil, Cambodia, Colombia, East Timor, Eritrea, Ethiopia, Fiji, Hungary, Namibia, Nicaragua, Poland, South Africa, Spain, Uganda, Venezuela, and Zimbabwe. The project has involved a wide range of international experts on constitutionalism, including members of constitutional commissions, legal advisers, and first-hand observers of constitution making in many of these countries.

On the basis of this project the U.S. Institute of Peace has responded to requests to assist a number of countries in the development of strategies to enhance their constitutional processes.

***In all countries undergoing a major political transition such as that currently underway in Iraq, the remaking of the national constitution is always a high-stakes, sensitive exercise in which the future rights and interest of all groups in society are implicated and are often in conflict.***

***In some cases, the imperative for guiding rules was addressed through the enactment of an interim constitution. South Africa's constitutional process—a case that may provide some useful lessons for Iraq—is an example of this approach.***

of government. Particularly in the context of a legacy of past abuses and atrocities perpetrated by the former regime, such a statement of fundamental principles can be crucial in providing a positive vision of, and commitment to, the country's democratic future in the period leading up to the ratification of a permanent constitution. For various vulnerable ethnic, religious, or political groups, such a statement can also establish adequate political space to enable all parties to participate in the process and debate even hotly contentious constitutional issues in an atmosphere that guarantees their rights and interests during and after the development of a final constitution.

In all countries undergoing a major political transition such as that currently underway in Iraq, the remaking of the national constitution is always a high-stakes, sensitive exercise in which the future rights and interests of all groups in society are implicated and are often in conflict. Suspicions and skepticism on the part of competing political, ethnic, religious, regional, or other types of factions will often affect the debate. In a variety of countries, the adoption of a transitional law on constitution making that maps out the process, ensures its transparency, articulates a workable state framework, and incorporates fundamental principles and rights guarantees—during the process itself and after the new constitution has entered into force—has been effective in reducing tensions and expanding dialogue among such factions.

Most of the cases included in the U.S. Institute of Peace–UNDP study have involved some type of interim arrangement that incorporates these two elements and provides for a certain degree of stability during the period of the constitution-making process. In some cases (for example, Rwanda and Cambodia), these arrangements were accomplished through peace agreements. In other cases (such as Ethiopia and Eritrea), stability was created through a national charter, which provided for a basic structure of government and the guarantee of human rights that would govern the interim period while the constitution was being created. In Eritrea, the National Charter also provided considerable detail regarding the organization of the constitutional process. In Poland and Hungary, interim arrangements were provided through constitutional amendment.

In some cases, the imperative for guiding rules was addressed through the enactment of an interim constitution. South Africa's constitutional process—a case that may provide some useful lessons for Iraq—is an example of this approach. At the time of its transition, South Africa was a deeply divided society, with a legacy of repression, ongoing violence threatening the transition, and a certainty regarding which political and racial faction would dominate the Constituent Assembly and the new government. Various political factions privately negotiated the terms of the interim constitution, which set out the basic ground rules for the process of adopting a permanent constitution and provided for the basic functioning of a Government of National Unity throughout the constitution-making period. The Constituent Assembly, in addition to drafting a permanent constitution for the country, would also function as a parliament in the interim period. The interim constitution set out 32 substantive principles to be followed in the drafting of the permanent constitution.

Iraq's TAL, which some have characterized as an interim constitution, is an example of this increasingly common approach to the constitutional process in transitional states. Chapters 1 and 2 of the TAL articulate a series of fundamental principles and guarantees of human rights of precisely the sort recommended by the experience of other similarly situated countries. Chapter 9 of the TAL defines the timetable for the constitutional process and rules for adoption or rejection of the draft. Yet it is silent on the organizational structure of the constitution-making process. Although many Iraqi political leaders appear to have accepted the TAL's framework for moving forward with elections, constitution making, and the establishment of a new Iraq government, some parties have recently questioned the degree to which the TAL's provisions remain binding on the Iraqi constitution-making process following the election of the National Assembly. (One early constitutional draft currently being circulated by a branch of one

prominent political party, for example, would abandon certain of the TAL's provisions regarding the manner by which the constitution is to be adopted.)

Early adoption by the new National Assembly of a set of rules for the constitution-making process, incorporating both a delineation of the process and a statement of binding fundamental principles, may warrant consideration for each of the reasons noted above; it can resolve any uncertainty regarding the TAL by reconfirming the basic rights and fundamental principles that will be respected during the life of the National Assembly and enshrined in the new constitution. This early adoption would also provide an essential assurance to vulnerable or underrepresented groups and to the Iraqi citizenry that the rights and freedoms of all will be guaranteed, which can in turn create an environment in which all these groups participate in redefining and rebuilding the Iraqi nation. In addition, the early adoption of such rules can elaborate an organizational structure for the constitution-making process that encourages confidence building and broad engagement of all Iraqis in this important process.

## Organizational Structure

In most transitional states, including those such as Iraq, where the drafting of the constitution is assigned to an elected constituent assembly, a central element of the process is the early establishment of a smaller, technical body to organize the constitution-making effort and ensure adequate linkage between the public and the constitution drafting exercise. It is, of course, unwieldy for the 275 people who will serve in Iraq's National Assembly to sit in a room and draft a constitution. Constitutional language and options are typically prepared in smaller group settings for consideration and decision making by the larger body. It is also useful for this smaller body to serve the constituent assembly as a repository and clearinghouse for input from the public, and for information on comparative models and options from the constitutional systems of other countries. This may be accomplished through creation of a constitutional commission.

Constitutional commissions have been used in a number of countries, including Eritrea, Ethiopia, Uganda, Kenya, Rwanda, Nicaragua, Brazil, and Fiji. These commissions have usually been appointed by the executive or chosen by an elected constituent assembly. Typically, the constitutional commission has three functions (although the delineation of those functions has not always been clear): they have been called upon to conduct civic education in connection with the constitution-making process; to consult the population on key constitutional questions; and then to compile a draft of the constitution, taking that consultation into account and also synthesizing other drafts and submissions from political parties, individuals, and NGOs.

In the Iraqi case, to best serve the National Assembly and the public, the composition of a constitutional commission would include National Assembly members—possibly supplemented by representatives of civil society—and would be supported by a secretariat comprising a range of technical professionals, including constitutional law experts, media specialists, and civil society specialists to coordinate public outreach and facilitate public dialogues throughout the country, professionals to develop public education materials on the constitution-making process and on key constitutional questions and options, information technology specialists to organize and collate the many suggestions and options received to make them more easily accessible for the constitution drafters, and research staff to assist the drafters.

Some of the commission's functions can also be organized outside the parliamentary framework but in close coordination with it. In Albania, for example, in addition to a Constitutional Commission in the parliament (with its own technical staff), a quasi-nongovernmental organization was created with the support of the government

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called the Administrative Center for the Coordination of Assistance and Public Participation. Although independent, the center worked closely with both the parliament and the public, organizing a series of forums and symposia in which constitutional issues were discussed and public input gathered, coordinating international expert assistance to the constitutional process and carrying out other tasks described below.

## Judicial Review

In a few cases, countries in transition have chosen to provide for the exercise of interim judicial power to examine the constitution-making process. In South Africa, Poland, and Hungary, for example, the constitutional courts played this kind of oversight role. This role was particularly important in the South African case, in which the interim constitution—in the form of an “Interim Agreement”—also endowed the Constitutional Court with the authority to determine whether the final draft of the permanent constitution complied with the principles set out in the Interim Agreement. The Constitutional Court actually returned one draft to the constituent assembly for revision of certain sections found to be inconsistent with the constitutional principles that had been established. In the context of Iraq’s constitution-making process, no constitutional court exists with jurisdiction to determine whether the process and new draft constitution adhere to any fundamental principles that might be established by the National Assembly. An option would be to vest any jurisdiction of this kind in Iraq’s current Supreme Court, or in the new Federal Supreme Court contemplated by Article 44 of the TAL. It will be for the National Assembly to determine whether it chooses to adopt such a model of judicial oversight.

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## Transparency and Negotiations

Interim constitutions usually reflect agreements formed among broadly representative elites and typically have not involved participation of the public at large. Even in cases where those elites have been elected—and are therefore accountable, in principle, to public constituencies—transparency has not generally characterized the talks to work out interim arrangements. In the South African case, the negotiations and settlement of the issues surrounding this initial stage of the process were relatively closed, apparently because of concern over the high risk of violence at the time. The constitution-making process has generally tended to be more closed and elite driven in those cases where the risk of violence is high; Cambodia serves as another example of this phenomenon, as does the TAL in Iraq. There is a place for such delicate, confidential negotiations.

As the constitutional process moves forward to the preparation of a permanent constitution, however, the cases in the U.S. Institute of Peace–UNDP study suggest that the process should be more open and transparent, with the drafters deeply informed by outside opinions and suggestions without being necessarily bound by them. Powerful elite factions will play a major role in any postconflict constitution-making process, but it is essential to avoid a final constitution that simply reflects a division of the spoils among such factions. It is also very much in the interest of the dominant faction(s) that the constitution is viewed not as one that is imposed on the nation by them but, rather, as the product of a robust, inclusive dialogue that protects the rights and interests of all groups in the country. In the past few decades, those cases in which the entire constitution-making process remained secretive and closed have permitted deal making among elites but have not typically produced either the most vibrant of constitutional democracies or the most stable governments over the long term.

## Public Participation and Ownership

Clearly, there is an emerging trend toward providing for more direct and far-reaching popular participation in the constitution-making process, not only through the election of a constituent assembly or voting in a referendum on the proposed constitutional text, but also in the form of civic education and popular consultation in the development of the constitution. Some scholars refer to this trend as “new constitutionalism.” Aspects of this approach have been employed around the world in recent years, including in Europe, Africa, Latin America, and Asia. This model enables the broader public to be actively engaged in the process throughout, not merely at the polling center to decide on a constitution that has been crafted completely behind closed doors by a small number of elites and handed down from on high. The case studies indicate that constituent assembly elections, though of course significant, are rarely preceded by robust and extensive constitutional discussions. Iraq is no exception to this pattern. For this reason, public engagement and consultation at later stages can serve to empower a broader range of groups, including women and emerging civil society groups, providing an opportunity for them to influence both the constitutional and political landscapes.

In the context of a divided society, the emphasis on public participation in the development of the constitution can provide the best possibility for vulnerable groups, or even those who view themselves as politically disenfranchised, to engage in an open national dialogue regarding decisions that are vital to the future direction of the country. This approach can be crucial to forging a common vision for the nation’s future, resulting in a new constitution in which all these diverse groups may not have the immediate satisfaction of all their demands, but in which they have a stake and a sense of ownership.

At its core, broad public participation and consultation is most important in developing an authentic sense that the new constitution is not irrelevant and abstract, or a tool to be used or abused by those in power but, rather, is the possession of all the people, who will insist on its implementation. In the Iraqi context, a range of laws and decisions have suffered from a lack of perceived legitimacy, criticized as the products of a few elites (whether foreign or Iraqi), with a consequent lack of a sense of acceptance by, or connection to, the public. If the constitution is perceived in a similar fashion—particularly by groups who are weakly represented in the National Assembly—a pivotal opportunity to secure the stability of the country will have been missed. Organized effectively, public participation in the process of developing the new Iraqi constitution can mobilize all segments of Iraqi society and forge a collective vision of the country’s future, including consensus on a workable state structure and protection of the rights of all Iraq’s people.

## Public Education and Consultation

The first challenge in ensuring that members of the public have an adequate connection to the making of their constitution is an effective program of public education. This public education phase provides an important vehicle to broadly disseminate information on the constitution and the constitutional process, and information on the basic themes that should inform the new constitutional framework. In Iraq, confusion has been reported in various parts of the country regarding the process itself and the ramifications of various constitutional models and options, suggesting the need for a public education program on these issues. In some countries, the public education campaign has served as a stimulus for civil society groups to organize public discussions. Generally, such campaigns involve providing information to the public through television and radio advertisements and programs; newspapers; posters; and the dissemination of informational materials through the schools, with food rationing coupons and through

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***In the Iraqi example, members of the National Assembly should participate in these local consultations to the extent possible. This process not only provides the public with a sense of ownership for the future constitution, but it also often provides ideas and insights to the commission and the National Assembly that may prove extremely valuable to the subsequent drafting of the constitutional text.***

other media. In certain countries, a great deal has also been learned about how to conduct these campaigns with a largely illiterate population through the use of radio, cartoons, and traveling theatrical presentations.

In some cases, constitutional commissions have tried to conduct civic education and popular consultation all in one phase, but experience suggests that they should be treated as two distinct phases of the process. In East Timor and Fiji, the public education and consultation phases were conflated, arguably weakening the effectiveness of each.

South Africa, Eritrea, and Rwanda are more successful examples of this aspect of the process, whereby a carefully planned program of civic education was conducted to educate the population on the role of a constitution in society generally and their role in constitution making. Also, it was during the program of civic education that the determination was made as to what questions were the most important for the population. In Rwanda and Eritrea, the population was then consulted for their response on these questions. Albania also provides a very useful model of a robust and well-organized public education and consultation process, which has arguably strengthened the drive toward democratization in that country.

During the public consultation phase, the constitutional commission should present to the populace a series of specific key questions and issues regarding the constitution. An adequate budget and resources would be required to enable the commission to hold sessions throughout the country, elicit the views of the public, and gather responses. In the Iraqi example, members of the National Assembly should participate in these local consultations to the extent possible. This process not only provides the public with a sense of ownership for the future constitution, but it also often provides ideas and insights to the commission and the National Assembly that may prove extremely valuable to the subsequent drafting of the constitutional text.

In the Albanian case, the Administrative Center organized separate public sessions focused on individual issues, including legislative power, executive power, judicial power, human rights, and local government. One major symposium, which was broadcast as a three-part program on Albanian state television, brought together members of the parliamentary constitution-drafting group with Albanian and foreign experts to discuss constitutional issues identified by the various public consultation sessions. The Administrative Center indexed and organized all the public comments to assist the parliamentary constitutional commission and its technical staff. Of the hundreds of suggestions from the public regarding changes to the draft constitution, more than fifty proposed changes affecting forty-five articles were accepted by the drafters and incorporated into a revised draft of the constitution that was ultimately submitted to a public referendum.

Similarly in South Africa, the Constituent Assembly determined that a comprehensive program of public participation was vital to the constitution-making process. Public participation included publication of Assembly debates, consultations at the village level, radio broadcasts, and the dissemination of public education material. The result was large numbers of public submissions for consideration by the drafters in the Constituent Assembly.

Iraqi political parties, NGOs, and regional political entities have developed sophisticated positions on constitutional matters. However, care should be taken to include even those Iraqis who have been isolated from constitutional discussions by reason of geography or education. The Iraqi people are the heirs to a vibrant legal tradition and make up an invaluable intellectual and cultural resource for the constitutional process. In some countries, members of constitutional commissions have been surprised at the sophisticated views expressed by even illiterate members of the populace once they understood the issues and were able to form their own opinions about them. Tapping the wisdom of the Iraqi public will undoubtedly produce useful contributions for consideration by the constitution drafters. In addition to collecting views and ideas expressed



in public consultation sessions, the National Assembly should encourage submissions by nongovernmental organizations and individuals.

As noted earlier, the public consultation process may include village meetings and debate sessions organized by civil society groups covering specific issues. The absence of information and discussion regarding key issues facing Iraqi society, such as models of federalism or the relation between religion and state, has resulted in large segments of the public adopting more simplistic—and often, extremist—positions on these issues, thereby creating pressure on National Assembly members to do likewise and adopt conflicting hard-line views. Exposure to differing views and options in the course of a public education and consultation process can make it more politically acceptable to forge consensus on these issues.

The process of public consultation should not only facilitate exposure to the views of one's own community, but should also make it possible for each segment of the public to hear the views, concerns, and ideas expressed by those of other religious, sectarian, ethnic, political, or regional groups.

Although the National Assembly's task of drafting the new constitution will be significantly aided by such a dynamic process of public consultation, the relevant tasks should not be monopolized by the National Assembly or its constitutional commission and staff. To the contrary, while the constitutional commission should organize programs of education and discussion around the country, it should also support such activities undertaken by other actors. Civil society organizations; academic institutions; trade and professional groups; local and national media; and other institutions, formal and informal, should organize debate and discussion on the development of the new constitution, with the encouragement and support of the National Assembly, and the constitutional commission should seek to monitor these activities and invite the submission of comments and suggestions from the groups and individuals participating in them. Through either a mechanism like Albania's Administrative Center or another entity, the international community should provide technical assistance and resources to enable civil society groups to play an active and dynamic role in this process.

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## **Linking Consultation to Drafting**

The synthesis of the results of popular consultation into the constitutional draft requires proper planning, which has been a challenge in certain cases. In East Timor, for example, the Constituent Assembly focused on a draft prepared by the dominant political party that apparently ignored the results of the popular consultation. Brazil is another example where the popular consultation was not entirely satisfactory: the popular consultation had been a massive effort but was poorly organized. The task of synthesizing the results was then assigned to one staffer, who was ultimately unable to absorb and synthesize the results of the popular contribution in the development of the final draft. The Iraqi National Assembly's constitutional commission can benefit from the experience of various countries in developing computer software to record and organize inputs from the public consultations to make them usable by the constitution drafters.

## **Timing of the Process**

Constitution making is a deliberative task and requires adequate time, especially when integrating a serious effort in public education and popular consultation. In some countries, domestic and international pressures have rushed the process, with disappointing results. This was the case in East Timor, where the effort of public consultation took only one month; a year later, when the consultation was seen to have been inadequate,

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the Constituent Assembly launched a second, belated effort at public consultation but, again, allocated too little time for the exercise. In the Cambodian case, many analysts have suggested that the rushed 1993 constitution-making process contributed to the weakness of the country's government. According to many experts, and supported by the case studies, an effective public education and consultation process will generally take at least a year, and some countries have allocated as many as three years to public engagement. A compressed schedule for constitution making necessarily obliges constitution drafters to carry out their task without the benefit of meaningful public consultation and input, risking a public that is less familiar with and invested in the resulting new constitutional order.

Recognizing that more time was needed to maximize public engagement and the legitimacy of the process, various countries decided to revise a previously established deadline for the completion of constitution drafting or for the holding of a public referendum on the final constitution. Under Iraq's TAL, the deadline for writing the new Iraqi constitution could be extended from August 15, 2005 to February 15, 2006, to be followed by a public referendum. Coming up with a realistic timetable for this process will be an immediate challenge for the National Assembly as it begins to organize the drafting of the new constitution.

## **Democratic Representation**

In addition to public participation, an important factor for the ultimate perceived legitimacy of the constitution and the stability of the system it establishes is democratic representation in the constitutional commission, which may take the lead on drafting, and in the larger body that ultimately debates, revises, and adopts a draft constitution. As in the case of Iraq, the latter is often a constituent assembly.

Constitutional commissions, while relatively small in size, should be fairly representative of the various political parties and ethno-religious groups in the society. In those countries where the constitution-making process has been sufficiently deliberative and has entailed broad public consultation, an intriguing result repeatedly has been the transformation of the members of a constitutional commission from a group of individuals serving primarily as advocates for their respective interest groups into a more cohesive collegial body with a broader focus on the needs of the whole society. In the best-case scenario, this transformation is precisely the kind of unifying effect that development of the new constitution would have on the country as a whole.

The nearly twenty case studies examined by the U.S. Institute of Peace–UNDP project suggest that a broadly representative constituent assembly is more likely to adopt a constitution that is characterized as legitimate and to establish a political system that will prove to be stable. With such a composition, all parties—including in particular those that view themselves as aggrieved or vulnerable—will have greater confidence that their views will be taken into consideration in the drafting of the final document. Where this is the case, the constitution can serve to resolve conflict and provide mechanisms and reliable institutions for peaceful resolution of conflicts in the future.

Whatever the end result of election boycotts by significant elements of Iraqi society—including particularly those in Sunni-dominated provinces—the official vote tally may reveal a new National Assembly that is not completely representative of all Iraqi society. For the reasons just described, these would be less than ideal circumstances in which to draft and adopt a new constitution. However, should the Iraq National Assembly prove to be less than fully representative, the constitution-making process will present the best opportunity for dialogue and the exchange of ideas on core issues at several levels of society—including through political factions, NGOs, media, religious and academic settings and community groups—outside the confines of the National Assembly.

The Albanian experience may be useful in this regard. A boycott of the constitutional process by the major opposition faction (including a refusal to appoint members to the parliamentary constitutional commission) produced a similar dilemma regarding the perceived legitimacy of the process and produced two important decisions by the commission. First, the boycott increased the need to reach out to the affected sections of the public and directly engage them in the constitutional discussion to ensure popular legitimacy. Second, while the boycott was not permitted to delay work on the new constitution, the parliamentary drafters decided that final decisions would be deferred until later, by which time it was hoped the boycotting group would have joined the drafting body.

In Iraq's case, such an approach can make it possible for members of these groups to engage in the nation's constitutional discussion and, through it, to develop sufficient confidence to participate in the constitutional framework under development by the National Assembly. At that point, a possible option to be considered might be late elections for the addition to the National Assembly of members from the provinces in question.

## Party Drafting versus Consensus Drafting

In many of the cases in the U.S. Institute of Peace–UNDP study, the tabling of a constitutional draft early in the process, particularly by a powerful party, becomes the focus of all debate and discussion. In East Timor, for example, the Fretilin party circulated a proposed draft even before the constitution-making process was formally initiated. In Cambodia, King Norodom Sihanouk commissioned a French expert to prepare his draft of the constitution very early in the process. From the moment that draft was prepared, it became more difficult for other participants to make their views heard or to propose alternatives, because there was a tendency to reduce all issues to the question of whether the alternatives were consistent with the king's draft.

The disadvantage that stems from the early establishment of drafts by powerful parties or individuals is that the approach of the particular draft tends to frame and skew what would otherwise be a more open-minded consultation and drafting effort. In Iraq, this practice risks impeding the development and consideration of issues and options for consideration by the National Assembly and serves to make the process generally less inclusive. In the case of Iraq, the Kurdistan Regional Government has advanced a draft constitution; recently, a branch of one prominent Shia political party has done likewise.

It is impossible (and not necessarily desirable) to bar factions from proposing their own constitutional drafts. However, the effect that these drafts have in narrowing public debate should be addressed. One way to minimize this negative effect is to establish a constitutional commission with broad political support to explore each constitutional question anew, and to ensure that the public has the opportunity to be heard on all constitutional issues—not merely those raised in respective drafts. In these circumstances, the constitutional commission can serve as the repository of all drafts and other submissions from all parties and individuals. The commission can then take those drafts and submissions into consideration, along with the results of the popular consultation; it can then synthesize all of these elements in a consolidated draft, or a set of options, which can then be prepared for submission to the National Assembly for debate. This approach can avoid the focus on individual ready-made drafts and the power associated with any particular faction and provide a greater opportunity to all groups in the society to express their views on constitutional issues.

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## The Role of the International Community

The international community can play a beneficial role in the constitution-making process and, in some cases, be crucial to its success. For example, some of the programs of civic education and popular consultation described previously could not have been conducted without the contribution of resources from the international community. In addition, in virtually all of the cases studied, international constitutional experts have served as a valuable human resource to locals who have developed and drafted constitutions.

The international community's involvement in constitutional processes has not always been without problems, however. For example, members of the international community have been criticized in some cases for favoring a political party to serve their own pragmatic interests, either viewing it as expedient to develop good working relations with the party that will obviously hold power once the process is completed, or favoring parties that are most sympathetic to a particular foreign power's own interests. When foreign governments favor one party, experience has shown that it may enable that party to dominate the constitutional process to the exclusion of others, or, alternatively, it can have the opposite effect of alienating or radicalizing significant segments of the local population. Various outside powers, including Iraq's neighbors and Western governments, will have interests in the outcome of Iraq's constitutional process. Especially in light of Iraq's recent history, in which key decisions and laws lacked broad legitimacy because they were not controlled and owned by Iraqis, outside powers should not attempt to influence the constitutional deliberations, which must be a sovereign Iraqi process.

In many cases, private international experts have been engaged as hired advocates for a political faction, providing advice and draft constitutional language designed to favor that faction. Although it is desirable that parties and factions have access to good legal advice, experience shows that very often the participation of outsiders can reduce the degree to which local voices and opinions are heard. It is important for that expertise to be channeled into the public deliberations, including those of a constitutional commission in particular.

The U.S. Institute of Peace–UNDP study has found the role of foreign experts to be especially constructive when they have served as a neutral resource, offering guidance to locals by elucidating the pros and cons of particular substantive issues, frequently through comparative analysis of how constitutional issues have been handled in other countries. This kind of role facilitates informed debate of issues among locals, who will ultimately make the substantive choices. In Eritrea, an advisory body composed of foreign experts was created to assist the Eritrean Constitutional Commission in this way. In Albania, foreign expert advice and comparative information was provided to the National Assembly drafters in a coordinated and neutral fashion. Those organizing the Iraqi constitution-making process would be well served by making use of neutral advisers to the National Assembly's constitution drafters and ensuring that the input of any competing foreign experts aligned with various political factions is properly channeled through the commission's deliberations.

One of the most important ways that the international community can assist the constitution-making process in Iraq is by facilitating access to information about, and key experts from, the relevant constitution-making experiences of other countries. The United Nations, the U.S. Institute of Peace, the American Bar Association's Iraq Legal Development Project, and other non-Iraqi organizations are well placed to carry out this function if requested. Each of these organizations has access to a range of constitutional experts—from both postconflict countries (including South Africa, Afghanistan, the countries of central and eastern Europe, and East Timor) and the Middle East—who can be provided to assist the Iraqi constitutional process if the National Assembly so desires. Although Iraq clearly presents a unique set of constitutional challenges, Iraqis

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will most likely find it useful to have reference to the successes and failures of other countries on certain key points of process and substance.

## Constitutional Implementation

One aspect of constitution making that is frequently overlooked is the question of implementation. It is one thing for a postconflict constitution to describe, for instance, separation of powers and human rights guarantees, but it is quite another thing for the citizens of the country to be able to invoke those provisions. The experience in Afghanistan and East Timor shows that well-intended constitutional provisions have languished in the postconstitutional phase. The best way to strengthen the likelihood of full respect for, and implementation of, the provisions of the new constitution in Iraq is probably through the constitution-making process itself. The broader and more meaningful the public consultation phase, the more likely that Iraq and other transitional governments will be expected to deliver on their part of the social contract.

Cases like Eritrea demonstrate, however, that even a robust program of public participation and consultation in the constitution-making process can be followed by the absence of constitutional implementation by the new government, particularly where power is concentrated in the hands of a few. Other possible strategies that Iraqis can adopt to address this problem include the creation of a "Constitutional Implementation Commission" (as provided for in the new Afghan constitution), the tasks of which may include developing a program for implementation, prioritizing and drafting key legislation to implement various aspects of the constitution, and monitoring and publicly reporting on the state of implementation. It will also be important in Iraq's postconstitutional period for the international community to provide assistance, if requested, to judicial, administrative, and other government institutions that will be responsible for breathing life into the constitutional text.

## Recommendations

- Iraq's new National Assembly should embrace a model of robust public participation in the constitution-making process. This effort can be pivotal in establishing the legitimacy of the process, fostering national dialogue, developing a common vision for Iraq's future, and cultivating a sense of public ownership and commitment to the country's new constitution, resulting in greater stability for the political system established by that constitution.
- The recent constitution-making experience of several countries, particularly with respect to public participation in the process, can provide helpful lessons and tools for Iraq, and the international community should facilitate Iraqi access to such comparative information.
- The National Assembly should consider early adoption of rules governing the constitution-making process that (1) spell out further details and organizational structure for the constitutional process, including active public consultation and participation, and (2) reaffirm fundamental principles and guarantees of human rights that will be respected during the life of the National Assembly and enshrined in the new constitution.
- Separate phases of public education and public consultation should be conducted. Members of the National Assembly, civil society groups, the media, academic institutions, and others should play active roles in this effort. This process should include dialogue among Iraq's various ethnic and religious communities regarding one another's concerns and ideas for the country's new constitutional system. Adequate

***It will also be important in Iraq's postconstitutional period for the international community to provide assistance, if requested, to judicial, administrative, and other government institutions that will be responsible for breathing life into the constitutional text.***

time should be allocated for this component of the constitutional development process.

- A constitutional commission should be established in Iraq to facilitate public education and consultation efforts, collect and organize public input for the National Assembly's constitution drafters, and conduct research and drafting for the National Assembly.
- The drafting of the constitution should ideally develop from an open consideration of issues and options, rather than simply focusing on a complete draft constitution tabled by any particular political faction.
- The international community should provide resources and technical assistance to aid the Iraqi constitution-making process. Foreign governments and institutions should not be aligned with particular political factions but, instead, should provide neutral assistance to the National Assembly and civil society constitutional efforts.

Notes

An online edition of this report can be found at our website ([www.usip.org](http://www.usip.org)), together with additional information on the subject.

## Of Related Interest

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### ***Miscellaneous:***

"Constitution-Making Process: Lessons For Iraq," testimony by Neil Kritz, director of the Rule of Law Program at the U.S. Institute of Peace, before a joint hearing of the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Property Rights; and the Senate Committee on Foreign Relations, Subcommittee on Near Eastern and South Asian Affairs, June 25, 2003. Online. Available: [http://www.usip.org/aboutus/congress/testimony/2003/0625\\_kritz.html](http://www.usip.org/aboutus/congress/testimony/2003/0625_kritz.html)



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