

Testimony of

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CONSTITUTION-MAKING PROCESS: LESSONS FOR IRAQ

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Introduction

In countries such as Iraq, a successful outcome requires a focus not only on the final document which emerges, but on the path to producing and adopting it. Indeed, the constitution-making process can be a transformational one for societies, if properly organized and given adequate attention and resources. These are among the lessons that emerge from an ongoing study that has been conducted over the past two years by the United States Institute of Peace on "Constitution-Making, Peace Building, and National Reconciliation." Through an examination of seventeen case studies of constitution-making processes around the world which have occurred over the course of the last twenty five years, focusing primarily on post-conflict transitions, the study is attempting to assess the constitution-making process for its potential for conflict resolution and prevention and for the maintenance of stable peace. To date, this review by a wide range of experts strongly suggest a basic message: perhaps moreso than at any previous time in history, the process by which constitutions are made matters.

Interim Arrangements

The constitutional process is often facilitated by the establishment of interim arrangements. While this has taken a variety of forms, the essential characteristics are the following: (1) the clarification of basic legal rules and governmental structures during the interim period, allowing society to move forward with a minimum of disorder; (2) an interim framework that embodies sufficient changes from the prior system to clearly demarcate a break from the past and to immediately remove those elements that are clearly objectionable or repressive. The result can be an interim constitutional framework that opens adequate political space to enable all parties to participate and debate even hotly contentious constitutional issues in an atmosphere that guarantees their rights and interests pending the development of a final constitution.

Most of the cases included in the USIP study have involved some type of interim arrangement which has provided for some degree of stability during the period of the constitution-making process. In some cases, (Rwanda, and Cambodia, e.g.), basic stability was provided through a peace agreement. In other cases (Ethiopia and Eritrea), stability was created through a National Charter which provided for a basic structure of government and the guarantee of human rights which would govern the interim period while the Constitution was being created. In Eritrea, the Charter also had the advantage of providing considerable detail of how the process was to be conducted ruling on such questions as the creation of a Constitutional Commission and the election of a Constituent Assembly. In Poland a series of constitutional amendments served this purpose, and the most important among them--that of October 17, 1992 was referred to as the small constitution. The process in Hungary was similar in that interim arrangements were provided through constitutional amendment. An alternative model would provide for adoption of the constitution, with a constitutionally mandated review process - complete with the public participation component discussed below - following an interim period of three to five years.

South Africa enacted a formal Interim Constitution which served these purposes and set out a series of constitutional principles which were to guide the process. The structure of the Constitution-making process was determined by the South Africans themselves with minimal input from the international community. Prior to 1993, private negotiations amongst the various political factions in South Africa were important. But by 1993, the parties had negotiated an 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. Under the Interim Constitution, the final constitution was to be adopted by a Constituent Assembly on the basis of a two-thirds vote and no constitutional commission was created. Election to the Assembly was supervised by an Independent Electoral Commission and governed by a proportional representation list system laid out in the Interim Constitution. The Constituent Assembly, in addition to drafting a permanent constitution for the country, would also function as a parliament in the interim period. In addition, the Interim Constitution in South Africa set out 32 substantive principles which had to be followed in the drafting of the permanent constitution. Once the Constituent Assembly began to undertake the process of constitution-making, it determined that a comprehensive program of public participation was necessary. Public participation included publication of debates, consultations at the village level, radio broadcasts of public education material as well as key issues and large numbers of public submissions.

Most of these arrangements provided for some basic measures for the exercise of executive and legislative functions. In a few of the cases, there was provision for the exercise of interim judicial power to oversee the process. In South Africa, Poland, and Hungary, for example, the constitutional courts in those countries played this kind of an oversight role in connection with the constitution-making process. This role was particularly important in the South African context where the Interim Constitution also endowed the Constitutional Court with the jurisdiction to determine whether the final draft of the permanent constitution complied with the principles set out in the Interim Agreement. One draft was actually rejected by the Constitutional Court as inconsistent with the constitutional principles which had been established.

The interim arrangements are usually agreements formed amongst a broadly representative group of elites and do not involve public participation. In the South African case, the negotiations and settlement of the issues surrounding this initial stage of the process at that stage were closed and secretive, apparently due to concern over the high risk of violence at that stage. 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.

Reducing the monopoly of power and influence

While powerful elite factions will play a major role in any post-conflict constitution-making process, it is essential to reduce their monopolization of that process, and to avoid a final constitution that simply reflects division of the spoils between such factions. If the constitution and the process of its adoption are to play a role in transforming society, then constraints on such monopoly of power need to be built into the process.

One tool in this regard is allowing adequate time for the constitutional process. A rapidly adopted constitution will generally only reflect a deal between the powerful. A more open and extended process provides an opportunity for other groups and civil society in general to challenge and debate and influence the process. A second element is the adoption at the outset of a set of basic rules that will govern both the process of constitution-making and the

substance of the ultimate document. These may include, for example, tolerance, pluralism, human rights, the rule of law, limited government, the role of the military constitutionally limited to defensive functions, and gender, religious and ethnic equality. Both of these steps serve to constrain the ability of current power centers to drive the constitutional process in the wrong direction, and would be advisable in the case of Iraq.

Public participation and ownership

There is a clearly emerging trend toward providing for more direct participation by the population in the constitution-making process, in the form of civic education and popular consultation. Some scholars are referring to this as "new constitutionalism." This trend seems to have begun and emerged particularly in Africa although at this point in time it has also been employed in Latin America (Brazil and Nicaragua) and Asia (East Timor and Fiji.) Rather than being crafted completely behind closed doors by a small number of elites and handed down from on high, this model enables the broader public to be engaged in the process. It can serve to empower a broader range of groups, including women and emerging civil society groups, as examples, providing an opportunity for them to impact on the constitutional process as well as on the political process. The constitutional process can provide a forum for national dialogue and education regarding issues and decisions that are vital to the future direction of the country.

This model has typically involved the establishment of a Constitutional Commission as it did in Eritrea, Ethiopia, Ugandan, Kenya, Rwanda, Nicaragua, Brazil, and Fiji. Typically the Constitutional Commission has three functions although the delineation of those functions has not always been clear, and the lack of delineation has contributed to the weakness of the process in some cases, see below.

In general, Commissions have been called upon to conduct civic education in connection with the constitution-making process, to consult the population on the questions which it determines to be key to the process, and then to compile a draft of the Constitution which takes that consultation into account and which also synthesizes other drafts and submissions from political parties, individuals, and NGO's. This tends to diffuse the focus on individual drafts which can otherwise detract from the democracy of the process when ready-made drafts are submitted in the early stages of the process by powerful parties or individuals.

These Constitutional Commissions have usually been appointed by the executive or elected or appointed by a Constituent Assembly. In this new emerging model for constitution-making, it is important that such bodies, while relatively small in size, be fairly representative of the various political parties and religious, racial and ethnic groups within the society. Where the constitution-making process has been sufficiently deliberative and has entailed broad public consultation, an intriguing result has repeatedly been the transformation of the members of a Constitutional Commission from serving primarily as advocates for their respective interest group into a more cohesive group with a greater focus on the needs of the whole society.

Constitution-making is a deliberative process, and especially when integrating the public participation model, needs to be given adequate time. It is a mistake to attempt to short-circuit this process. For example, in some cases, Commissions have tried to conduct civic education and popular consultation all in one phase. It is strongly urged that these generally be treated as two distinct phases of the process. The public education phase provides an important vehicle to broadly disseminate to the public information regarding the constitution and the constitutional process, and information on the basic themes -- that should inform the new constitutional framework. In various places, this has served as a stimulus to civil society groups to organize public discussions on these issues. Through this process, long before adoption of any final constitution, the process can begin to diffuse power within the society and facilitate democratization, rather than leaving it all in the hands of those few with their hands on the levers of power.

In East Timor and Fiji, the public education and consultation phases were essentially conflated, arguably weakening the effectiveness of each. South Africa, Eritrea, and Rwanda are more successful examples of this aspect of the process. In those processes, a carefully planned program of civic education was conducted so as to educate the population on the role of a constitution in society generally and as to their role in the process. 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. Over the course of the Rwandan constitutional process, it is worth noting, the opinions of the Constitutional Commission were revised in light of the popular consultations. 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 population a series of specific key questions and issues regarding the constitution. An adequate budget and resources are needed to enable the Commission to hold sessions throughout the country, elicit the views of the public and compile and receive responses. This process not only provides the public with a sense of ownership over the future constitution; it also often provides ideas and insights to the Commission that may prove extremely valuable to the subsequent drafting of the constitutional text.

The case studies have clearly shown that the challenge of conducting these processes in the context of a high rate of illiteracy has proven to be much less significant than some would imagine. Members of constitutional commissions have been frequently amazed at the sophistication of the views expressed by their illiterate population once they understood the issues and were able to form their own opinions about them. In addition, a great deal has been learned about how to conduct these processes with an illiterate population. The message has been passed in several of these societies through the use of radio, cartoons, traveling theatrical presentations, etc.

The synthesis of the results of the popular consultation into the constitutional draft has been a challenge in certain cases, and requires proper planning. In East Timor, for example, the Constituent Assembly focused on a draft prepared by the dominant political party that ignored the results of the popular consultation. Brazil is another example where the popular consultation failed at this stage. In that case the popular consultation had been massive but poorly organized. The task of synthesizing the results was then assigned to one man. Consequently, he was ultimately unable to absorb and synthesize the results of the popular contribution in the development of the final draft.

It is also important to note that the process of civic education and popular consultation takes time. Some countries conducting these processes have tried to rush them. This was the case in East Timor, where the process was to take one month; a year later when the process was seen to have failed, the Constituent Assembly launched a second effort at public consultation, but allocated only one week for the exercise. This is currently a potential problem in Afghanistan as well. An effective public education and consultation process will take at least a year, and some countries have spent as much as three years on this aspect of the process.

Democratic representation

In addition to public participation, an important factor for the ultimate legitimacy of the constitution and the stability of the system it establishes is democratic representation in the body that receives the Commission draft. This is often a Constituent Assembly that debates and revises the Commission draft and adopts the Constitution.

The case studies suggest that a broadly representative Constituent Assembly is more likely to adopt a constitution which is characterized as legitimate and to establish a political system which will prove to be stable. When there is broad democratic representation, there is a greater likelihood that all aggrieved parties will have an opportunity to express their views on key constitutional issues of importance to them, and perhaps more importantly, there is a greater likelihood 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.

The biggest problem that arises in this connection is the dominance of a single political party, and this problem has been encountered in many of the cases studied. It is a factor which frequently detracts from the democracy of the process and serves to block the resolution of issues which are important to minority groups who have historically felt aggrieved.

For this reason, frequently a great deal of thought is given to the choice of the electoral systems which will govern democratic representation, and very often an Electoral Commission is established to oversee the elections of the Constituent Assembly and to resolve conflicts which may arise in this connection.

A problem which frequently occurs in connection with the dominance of a particular party is the establishment of a constitutional draft early in the process which becomes the focus of all debate and discussion. This problem was observed recently in East Timor, for example, where the Fretilin party developed a proposed draft even before the constitution-making process was formally initiated. The disadvantage which stems from the early establishment of drafts by powerful parties or individuals is that debate then tends to focus on the power to be accorded to that group or individual rather than on the issues that the draft addresses. This phenomenon serves to make the process generally less democratic.

One way to combat this problem is to establish a Constitutional Commission charged with the functions described above in the section on the right to participate. In that case, the Commission can serve as the recipient 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. They can then synthesize all of the elements in the final draft which they then prepare for submission to the Constituent Assembly for debate. This kind of a system can diffuse the power associated with any particular individual or group and provide an opportunity to all of the various groups in the society to express their views on constitutional issues.

Ratification

The case studies have not revealed any particularly uniform method for ratification of a Constitution. In many of the cases studied, the Constitution has been ratified by a Constituent Assembly elected for that purpose, and in several cases the Constitution had to be adopted by a 2/3 vote of that body. South Africa, Cambodia, and East Timor are examples. In other cases, the Constitution has been ratified simply by the parliament (Fiji, for example), in one case, Columbia, the Constitution was ratified by Presidential decree, and in Rwanda, the Constitution was ratified by popular referendum. It is interesting to note that there is a tradition of ratification by popular referendum in those countries, like Rwanda and earlier Iraq, which are influenced by the French Constitutional tradition.

However, none of the case studies has suggested any problems relating to legitimacy of the Constitution that can be traced to the method chosen for ratification. They suggest that questions of legitimacy appear to be more related to the education of the population and their participation in the process, as discussed above.

The role of the international community

At the outset, it is important to note that the role of the international community has been essential in many constitution-making exercises. For example, some of the programs of civic education and popular consultation which are described above could not have been conducted without the contribution of valuable 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 can play a role which is beneficial, and in some cases, crucial to the process.

The international community's involvement in constitutional processes has not always been without problems. For example, the role of the international community has been criticized in some cases for favoring one political party over others. When one party is allowed to dominate the process, there is a significant risk that aggrieved parties in a conflict will not have the opportunity to air their grievances and secure concessions in the constitution-making process which could serve to reduce the potential for future conflict. The problem is exacerbated when the international community lends its support to such a party.

The international community often engages in this kind of favoritism out of practical and temporal concerns. In general, their view is that it is perhaps most expedient to develop good working relations with the party which will obviously hold the power once the process is completed. In addition, there is the view that support of that party could shorten the process by accelerating an outcome which is seen as a forgone conclusion. This approach could, however, prove to be very short sighted in that, it could, as noted leave the embers of conflict smoldering.

This concern is related to another potential problem associated with the role of the international community in constitution-making processes--the issue of its influence on the timing of the process. The assistance of the

international community to constitution-making is usually part of a larger program of rule of law assistance which is very demanding in terms of both human and financial resources. For this reason, the international community has frequently sought to expedite the process, and some have taken the view that this time pressure has served to short circuit the process in some cases. In Cambodia, for example, the Paris Peace Accords of 1991 provided that the constitution-making process should be completed in a period of ninety days. Analysts of this process have unanimously taken the view that this period was clearly too short, particularly given the lack of human resources resulting from the Cambodian genocide and the impossibility generally of conducting an effective process under such time constraints in the most ideal of circumstances. Some authorities have suggested that the rushed nature of the process contributed to the weakness of the system created under the Constitution of 1993, and the coup d'état of 1997 has lent credence to that view.

Finally, while, as noted, the role of the international experts has been by and large extremely beneficial to the constitution-making processes studied, there have been instances where the contribution of certain individual experts has served to make the process less democratic. For example, in Cambodia while the process was unfolding in 1993 King Sihanouk commissioned a French expert to prepare his draft of the constitution. From the moment that draft was prepared, it then became more difficult for others participating in the process to make their views heard or to propose alternatives since from then on there was a tendency to reduce all issues to the question of whether the alternatives were consistent with the King's draft. (The problem associated with the development of drafts early in the process is more fully discussed earlier.) The study has shown that the role of foreign experts has been most 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 a role encourages debate of issues amongst the locals who will ultimately be the ones who will make the substantive choices. The making of informed choices by locals will serve to increase their sense of ownership of the constitution and contribute to its legitimacy in the long run. In Eritrea, an advisory body composed of foreign experts was created to assist the Eritreans in this way.

Summary and Recommendations

? The international community should encourage the Iraqis to take the time which is needed to conduct the process taking into consideration the time which will be required to engage in meaningful civic education and popular consultation.

? Basic rules governing the constitution-making process and the drafting of the final constitutional document should be established at the outset of the process. These rules should mandate a robust process of public engagement and should enshrine fundamental rights in the new Iraqi society.

? The case studies suggest that Iraq should follow the new model of constitutionalism which is emerging in recent constitution-making exercises by taking steps to ensure that meaningful civic education and popular consultation are conducted. In order to accomplish this goal, a Constitutional Commission should be appointed which is broadly representative of all of the political, religious, and ethnic factions within the society. This Commission could be appointed by the interim authority in Iraq as long as it is thus broadly representative of the society.

? The Constitutional Commission should conduct its work in three separate phases. It should first engage in a program of civic education which informs the population of the role of the constitution in the society and lets its people know what will be expected of them during the popular consultation phase. During this phase, the Commission should be taking note of the values and issues which the society considers to be of paramount importance and should be compiling a list of specific questions which should be put to the population during the popular consultation phase.

? In the second phase, the Commission should conduct consultations based upon specific questions, and these consultations should take place in every area of the country in both rural and urban settings. The Commission should also receive submissions and proposed drafts from political parties, individuals and NGO's.

? In the third phase of its work, the Commission should develop a draft which synthesizes the results of the popular consultation and the other submissions.

? The interim authority should develop an electoral law which should establish the electoral system which should be used in the election of a Constituent Assembly and which will provide for the establishment of a broadly representative Electoral Commission which will supervise the election and resolve disputes which arise during the election.

? The Constituent Assembly should carefully consider and debate every article in the draft proposed by the Constitutional Commission. It should be empowered in the electoral law to adopt the Constitution by a two thirds vote of the Assembly.

? It would be useful for the international community to provide detailed advice to the Iraqis on the development of the constitution-making process. As noted above, in the past foreign experts have focused almost exclusively on issues of substance. In a place like Iraq, locals could greatly benefit from an analysis of lessons learned from other processes which could serve to ensure the legitimacy of the Constitution and the stability of the political system it creates.

? International experts should serve as a resource and should avoid acting as a "hired gun" for particular parties or groups within Iraq. They should offer comparative observations based on their knowledge of how particular constitutional issues have been dealt with in other countries.

? The international community should avoid supporting one group or political party over another.