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# Transitional Authority in Iraq : Legitimacy, Governance and Potential Contribution to the Progressive Development of International Law

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# **SJD in International Legal Studies**

**GOLDEN GATE UNIVERSITY**

**School of Law**

**Transitional Authority in Iraq: Legitimacy, Governance  
and potential contribution to the Progressive  
Development of International Law.**

**By: Zakia Afrin** | Scientiae Juridicae Doctor Candidate

**This work is dedicated to my parents:**

***Alfaz Uddin, A freedom Fighter of Bangladesh Independence war and***

***Kamrun Nahar, Divine purity on earth***

## Preface

The unauthorized use of force in Iraq by the coalition forces and the establishment of a transitional authority following the occupation of Iraq by the occupying powers raised serious concerns for the appearance of legitimacy under international law. As scholars have called this period of uncertainty 'cross roads'<sup>1</sup>, this event calls for a precise legal analysis. As a student of International Law I find it irresistible to undertake an in-depth research on this phenomenon. I shall to this end conduct and present a thorough investigation of the Transitional Authority in Iraq, its legitimacy, governance and seek to identify potential contribution to the progressive development of international law in this field.

Besides, my personal interest in the Iraqi events played a role in selecting this topic. Freedom, war, and democracy- these words have simply been integral part of my regular life as I was growing up in Bangladesh. The fact of being the first generation of a new country came with its demands. I witnessed nostalgia about the freedom struggle, survival stories during the war, almost fifteen years of military dictatorship and uprising and sacrifice of common people for democracy. The ordeal of Iraqi people and the future of this vibrant culture attracted me to study their journey to a new political reality. My two and half years' stay in the Middle East has played a role in deciding to work with this subject.

By any standard, this is as sensitive a political topic as it is a legal one. Though I tried to analyze without partisan bias, at times I have taken sides. As one of the most

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<sup>1</sup> Sompong Sucharitkul, *International law at the crossroads*, 13<sup>th</sup> Regional Meeting of the American Society of International Law, March 12, 2004, San Francisco.

influential historians in the US Howard Zinn wrote, "You can't be neutral on a moving train"- I did not try to be one. I have voiced my support for the law above everything else.

It is my great pleasure to thank the members of my committee; my advisors Professor Christian Okeke and Professor Michael Van Walt for their support and inspiration over the years. I am indebted to my Supervisor Distinguished Professor Sompong Sucharitkul for his endless contribution to this work as well as my understanding of international law in general.

My heartfelt thanks go to John Pluebell of GGU International Student Services for his ever smiling helpfulness. My deepest appreciation for all my friends in the Bay Area who helped me survive spiritually. And last but not the least I thank the most favorite men in my life -my brother Kamrul Hassan, spouse Pablo Barua and my two month young son Duronto Pablo, without whom I might have given up a long time ago.

I hope this dissertation contributes to the growing study of transitional authorities in international law. This work has been my love made visible (As put by Kahlil Gibran) and I wish to continue my efforts in this regard.

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# **Chapter I**

Transitional Authority in International Law and the  
Relevance of the Iraqi Case

## Introduction:

'Transitional Authority' can be described as one of the most recent phenomenon in international law. It is the authority, exercised by a party other than the legitimate sovereign, over a territory for a limited period of time. In the absence of a formal definition, precedence could be considered as providing the mandate of the authority. Thus it can be accurately defined as 'the unique legitimate body and source of authority in which throughout the transitional period, the sovereignty, independence and unity' of the territory in question 'are enshrined'<sup>2</sup> as well as the administrative body which is 'empowered to exercise all legislative and executive authority including the administration of justice'<sup>3</sup>. From the definition arises a two fold characteristic of a transitional Authority namely, its temporary nature during a transitional period and its exercise of sovereign authorities and discharge of corresponding responsibilities. The Transitional period may have been the result of an internal conflict or an international intervention; international law has not crystallized a specific set of rules in this regard and merely prescribes the necessary authority on a case-by-case basis. In this crucial period of progressive development of international law in the area of transitional authority, the world has witnessed an unprecedented situation in Iraq, which through the acts of bringing about the interim government challenges the sovereign equality of States assured by the United Nations. The unauthorized use of force was condemned by the United Nations despite the promise of cooperation for rebuilding the nation. Subsequently the UN has authorized the Transitional Authority and joined the efforts to reinstate a permanent governing body. The Legitimacy and authority of this Transitional

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<sup>2</sup> SC Resolution 745 (1992) establishing United Nations Transitional Authority in Cambodia.

<sup>3</sup> SC Resolution 1272 (1999) establishing United Nations Transitional Administration in East Timor.

Government in Iraq as well as its contribution to the development of international law will be examined in this study.

Though there is no codification of the rules of governance by the United Nations or other international bodies, international law has come a long way to confront and manage conflict situations. The colonial rules have mostly ended <sup>4</sup> before international law was institutionalized through the formation of the United Nations in 1945. Thus formally the UN never encountered the clashes of sovereignty issues. Though the UN Charter establishes 'sovereign equality of all its Members'<sup>5</sup>, it has permitted deviation from the principle of non-interference in times of extraordinary events and to act accordingly<sup>6</sup>. Prior to the end of the Cold War, The United Nations had frequently been involved in the monitoring of borders and cease-fires as well as conducting or monitoring the process of elections. The UN also assumed responsibility for the territories, (detached from enemy States as a result of World War II), previously under the mandate of the League of the Nations in accordance with the Trusteeship system<sup>7</sup>. Authorized by chapter XII of the Charter, it administered Irian Jaya (western New Guinea) for seven months during the transition from Dutch colonial rule to Indonesian control in 1962-1963 pursuant to an agreement between Indonesia and the Netherlands<sup>8</sup>. The UN also asserted the right to govern Namibia when the General Assembly terminated the trusteeship of South, a mandate established under the League of Nations and provided to set up a council for Namibia for governing purposes<sup>9</sup>.

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<sup>4</sup> With few exceptions like Hong Kong, Puerto Rico, Samoa etc

<sup>5</sup> Article 2.1 of the UN Charter

<sup>6</sup> Article 39-51 of the UN Charter

<sup>7</sup> Article 75-85 of the UN Charter

<sup>8</sup> Agreement concerning West New Guinea (West Irian), Aug 15, 1962, Indo.-Neth., 437 UNTS 274

<sup>9</sup> GA Res. 2248, UN GAOR, 5<sup>th</sup> Spec. Sess., Supp No 1, at 1, UN Doc. A/6657 (1967)

Since the end of the Cold War a decade or two ago, there has been tremendous development in the UN as a global organization exercising authority in a number of new ways to address conflict situations and to cope with their consequences. These new measures came in the form of the use of force to end interstate and internal violence<sup>10</sup> such as in the case of the invasion and occupation of Kuwait by Iraq in 1990, intervention in Haiti in 1990, protection of civilians in Rwanda in 1994; and enforcement of Dayton Accords in the Former Yugoslavia in 1995. The UN stepped forward to resolve boundary issues between Iraq and Kuwait in 1991<sup>11</sup> as well as to create international criminal tribunals for former Yugoslavia in 1993<sup>12</sup> and for Rwanda in 1994<sup>13</sup> in order to prosecute violations of international humanitarian law. Compensation for victims of Persian Gulf conflict has also caught international attention<sup>14</sup>. However authoritative these measures may have been, they were not governing acts or governance in the true sense of the word.

The first major UN exercise in governance came with the formation of the UN Transitory Authority in Cambodia (UNTAC), an institution created by the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia<sup>15</sup>. There was also the UN Interim Administration Mission in Kosovo (UNMIK) created "under United Nations auspices, of international civil and security presences"<sup>16</sup>. The mission of

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<sup>10</sup> SC Res.678, UN SCOR, 45<sup>th</sup> Sess., Res. & Dec., at 27, UN Doc. S/INF/46 (1990), reprinted in 29 ILM 1565 (1990) ; SC Res. 929, UN SCOR, 49<sup>th</sup> Sess., Res. & Dec., at 10, UN Doc. S/INF/50 (1994); SC Res.940, id at 51; SC Res. 1031 UN SCOR, 50<sup>th</sup> Sess., Res. & Dec., at 18, UN Doc. S/INF/51 (1995), reprinted in 35 ILM 251 (1996).

<sup>11</sup> SC Res. 687, UN SCOR, 46<sup>th</sup> Sess., Res. & Dec., at 11, paras. 2-4, UN DOC. S/INF/47 (1991), reprinted in 30 ILM 847 (1991).

<sup>12</sup> SC Res. 827, UN SCOR, 48<sup>th</sup> Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), reprinted in 32 ILM 1203 (1993).

<sup>13</sup> SC Res. 955, UN SCOR, 49<sup>th</sup> Sess., supra note 1 at 15, reprinted in 33 ILM 1602 (1994).

<sup>14</sup> SC Res. 687, supra note 7, paras. 16-19,

<sup>15</sup> Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct 23, 1991, Art. 6 & Annex1, 31 ILM 183, 184 (1992).

<sup>16</sup> SC Res. 1244 (1999).

the international civil presence was unprecedented in scope and complexity<sup>17</sup> and it ended the reluctance of the UN to assume governing responsibilities in conflict stricken territories. Within months of the advent of the UNMIK, the UN Security Council faced an emergency situation in East Timor encouraging the formation<sup>of</sup> another institution of a similar kind. Thus, the Security Council established the UN Transitional Administration in East Timor (UNTAET), with "overall responsibility for the administration of East Timor", empowered "to exercise all legislative and executive authority, including the administration of justice"<sup>18</sup>. In Afghanistan, the world has witnessed yet another more matured Transitional Authority brought about by the international community after using force under the guise of the principle of State responsibility<sup>19</sup>.

This gradual development of the principle and practice of the 'Transitional Authority' in international law raises many legal questions on the face of it. Whether there is in fact adequate legal authority for UN actions in such cases. It is unclear whether UN has the necessary legal authority to assume the character and scope of the governance functions it has assumed. The exercise of governance may represent an impermissible interference with State sovereignty.<sup>20</sup> The institution of an authority in Iraq has further complicated the issue. There arises further query as to whether the transitional authority created by an occupying force can operate with undoubted validity in conformity with international norms. It is difficult to justify such an institution on the notion of sovereignty. It is difficult to define the role of the UN in this situation. The suffice of this dissertation is to dissect the Transitional Authority in Iraq, examine its legitimacy and

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<sup>17</sup> Michael Matheson, *United Nations Governance of Post conflict Societies*, 95 Am. J. Int'l. L. 79 (2001).

<sup>18</sup> SC Res. 1272 (1999).

<sup>19</sup> <http://www.state.gov/p/sa/rls/6675.htm>

<sup>20</sup> Supra note 17 at 84.

governance and seek to identify its contribution to the growing jurisprudence of international law.

The degree or extent of the jurisdiction or sovereign authority of the Transitional Authorities is a pressing issue for discussion. Traditionally the mandates of TA has included the duty of maintaining law and order, to establish effective administration, rehabilitation of the infra structure as well as to oversee all aspects of Human Rights improvement. The central question of post conflict societies, however, remains political: how to best construct a stable form of democratic institution complete with the ideal power sharing and governance<sup>21</sup>. There is no unanimous support for any particular ideology, though democracy has the strongest force of the whole world behind it. Economically successful nations and international instruments speak in unison highly of democracy. This favorable image is further demonstrated by public opinion all over the world. But the next question is whether democracy, with its proper foundation, is in reality the most viable option for governing a conflict stricken society. It is not clear how far the TA should have the authority to prescribe any given blend of democracy for the regime? Especially in the case of Iraq, despite its autocratic system, where the conflict was not brought about by the ruling party itself, it is not at all convincing that an interim authority should be empowered to make fundamental changes in the political structure of a country. Again, the fear of destabilization by democracy itself can not be ignored. History suggests from the experiences of Burundi, former Yugoslavia and Germany that elites may rally ethnic sentiment or use ethnic violence to retain power when threatened

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<sup>21</sup> Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Post conflict Societies*, 95 Am. J. Int'l. L. 86 (2001).

by democratic changes<sup>22</sup>. Considering the possibilities, it is the purpose of this study to endeavor to identify and suggest the path for the Transitional Authority has followed in this respect.

Addressing the root causes of conflict within the society and attending to HR violations rank among the more important tasks of the interim Government. To add to the criminal prosecutions of the responsible offenders, the UN introduced Truth Commissions to accelerate the healing process of a troubled nation. As the case of Iraq is fundamentally different from any other situation of this kind, it is questionable whether the judicial process be any different or should not. A question is raised whether an international tribunal would not be more suitable for a country's ruler where the neutrality of the trying court is in doubt. History of international law and practice does not appear to support any such prosecution of a head of State merely with respect to crimes committed within its territorial constraint. It might have been wiser to have this prosecution delayed until a regular government is restored in Iraq.

Perhaps the most complex and laborious agenda on TA's hand is one of social reform. Since every situation has its unique history and consequences, the code of conduct must be crafted creatively. The local capacities for change and international commitment to assist the process must be determined first. Religious, ethnic and minority issues are very sensitive; they should as such be handled with much care and sophistication. Above all, strategies should be designed to address the case in hand. Bearing the rare stigma of secularism in the Middle East, it is difficult to imagine how Iraq would survive the struggle for religious supremacy in the absence of a secular

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<sup>22</sup> Edward D. Mansfield & Jack Snyder, *Democratization and the Danger of War*, Int'l Security, Summer 1995 at 5.

identity. Did the TA bow to popular demand rather than implementing international standard is another issue at hand?

It is high time to evaluate the gender issue in peace-keeping force according to the explanation of the Economic and Social Council- "Women's equal participation in all aspects of peace processes and attention to gender issues in such processes have been an important focus of international action, especially since the Fourth World Conference on Women and the adoption of the Beijing Platform for Action (1995)".<sup>23</sup> Gender issues in post conflict territories cover two aspects- women's equal participation in peace building and ensuring gender equality in all segments of society. Complaints of violence against women by the peacekeeping troops must be heard and treated with seriousness. Prison abuses by the occupying forces in Iraq, for example, must be examined under the provisions of international instruments. Encountering the gender issue in particular is yet another challenge for the TA. It is important to find out whether the previous TAs has strictly followed the international guidelines for empowering women. In particular an examination will be made regarding East Timor as well as Afghanistan, whether the TA has launched legislative rules to secure women's participation and equal status in all walks of the society and ultimately by way of comparison the TA in Iraq is coping with the 'woman question' in a structure where democracy might empower the conservative Muslims over secular forces. In short, it is the object of the present study to ascertain the best conditions possible for women under international law in these circumstances.

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<sup>23</sup> ECOSOC 2003.

To sum up, this work is intended to accomplish a number of objectives, including, among others-

1. An analyses, syntheses and examination in depth of all the international instruments relating the to formation of a Transitional Authority, the extent of its authority and the ecologies of effective authority.
2. A Description of the foundation, legality and procedures undertaken by the Iraqi Transitional Authority; provision of a critical analysis of the same.
3. A Suggestion of ways and means of implementation, compliance and enforcement of existing international norms related to Transitional Authorities and recommend modes of developing the jurisprudence in this area of law.

As the study demands, this dissertation builds on international legislations, mostly resolutions, treaties, judicial decisions, commentaries, interviews with scholars in different fields as well as domestic legislations on the subject of TA. The World Wide Web has been especially helpful in the research. This work will be divided into six chapters.

After setting this agenda in Chapter one, Chapter two will discuss the formation of the TA for Iraq and the Legal consequences arising therefore. I will discuss the dilemma of unauthorized use of force in this case, international condemnation and realization of the necessity of international commitment to rebuild this territory. The political concern regarding the TA being set up by the Coalition Provisional Authority rather than the United Nations is another point of consideration in this chapter. As I look into the scope of authority of the CPA, Governing Council, Interim Administration and

Transitional Government- together forming the Transitional Authority in Iraq, I answer four specific questions. First, did the coalition have legal authority to go into Iraq and overthrow the government, which required installing of a transitional administration? Second, did the occupying force have legal authority for the character and governance functions it had assumed? Third, Did the Transitional authority govern within its scope and limits allowed by international law? Fourth, what effect if any does this temporary government have over the principle of sovereignty under international law.

In Chapter three, the research will focus on one of the most critical issues for the TA; drafting a permanent constitution. I will analyze, document and examine the issues relating to the constitution making process and the content of this constitution. I will argue in this part that the constitution making process did not satisfy international standards and a practical approach where the content neglected to identify common strategies to unify a diverse community.

In Chapter four I will talk about the gender role in rebuilding a society through TA. The main points for discussion in this chapter are Iraqi legal infrastructure affecting women, gender sensitivity in the society and participation of women in political as well as social decision-making. I draw a comparative picture of the situation of women both under the previous regime and under the TA. Supporting my argument I demonstrate that women's status during the TA and present government influenced by the constitution drafted by the TA suffered a major setback compared to the previous autocratic government. -

Chapter five deals with another important aspect of post conflict nation building- establishing rule of law. Describing international trends for post conflict justice, I analyze

two aspects of Iraqi TA efforts- establishing Special Tribunal for trying previous government's violation of human rights and reconstructing the Iraqi legal system. In this chapter I argue that though milestones regarding criminal liability of heads of state have been reached, the special tribunal as well as the reconstruction effort falls short of international legal standards.

Chapter six is a compilation of all my arguments, development of jurisprudence in this area of law and recommendation to further enhance the international commitment in this regard. I will argue that this is high time to enact a complete set of rules with regard to Transitional Authority and set the limit to the virtually unrestricted broad exercise of authority. Consequences of violations of the law will be suggested. Even though international cooperation is needed to rebuild Iraq, the unauthorized act of the use of force must bear adequate condemnation and the TA should always confirm to international (In other words UN) standards in all actions and at all times.

## **Chapter II**

### **Transitional Authority in Iraq: Legitimacy and Governance**

## Introduction:

*"I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions? Then you will find your doubts and your self melt away."<sup>24</sup>*

[M K Gandhi, 1948]

In a world that Gandhi, one of the greatest leaders of twentieth century envisioned freedom benefits the marginalized group of the society; in today's reality, however, it seems to be about political choices, free market economy and agendas of business entities. 'Operation Iraqi Freedom' was such an undertaking where an internationally mandated occupying force assumed the role of Transitional Authority (TA) in Iraq and offered massive economic and structural reconstruction without much regard to the common people's interest in basic needs.

The TA in Iraq was installed after the Government of Iraq was ousted in a preemptive self defense by a coalition force led by the United States. The coalition was publicized to consist of 49 countries including UK, Japan, Italy, Spain, Turkey, Philippines and Poland. Whereas the majority of the troops were from the US, many countries sent token appearances, medical teams and personnel in other capacities instead of soldiers. Even they were reportedly '*often sent (them) in response to US arm-twisting,*

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<sup>24</sup> Mahatma Gandhi, Vol. II (1958) p 65 retrieved from [www.mkgandhi.org/gquotes](http://www.mkgandhi.org/gquotes) on April 6, 2007

to carry favor with the world's only superpower or to gain access to Iraqi oil'<sup>25</sup>. As if to prove the fragility of the coalition, within a year many countries began to pull out whatever personnel they provided<sup>26</sup>. Heated debates on the legality of the use of force still exist among international law practitioners<sup>27</sup>. Though the question of legality found no satisfactory closure from the international legal scholars, the coalition became de facto sovereign of Iraq and with UN mandate began to exercise authority as occupying force. Before returning sovereignty to a democratically elected government, the occupying power Coalition Provisional Authority (CPA), Iraqi Governing Council (IGC), Interim Government (IG) and Transitional Administration (TAd) governed Iraq in the capacity of temporary government. These four institutions governed Iraq from May 2003 to 2006 and form the Transitional Authority of Iraq. In my endeavor to analyze governance of Iraq during this period, I look for the answers to the following questions raised by the developments of events:

First, did the coalition have legal authority to go into Iraq and overthrow the government, which required installing of a transitional administration?

<sup>25</sup> Global Policy Forum, Iraq Program, retrieved from <http://www.globalpolicy.org/security/issues/irqindx.htm> (Last visited on April 8, 2007)

<sup>26</sup> Countries including Japan, Italy, Spain, Slovakia, Bulgaria, Ukraine, Poland, Costa Rica, Philippines, Honduras, Dominican Republic have pulled their personnel out of Iraq.

<sup>27</sup> For a complete discussion of the Use of Force in Iraq see Mahmoud Hamoud, *The Use of Force against Iraq: Occupation and Security Council Resolution 1483* 36 Cornell Int'l. L. J. (435-454) 2003-2004; Christopher Greenwood, *International Law and the Preemptive Use of force: Afghanistan, Al-Qaida and Iraq* 4 San Diego Int'l L. J. (7-38)2003; Patrick McLain, *Settling the score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force against Iraq* 13 Duke J. Comp. & Int'l L. (233-292) 2003; Ben Saul, *The Legality of the Use of Force against Iraq in 2003: Did the coalition defend or defy the United Nations?* 8 UCLA J. Int'l. L. & Foreign Affairs (267-330) 2003; Nikolaos Tsagourias, *The Nicaragua Case and the Use of Force: The Theoretical Construction of the Decision and its Deconstruction* 1 J. Armed Conflict L. (81-111) 1996; John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations* 5 Chi. J. Int'l. L. (379-394) 2004-2005; Edward McWhinney, *The US/British Invasion of Iraq and the United Nations Charter Prohibition of the Use of Force: The Paradox of Unintended Consequences* 2 Chinese J. Int'l. L. (571-586) 2003.

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Second, did the occupying force have legal authority for the character and governance functions it had assumed?

Third, did the Transitional authority govern within its scope and limits allowed by international law?

Fourth, how did the transitional authority affect the existing sovereignty principle?

### **Iraq: Cradle of Civilizations**

*"It's the place where we get the first cities, the first writing, the first thoughts about what's man's relationship to God. It's the first sort of ideas about death. It's the first recorded literature that we have".<sup>28</sup>*

Today's Iraq does not represent that place anymore. Now it's a land of death waiting at different corners in the guise of suicide bombers. It is hard to believe that the land where the earliest code Hammurabi<sup>29</sup> emerged has now become one of the most lawless countries on earth. Known, as the cradle of several civilizations Iraq's history is one of dominating rulers and repressed peoples<sup>30</sup>. Before becoming the part of the Turkish Ottoman Empire in 17<sup>th</sup> Century, Iraq was governed by Sumerians, Babylonians, Chaldeans, and Persian and Arab rulers. After the First World War Iraq became a British mandate under the League of Nations and in 1932 became independent. Independent Iraq

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<sup>28</sup> McGuire Gibson, Professor of Mesopotamian Archeology at the University of Chicago commented on Morning Edition of National Public Radio, Feb 20 2003. Retrieved from <http://www.npr.org/templates/story/story.php?storyId=978050>

<sup>29</sup> The Code of Hammurabi is one of the earliest codified laws in the world. It was created in 1760 by King Hammurabi of Babylon. For complete text of the code see <http://www.wsu.edu/~dee/MESO/CODE.HTM>

<sup>30</sup> For complete History of Iraq see George Roux, *Ancient Iraq* 1992.

suffered under British mandated monarchy only to be overthrown by military in 1958. This regime change was followed by two other Baathist coups in 1963 and the 1968. After the last Saddam Hussein became the vice president of Iraq before taking over as the President of the Republic in 1979. Saddam Hussein's government was severely criticized by the UN and the international community for its mistreatment of citizens, brutal measures against political dissidents, eight year long armed conflict with Iran in the 80's and invasion of Kuwait in 1990 that sparked the first Gulf war through a Security Council resolution. Prior to the invasion Iraq , its citizens were sentenced to penury and suffered from lack of a vibrant civil society culture for the government's political repression.

### Legality of the Iraq war

Historically, a state was free to treat its citizens, as it wished based on the principle of sovereignty.<sup>31</sup> If we leave out the religious and national solidarity factor encouraging interventions, the first legal doctrine developed during the Grotius era<sup>32</sup>. In 1625 he wrote:

*“, whether a war for the subjects of another be just, for the purpose of defending them from injuries by their rulers. Certainly it is undoubted that ever since civil societies were formed, the ruler of each claimed some especial right over his own subjects....(But)*

<sup>31</sup> Louis Henkin, 'The Internationalization of Human rights' (1977) 6 *Proceedings of the General Education Seminar* 7, quoted in Louis Henkin et al (eds), *International Law: Cases and Materials* (1987)981

<sup>32</sup> For general discussion see Andrew Field, The legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority, *Monash University Law Review* (Vol 26 no2 '00)

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*if a tyrant....practices atrocities towards his subjects, which no just man can approve, the right of social human connection is not cut off in such case.*"<sup>33</sup>

The Grotius doctrine of 'Social human connection' was followed in many interventions since then<sup>34</sup> but mostly remained as an exception to the rule of non intervention. Situations were overlooked when there existed no Real Politik benefit but never on the ground of non-interventional theory. As Field points out, it was only after the UN Charter was drafted that 'a split in this near unanimity as to when humanitarian intervention was legitimate' arose in the legal scholarship. The debate is surrounded around Article 2(4) of the Charter that states,

*All members shall refrain in their international relations from the threat or use of any force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.*<sup>35</sup>

This article is considered to be a *jus cogens* principle or peremptory norm meaning that states are obliged not to depart from this rule. The first paragraph emphasizes an outright ban on the use of force. The second paragraph provides the exceptions to this rule. Use of force is legitimate in case of self defense<sup>36</sup> and collective deployments of force authorized by Chapter vii of the charter<sup>37</sup>. Since no other exception is made, it can be concluded that unilateral or collective use of force or humanitarian intervention without UN approval has been declared illegal in the Charter.

Support for this position is apparent in the Corfu Channel case where the International court of Justice (ICJ) mentions intervention as capable of leading to

<sup>33</sup> Hugo Grotius, 2 De Jure Belli est Pacis, ch xxv, 438 (1625, Whewell trans. 1853) quoted in Field 342

<sup>34</sup> David Scheffer

<sup>35</sup> Charter of the United Nations (1945) reproduced in Louis Henkin et al (eds) Basic Documents to Supplement International Law: Cases and Materials (2<sup>nd</sup> edition, 1987) 99

<sup>36</sup> Article 51 of the UN Charter

<sup>37</sup> Article 42 of the UN Charter

'perverting the administration of international justice itself'<sup>38</sup>. The ICJ reiterated the doctrine once again in the case of *Military and Paramilitary activities in and against Nicaragua* in 1986. It further declared that Article 2(4) of the Charter became customary international law, a binding obligation for the states.

Whatever the position of international law may have been, invasion, intervention and the most recent use of force phenomenon have kept the horrors of war alive in today's world. The post cold war era has produced a number of legal armed interventions many of which have been subject to criticisms by legal scholars. As pointed out by Anne Orford, the supporters of such trend dominate the scholarships today:

*'One of the most significant changes in international politics to emerge during that period was the growth of support, within mainstream international law and international relations circles, for the idea that force can be legitimately used as a response to humanitarian challenges....'*<sup>39</sup>

After the end of US-Russia enmity in the SC, the power to authorize use of force has proliferated unrestrictedly. Threat to peace has received very broad interpretations even to include popular leaders restricting market economy or WTO influence in their territories<sup>40</sup>. Many scholars are looking at this development as human rights movements going on to the offensive. Realists defend this development on the ground that states' practice in this area is practically customary international law. In many cases action or silence by the international community is driven by political motivations. Even where the UN did not approve that attack, states have supported interventions directly or in silence

<sup>38</sup> Corfu Channel case of the ICJ, 1946

<sup>39</sup> Anne Orford, *Reading humanitarian intervention: human rights and the use of force in international law*,

<sup>40</sup> Cambridge University Press, 2003

<sup>40</sup> For example, Cuba and Venezuela are being considered as threats to regional stability by the USA because of their preferences for state owned enterprises.

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where it affected their interest. The Indian intervention in East Pakistan that led to the independence of Bangladesh in 1971 from Pakistan is one of such cases. Despite UN condemning the actions as 'violation of Pakistan's territorial sovereignty', India got involved apparently overwhelmed by the refugee crises. In a contrasting situation province of Biafra in Nigeria did not receive any significant recognition or aid from the international community in its secessionist effort the same time. Supporting the NATO intervention in former Yugoslavia, which was not authorized by the SC, Field concluded that doctrine of humanitarian intervention must continue to exist<sup>41</sup>

In this backdrop of debate regarding use of force and its validity under international law, the United States together with coalition forces led an attack against Iraq in April 2003. The coalition primarily defended its action by relying on the interpretations of the SC resolutions 678, 687 and 1441<sup>42</sup>. These resolutions were adopted under the authority of chapter vii and were interpreted by the coalition force to have allowed them to invade Iraq. Supporters of the administration rallied behind the theories

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<sup>41</sup> Field, *ibid* 361

<sup>42</sup> **Resolution 678:** Adopted in 29 November 1990, this resolution authorized the use of force in Iraq to eject it from Kuwait and to restore peace and security in that area. It also authorized use of all 'necessary means' for all relevant resolutions. The broad measure of all necessary means included military action.

**Resolution 687:** Adopted in 3 April 1991, this resolution provided the conditions for cease fire and imposed continuing obligation on Iraq to eliminate its WMD in order to restore international peace and security. It further empowered the SC to take steps to implement the resolution and to secure peace and security in that region.

**Resolution 1441:** This resolution was adopted in 8 November 2002 and gave Iraq the final opportunity to comply with its obligation to disarm. It also warned Iraq of serious consequences in case of failure to comply but did not specify any penalty or punishment. As no specific course of action was described, this should not have been read as an authorization of using force against Iraq. Also the effort by the US and UK governments in seeking a resolution specifically authorizing an attack against Iraq speak of their understanding of the limitation of SC 1441. Similar view can be found

of supremacy of Security Council resolutions even when specific non-authorization exists<sup>43</sup>.

The Australian and UK governments relied on the interpretations of SC resolution 678 to justify the attack.

The US government went a step further and built its case on the principle of self-defense. After voting on SC resolution 1441, US Ambassador to the UN John Negroponte made his point clear by claiming ‘...this resolution does not constrain any member state from acting to defend itself against threat posed by Iraq.’<sup>44</sup>

There has been no general acceptance of the doctrine of pre-emptive self-defense within the structure of the UN beyond a possible right of interceptive self-defense. Interceptive self defense confers a right on states to defend themselves against actions of another state, of sufficient magnitude which clearly have a hostile intent, before the aggressor’s forces actually execute the attack.<sup>45</sup> The mostly noted pre-emptive attack under Article 51 was the Israeli air strike on a nuclear reactor in Iraq in 1981 that was criticized by the UNSC as a clear violation of international law.<sup>46</sup>

The mere fact that both arguments for and against the Iraq war involved legality under international law has been praised by many. Professor Ibrahim J. Gassama quoted wrote,

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<sup>43</sup> For example consider Hoover Fellow and Professor of Law at the Stanford University, Abraham D. Sofaer’s argument “ It is unreasonable to refuse to give weight to Security Council actions in evaluating the need (and hence the legality) for using force merely because the Security Council may not have granted explicit authority” in *On the Legality of Preemption* , Hoover Digest 2003 No 2 p 68.

<sup>44</sup> [www.pbs.org/newshour/bb/international/july-dec02/iraq\\_setup\\_11-08.html](http://www.pbs.org/newshour/bb/international/july-dec02/iraq_setup_11-08.html) - 23k -

<sup>45</sup> Y Dinstein, *War, Aggression & Self Defense* (Cambridge, University Press 3<sup>rd</sup> edition 2001) 172-173 quoted in Peters n12 p 10.

<sup>46</sup> For a general discussion on this see *ibid*

*“One must pause and reflect on the fact that at least for a short period and at a certain level of discourse, the notion of international legality attained a status few were willing to challenge openly- certainly not on the rhetorical plane.”<sup>47</sup>”*

Though the UN Secretary General in his personal capacity has called the invasion illegal, the official stand of the world organization is still not clear. Scholars continue to argue both sides only to prove the weakness of international legal regime in this regard. The UN SC resolution 1483 virtually drove the issue in a different wave while recognizing the coalition force as occupying authority thus binding them under the laws of war.

### **Authority of UN in delegating power to occupiers**

When the UN undertakes to administer temporary administration of any country or territory, it seems easier to justify the legitimacy of its actions under Chapter VII of the UN Charter. The authority of the Security Council under Article 39 justifies any action by the body in responding to *“the existence of any threat to the peace, breach of the peace, or act of aggression”*<sup>48</sup>. As the language permits broad interpretation, internal conflict, breakdown of security structure as well as governance complications can be described to amount to threat to peace and security. The Council has previously used the measures to address humanitarian disasters, refugee crises and the like<sup>49</sup>. The same argument could be used to evaluate the authority of the coalition forces as occupying

<sup>47</sup> Ibrahim J. Gassama, *International Law at a Grotian Moment: The invasion of Iraq in Context* 18 Emory Int'l L. Rev. 7 2004

<sup>48</sup> Article 39 of the Charter

<sup>49</sup> Article 39 has been invoked to address the situations in Haiti, Yugoslavia, and Rwanda etc.

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powers. Whether 'occupation' itself is a violation of international law remains to be explored, UN's delegating the governance function to an occupying power must be recognized as valid under chapter VII of the Charter.

Question may arise as to whether introducing a temporary government structure is within the authority of Article 38. Though measures like imposition of embargo, interruption of communication or severing diplomatic relations have been identified as valid actions by the SC in addition to use of force, these are by no means exhaustive and may include temporary governance solutions<sup>50</sup>. The introduction of international criminal tribunals for former Yugoslavia and Rwanda<sup>51</sup> through the Council supports the view that going beyond the expressed provisions of the Charter is well within the authority of SC. As long as a threat to peace is determined, any measure by the SC seems to be under the purview of the Charter. Accordingly, creating an institution for governance and delegating the authority to an occupying force do not pose any legal concerns.

Another pressing argument concerning the legitimacy of such a temporary government authorized by the SC is that it contradicts the principle of state sovereignty. "Based on the principle of the sovereign equality of all its members"<sup>52</sup> the UN Charter mandates that members settle their international disputes by peaceful manners and refrain "in their international relations from the threat or use of force against the territorial integrity or political independence of any state"<sup>53</sup>. The notion of occupation is directly conflicting with the utterances of the Charter until the provision of enforcement under SC

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<sup>50</sup> Article 41 of UN Charter

<sup>51</sup> S/Res/827 (1993) established that International Criminal Tribunal of Yugoslavia

<sup>52</sup> Article 2(1) of the Charter

<sup>53</sup> Article 2(4) of the Charter

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authority comes into effect<sup>54</sup>. This principle of subjecting state sovereignty to the judgments of a few powerful states, namely the SC permanent members is a controversial but influential one. Once in effect, it legitimizes all actions taken by the SC including building temporary governance institutions. Since members of the UN submit to the authority of UN Charter, they also agree to this SC superiority over their sovereign powers. This consented demotion of sovereignty may raise philosophical concerns but is perfectly within the realm of international law.

### **The Occupying power and Their Legal Authority**

It is an interesting phenomenon of international law that law of occupation deals exclusively with the consequences of an occupation after it has taken place notwithstanding the reasons or justification of the occupation. Likewise, the Iraq war or invasion without the Security Council resolution may have been illegal, but as soon as the coalition forces satisfied the requirements of becoming occupying force, the yardstick for their performance was obligations of occupying forces under international law. In order to determine the scope of authority of the CPA and its implementation, it is essential to look at the law of occupation.

According to Article 42 of 1907 Hague Convention IV respecting the laws and customs of war on land,

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<sup>54</sup> Article 2(7) of the Charter, "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII*"

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*"Territory is considered occupied when it is actually placed under the authority of the hostile army"*<sup>55</sup>.

Shortly after the US led coalition entered Iraq, there was little doubt about the failure of Saddam Hussein's government to exercise effective authority over Iraq's affairs. Legitimacy of the occupation came through SC Res. 1483 that established the US and UK forces as occupying power and recognized their authorities, responsibilities and obligations under applicable international law<sup>56</sup>

International humanitarian law clearly communicates the authorities and responsibilities of the occupying power embedded in Article 42-56 of the Hague Convention<sup>57</sup>. Whether the occupying power has successfully met its obligations is a question of fact and requires careful examination of the events that followed the occupation.

The first and perhaps the foremost obligation of an occupying power is *'to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'*<sup>58</sup>. The Hague Convention continues with duties of the occupying power to refrain from forcing the inhabitants to furnish information relating to the belligerent or of the belligerent defense<sup>59</sup>, compelling the inhabitants to swear allegiance to it<sup>60</sup>, confiscating private property<sup>61</sup>, looting<sup>62</sup> etc.

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<sup>55</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 retrieved from

<sup>56</sup> S/Res/1483 (2003) retrieved from <http://daccessdds.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement> on March 21, 2007

<sup>57</sup> Id

<sup>58</sup> Article 43 of the Hague Convention IV of 1907

<sup>59</sup> Article 44

<sup>60</sup> Article 45

<sup>61</sup> Article 46

<sup>62</sup> Article 47

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Duties binding the US led coalition as occupying powers are also found in the Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of war. Part III of the Convention puts forth the obligations of occupiers towards the people within the territory and management of different resources of the territory (Part III). Few provisions of the additional protocol of the Convention (I of 1977) also apply to the occupiers.

SC Res. 1483 and SC Res. 1511 removed whatever limitations the codified law may have presented and allowed the authority broader range of powers including administration of justice and post conflict reconstruction measures.

Question arose whether the provisions of human rights instruments like ICCPR and ECHR should have been applied to the Iraqi people. The ICJ commented on the Advisory opinion on Nuclear weapons,

*"The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency"*<sup>63</sup>

Though signatories of the treaties both UK and US maintained otherwise.<sup>64</sup> The occupying power thus derogated from a well-established principle of international law.

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<sup>63</sup> Para 25, Nuclear Weapons advisory opinion, ICJ website

<sup>64</sup> The US contended that ICCPR does not apply during armed conflicts and outside the territory of the United States; The UK maintained that ECHR only applies to contracting parties and within the borders of a signatory. For more on this see Ralph Wilde, *The applicability of International Human Rights Law to the Coalition Provisional Authority(CPA) and Foreign Military Presence in Iraq* 11 ILSA J.Int'l & Comp. L. (485-495) 2004-2005

## Coalition Provisional Authority (CPA): Occupying liberators

Led by Ambassador L. Paul Bremer III, the CPA was created replacing the ORHA and its primary responsibility of reconstruction of Iraq. "The lack of an authoritative and unambiguous statement about how this organization was established"<sup>65</sup> gave way to two competing theories about its creation. On one hand it may have been an act by the US President materializing by a National Security Presidential Directive (NSPD), on the other SC Res. 1483 have been mentioned as the primary source for its creation. The official version of the CPA documents also leave this question unanswered and rather discusses deriving of its authority from the SC Res. 1483, the laws of war and from the institution of CPA itself<sup>66</sup>.

The mandate was to exercise powers of government temporarily during the transitional period that included restoring conditions of stability and security, creating conditions for the Iraqi people to be able to determine their political future through restoration and establishment of national and local institutions for representative government and facilitation of economic recovery, sustainable reconstruction and development<sup>67</sup>. All the laws previously in force in Iraq were declared valid as long as they were consistent with the CPA objectives and did not become obsolete because of any action by the CPA or Iraqi government<sup>68</sup>.

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<sup>65</sup> L. Elaine Halchin, *The coalition Provisional Authority: Origin, Characteristics, and Institutional authorities*, CRS Report for Congress April 29, 2004 retrieved from <http://www.fas.org/man/crs/RL32370.pdf> on March 27, 2007

<sup>66</sup> CPA/REG/16 May 2003/01 retrieved from Official website of the CPA <http://www.cpa-iraq.org/regulations/#Regulations> on March 27, 2007

<sup>67</sup> CPA/REG/16 May 2003/01 Section 1 Para 1

<sup>68</sup> CPA Reg. 1 Section 2

In its promulgated 12 regulations<sup>69</sup>, 100 orders, 17 memoranda and 13 public notices, the CPA exercised its authority as vested through the SC sometimes going outside the sphere of its mandate.

Though the authority and objectives of the CPA had been explained in precise terms, the background of its establishment remained in the dark. The communication from the US administration had been one of eliminating options rather than offering one. Halchin correctly observed,

*Available information about the authority found in materials produced by the Administration alternatively: (1) deny that it is a federal agency; (2) state that it is a U.S. government entity; (3) suggest that it was enacted under United Nations Security Council Resolution 1483; (4) refer to it, and OHRA, as "civilian groups....reporting to the Secretary [of Defense]"<sup>70</sup>*

The true identity of such an institution may seem less important than its mission under the circumstances, but its long running effect is undeniable. Lack of founding institution may have allowed the CPA officials, more specifically the Administrator evade accountability and face possible consequences for the mismanagement of issues<sup>71</sup>.

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<sup>69</sup> The official CPA website defines 'Regulations' as instruments that define the institutions and authorities of the CPA; 'Orders' as binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law; 'Memoranda' as expand on Orders or Regulations by creating or adjusting procedures applicable to an Order or Regulation; 'Public Notices' as the intentions of the Administrator to the public and may require adherence to security measures that have no penal consequence or reinforces aspects of existing law that the CPA intends to enforce.

<sup>70</sup> Halchin, CRS Report, p 38

<sup>71</sup> The CPA was accountable to the Department of Defense of the United States. The UN or the Iraqi people had no authority over the institution thus no way of evaluating its performance.

## Governing Council of Iraq: Shadowy existence

On July 13 of 2003, the CPA formed a 25 member interim body called Governing Council of Iraq. This diverse Council consisted of 13 Shia Muslims, 5 Sunni Muslims, 5 Kurds, 1 Christian and 1 Turkmen. CPA formally recognized the Council as *'the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq'*<sup>72</sup>. According to the CPA, its main responsibility was to uphold Iraqi people's interest in the interim administration and *'in determining the means of establishing an internationally recognized, representative government'*<sup>73</sup>. The Council was to provide advice and leadership to the CPA until the transfer of sovereignty to the Iraqi Interim government. Though the Council's power was subject to the authority of the CPA administrator, few controversial decisions by the body had not been officially endorsed by the CPA. For example, Iraq's secular family law was about to be replaced by Islamic law giving rise to concerns that it would undermine women's rights and privileges traditionally enjoyed in Iraqi society<sup>74</sup>. This Council also declared the day Baghdad fell as a national holiday and banned television stations that did not support the coalition agendas.

Perhaps the most significant contribution of the Governing Council was the preparation of the temporary constitution 'Transitional Administrative Law (TAL)' to determine the governance structure of the interim administration, timeline for a National Assembly election, drafting of a permanent constitution and elections to a permanent

<sup>72</sup> CPA/REG/13 July 2003/06

<sup>73</sup> CPA/REG/13 July 2003/06

<sup>74</sup> Directive 137 of December 29, 2003 passed by the Governing Council of Iraq

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government. A closer look at the drafting and content of this document is warranted for evaluating the Council's role in rebuilding Iraq.

The Law of Administration for the State of Iraq for the Transitional Period, also known as the TAL became effective on June 30, 2004 after the CPA formally transferred sovereignty to the interim administration. The TAL declared Iraq as republic, federal, democratic and pluralistic<sup>75</sup> where the *'federal system shall be based upon geographic and historical realities and separation of powers and not upon origin, race, ethnicity, nationality, or confession'*.<sup>76</sup> Islam was proclaimed the official religion of Iraq<sup>77</sup>, a feature all too familiar with the regions' countries to which secular Iraq had been a progressive exception. The emphasis on religion grew stronger as it was mentioned as a source of legislation. Later on an identical provision is found in the permanent Constitution of Iraq.

In its 62 Articles within 9 chapters, the TAL promises many reforms including *'the basic rights of all Iraqis, including freedom of religion and worship, the right to free expression, to assemble peacefully, to vote, to a fair trial, and to be treated equally under the law'*<sup>78</sup>; independence of the judiciary and separation of powers; balanced executive powers by the President and the Prime Minister and federalism. Many of the provisions have come under vigorous criticism from legal scholars. Whereas the fundamental right regime is more progressive than most other constitutions in the world including the USA, many others fail to meet practical considerations. The chapter five clauses that requires two-third majority among National Assembly members to agree on the identity of the

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<sup>75</sup> Article 4 of TAL

<sup>76</sup> Article 4 of TAL

<sup>77</sup> Article 7(A) of TAL

<sup>78</sup> <http://www.cpa-iraq.org/democracy/TAL-themes.html>

presidency council consisting of a president and two vice-presidents has attracted a lot of negative comments from scholars<sup>79</sup>. Calling it a '*neo-colonial imposition*' and '*..Characteristic of only one nation on Earth, i.e. American Iraq*' professor Juan Cole observed

*"I fear it is functioning in an anti-democratic manner to thwart the will of the majority of Iraqis, who braved great danger to come out and vote"*<sup>80</sup>

Minority groups seem to have considerable rights in the TAL. The National Assembly needs a three fourth majority to pass a measure if vetoed by the presidency council after passing by a simple majority. The 'three fourth majority' rule also applies in amending the TAL. Though this emphasis on the minority consensus in national issues has met with criticisms, there is true potential for building a just society by implementing this provision. Majority preferred democracies led to much violent oppression of marginal communities throughout history<sup>81</sup> and securing legislative measures only by confirming minority approval can translate into a protection of minority rights in Iraq. This can also create check and balance situation in the National Assembly to diffuse the interests of conservative religious groups in legislating laws denying rights to women in the name of religion. Unfortunately, rather than uniting different groups, the TAL and

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<sup>79</sup> Article 36 (A) of TAL provides, "The National Assembly shall elect a President of the State and two Deputies. They shall form the Presidency Council, the function of which will be to represent the sovereignty of Iraq and oversee the higher affairs of the country. The election of the Presidency Council shall take place on the basis of a single list and by a two-thirds majority of the members' votes. The National Assembly has the power to remove any member of the Presidency Council of the State for incompetence or lack of integrity by a three-fourths majority of its members' votes. In the event of a vacancy in the Presidency Council, the National Assembly shall, by a vote of two-thirds of its members, elect a replacement to fill the vacancy."

<sup>80</sup> Juan Cole is professor of modern Middle Eastern and South Asian history at the University of Michigan and hosts a reputed web diary on events in Iraq. He is quoted from a BBC online feature retrieved from [http://news.bbc.co.uk/2/hi/middle\\_east/4359559.stm](http://news.bbc.co.uk/2/hi/middle_east/4359559.stm) on March 30, 2007.

<sup>81</sup> Consider the ethnic violence in Yugoslavia, Rwanda in the 90's.

subsequent permanent constitution of Iraq has successfully divided ethnicities and turn the country into a violent society.

### **Iraqi Interim Government: Conditional sovereignty**

The Iraqi interim government was described as the first initiative of the occupying power to return sovereignty of Iraq to Iraqi people. Facilitated by Lakhdar Brahimi, Special Advisor on Iraq to the Secretary General of the UN and in consultation with the CPA and the Governing council, *'The Iraqi Interim Government was formed through a process of wide-ranging consultation with Iraqis, including political leaders, religious and tribal leaders and civic associations'*<sup>82</sup>. Operating under the TAL this government consisted of a President, two Deputy Presidents, a Prime Minister leading a Council of Ministers, an interim national council composed of diverse groups of Iraqis and a Judicial authority. The primary responsibility of the interim government was to prepare for the national election to be held through which a representative Iraqi Transitional Government would come into being and lead the country towards a permanent constitution and democratic leadership. Begin functioning on June 30 of 2004, the interim body had only till January 1, 2005 to prepare for the national election. Tasks like administering day to day affairs of Iraq, providing welfare and security for the people and promoting economic development were also in the agenda of this body.

Though this government was recognized by the UN and few other countries as sovereign power of Iraq, the occupying forces specially the US exercised actual control over the territory. The CPA was officially dissolved but by installing a group of Iraqis

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<sup>82</sup> Iraqi Interim Government, Announcement ceremony Press packet, retrieved from [http://www.cpa-iraq.org/government/press\\_packet.pdf](http://www.cpa-iraq.org/government/press_packet.pdf) on March 31, 2007

loyal to the occupation agendas, they managed to dictate the events from under a veil. The 31 member body was crowded with exile Iraqis and US favorites. The most powerful position in Iraq for this interim period went to Prime Minister Iyad Allawi, who had been reported to be closely related to the CIA and US administration during exile years<sup>83</sup>. Even though the appointments were officially made by the UN representative, the fact of Mr. Brahimi's resignation only after two weeks speaks volumes about his approval of the process<sup>84</sup>.

Many controversial actions of the interim government have been linked to the Prime Minister including reintroducing capital punishment for criminal offences<sup>85</sup>, formation of a secret spy agency to tackle insurgency, and banning news channel Al Jazeera for thirty days. Allawi has been reported to have executed suspected insurgents himself in the presence of at least a dozen Iraqi and American security personnel. To appoint Allawi in the significant position can be viewed as an assurance of de facto CPA rule in Iraq.

The Interim government was vested with powers '*to conclude international agreements in the areas of diplomatic relations and economic reconstruction, including Iraq's sovereign debt*' without being able to '*amend the TAL or to form agreements which permanently alter the destiny of Iraq*'<sup>86</sup>. Ironically drafted by chosen Iraqis of the CPA, some of the provisions of the TAL have changed Iraq and its secular heritage

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<sup>83</sup> Various articles published in New York Times, Washington Post and other reputed media outlets suggested such connections.

<sup>84</sup> In an June 22, 2004 Asian times Article, Kaveh Afrasiabi wrote, "the mere fact that Lakhdar Brahimi, the UN's special envoy on Iraq, has reportedly tendered his resignation out of frustration with the Bush administration, which undercut his efforts to install an interim government in Iraq after misleading him into thinking that this would be essentially his call, represents another sobering lesson of "roads not taken" by the world organization vis-a-vis a major international crisis" retrieved from [http://www.atimes.com/atimes/Middle\\_East/FF22Ak01.html](http://www.atimes.com/atimes/Middle_East/FF22Ak01.html) on May 7, 2007

<sup>85</sup> CPA/REG/ abolished the death penalty for any criminal offence in Iraq.

<sup>86</sup> n60

profoundly and the so-called sovereign government was openly forbidden to change any of those. During the Governing Council and Interim Government, fundamental changes made to Iraqi economic structure also raises question of sovereignty and whether these Transitional Administrations complied with their authorities prescribed by international law.

Before handing over sovereignty to the interim administration, Paul Bremer promised to withdraw coalition troops upon request from the government. As any request was never made, the troops got comfortable. The trend continues today. Iraq is unofficially under US military surveillance. There is even talk in the US to send more troops. Where allies in the coalition including the UK have taken steps to remove their presence from Iraq, US continue to call the shots today. The occupying cap may not be there any more, but US claims moral authority to advise, criticize even force certain agendas inside Iraq.

### **Iraqi Transitional Government**

After the election took place for the National Assembly in January 2005 under the leadership of the Iraqi interim Government, the Iraqi Transitional Government became the first elected government of Iraq after the occupation in 2003. This body also operated under the TAL. Besides the traditional governance functions, the Transitional Government's main responsibilities were to draft a permanent constitution and to form a permanent democratic government.

The National Assembly failed to form a representative government as Sunni Iraqis boycotted the election. The structure of the government remained the same as the interim government as TAL was the foundation for both. This government's performance as the drafter of the constitution met with severe criticism. As I take a look at the constitution building process in chapter two, it becomes clear that the rushed process presented a constitution with numerous rights without much planning for the implementation and left a lot of loop holes through which Iraqi society may become hostage to civil war, theocracy and male domination. After two years, many of those fears are coming alive.

### **Multi National Force (MNF)**

Referring to the coalition forces as multi national force, the UN welcomed the 'willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition'<sup>87</sup>. Thus occupation forces under the CPA became UN mandated security forces under the sovereign transitional government. They were bound to act 'in accordance with international law, including obligations under international humanitarian law'<sup>88</sup>.

During the occupation, these forces have been accused of using incendiary weapons violating norms of international humanitarian law<sup>89</sup>. More than thousand innocent people have reportedly been killed by the troops during house searches, check posts, air raids and in other circumstances. One of the most publicized incidents despite

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<sup>87</sup> SC/REG/1546 of 2004

<sup>88</sup> Id

<sup>89</sup> Reputed NGOs like Amnesty International and Global Policy Forum among others have accused the coalition forces of using napalm, white phosphorus, depleted uranium, cluster munitions and other incendiary weapons on civilian targets.

attempt to cover up took place in Haditha on November 19 2005, in which case the members of the troops went into a rampage killing 24 innocent Iraqis when one of their soldiers died in a roadside bomb<sup>90</sup>. The insecurity faced by the MNF is sometimes met with frustration and random shooting of the civilians. The latest incident in March 2005 regarding the killing of an Italian secret service agent by mistake at a US check point in Baghdad attracted much attention and brought this neglected issue for discussion<sup>91</sup>.

Immunity granted to the coalition force by the CPA that translated into immunity for the multinational force prevented any of the atrocities to be tried in Iraqi courts. The troops are under the jurisdiction of their native countries, similar to the UN peace keeping force regulations. Only a few complaints of violence and atrocities against the US forces have been investigated resulting in convictions for even fewer soldiers.

## Nation Building

*“The ultimate goal for Iraq is a durable peace for a unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy. A key long-range strategic objective is a secure environment for people and property that enables citizens to participate fully in political and economic life”<sup>92</sup>.*

[Historic Review of CPA Accomplishments]

<sup>90</sup> See May 29, 2006 issue of Washington Post @ <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/28/AR2006052801011.html>

<sup>91</sup> US troops killed Nicola Calipari as he was returning with Giuliana Sgrena, a hostage whose release he just facilitated on March 4 2005. See full coverage on <http://www.guardian.co.uk/Iraq/Story/0,,1431126,00.html>

<sup>92</sup> *An Historic Review of CPA Accomplishments* retrieved from <http://www.cpa-iraq.org/>

Right before returning sovereignty to elected transitional authorities, the CPA communicated its strategic 'goals and objectives' in these words. It claimed to have 'achieved its primary goals' before leaving Iraq and helped Iraqis build the fundamental pillars of sovereignty- security, essential services, economy and governance.

Nation building by a foreign power may mean exercising the domestic authority to create an institutional framework to return sovereignty to the people through a political process. Depending on the existing preconditions of a territory, it may mean fostering a national identity or nurturing a political culture that represents the interest of its citizens. Whatever the goal may be the foreign power must respect original sovereignty of the people and keep in mind the cultural component of their lives. Reforms imposed by external experts or ideologies notwithstanding the experiences of the native people are destined to fail<sup>93</sup>. The actions of the CPA, Governing Council, Interim Government and Transitional Government must be weighed against the requirement of acting within their authority.

Though SC Res. 1483 recognized the coalition as occupying power allowing them venture into nation building to some extent, the right came with limited authority. The occupying forces were only authorized to restore a country's law and order situation without altering any fundamental feature of it<sup>94</sup>. The restriction CPA put on the Governing Council and the Interim Government through TAL and an obligation not to amend it were meant for them in terms of drafting the temporary Constitution.

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<sup>93</sup> For example, Ash U Bali mentions Toby Dodge as detailing the ambitious and unsuccessful British effort to build a liberal Iraq that tried to 'transplant foreign political conceptions and institutions without a detailed understanding of Iraqi society'. 30 *Yale J. Int'l. L.* 2005 (431-466). For a contrasting picture, consider reconstruction of Germany by the US after the WWII.

<sup>94</sup> Article 43 of 1907 Hague Regulations

Under the mandate of previous TAs and occupation Law, security is the first and foremost important issue for the temporary authority. In a report published in October 2004 , the International Institute for Strategic Studies concluded in part,

*“ war in Iraq has probably inflamed radical passion among Muslims, and that's increased Al Qaeda's recruiting power and morale, and at least marginally its operating capability”*<sup>95</sup>.

The consequences of the TA's failure to rebuild the security structure have not only failed to solve the present security concerns but also created a dangerous future for the whole region. Previously the US has criticized the UN for its lack of planning and resources of peacekeeping operations in different parts of the world<sup>96</sup>. Ironically the US forces in Iraq met with the same reactions from many sources.

In the form of economic reconstruction, the CPA had introduced major changes in the existing Iraqi structure even before the Governing Council or Interim Government came into existence. By promulgating orders, the CPA Administrator removed all conditions, safeguards even sovereign preferences from the Iraqi economic regime to allow market economy to flourish. During its 13 month rule in Iraq, the CPA facilitated the transition of Iraqi economy from a 'non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector'<sup>97</sup>. In the process, many fundamental changes were brought about in the economic framework<sup>98</sup>:

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<sup>c</sup>ross posted from Democracy Now website @  
<http://www.democracynow.org/article.pl?sid=03/10/16/1534236>

<sup>96</sup> US State Department's official comment on Brahimi report on UN Peacekeeping reform, retrieved from  
[http://www.usembassy.it/file2000\\_08/alia/a0082307.htm](http://www.usembassy.it/file2000_08/alia/a0082307.htm) (page last visited April 5, 2007).

<sup>97</sup> CPA/ORD/19 September 2003/39

<sup>98</sup> CPA Orders 17, 39, 49

- Privatization of state-owned enterprises
- National treatment of foreign firms
- 100% foreign ownership permissible in all sectors except oil and mineral extraction
- Unrestricted and tax free remittance of all funds related to investment
- Forty year ownership licenses with an option to renew
- Reduction of corporate tax to flat rate of 15%
- Suspension of 25% levy on company profits
- Immunity of Foreign Liaison Missions, their personnel, property, funds or assets from Iraqi legal system during the CPA administration.

These orders modifying the fundamental features of Iraqi economic scenario raise some serious concerns. First of all, the CPA opened all state enterprises for privatization including utility services. In most countries of the world, particularly in the developing countries governments are usually held as the guardians of people's welfare and responsible for offering these basic necessities of everyday lives to everyone including the ones who are unable to provide for the services<sup>99</sup>. The measure basically took away the hope for the marginalized population of Iraq. Unemployment of government employees and offering reconstruction contracts to non Iraqi firms contributed largely to the unemployment problem in the aftermath of the conflict.<sup>100</sup>

Measures related to foreign investments are potentially more harmful for the Iraqi economy than the claim of improving it. Allowing 100% foreign ownership in important

<sup>99</sup> During my stay in Doha, Qatar from 1988-1990, the utility services of water, electricity, telephone etc were provided free for all citizens and residents in that country. Recently Qatar introduced utility charges.

<sup>100</sup> Supra n Bali p 442

sectors, unrestricted tax free remittance, 40 year contracts with options for renewal- each of these rules make it impossible for a war torn country to revive and rebuild its economy. The national treatment clause meant for foreign investments stand in complete contrast to the general internationally accepted measure for developing countries where governments subsidize or otherwise facilitate the blooming of businesses owned by their citizens. Even the WTO leaves discretionary power to government under special circumstances to regulate aspects of foreign investment and native businesses. One of the reasons a multi lateral treaty on foreign investment does not exist today is the deep division between the interests of the global north and the global south. Developed countries are interested in unrestricted access and tax free exits with profits whereas the developing countries insist on accountability and the final word on investment sectors. As a result bi lateral investment treaties are made worldwide ironically many times to the detriment of the interest of developing countries.<sup>101</sup> A country like Iraq struggling to survive literally in every state affair and recovering from decade long economic sanction and two wars is definitely in no position to negotiate a treaty in equal footing. So, the impact of these rules is '*stark and designed to be durable*'<sup>102</sup> .

Ideally all these changes are not permanent as the democratically elected government can amend these provisions. Practically, however, this proved to be ineffective. Dependence on international aid mostly backed by the US and the existence of the US companies and investors through the CPA orders in the beginning of post conflict period made it even harder for a fragile government to negotiate an exit strategy.

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<sup>101</sup> See Zakia Afrin, Foreign Direct Investment and Sustainable Development in the Least- Developed Countries, Annual Survey of International & Comparative Law, vol. x 2004 for a complete discussion.

<sup>102</sup> Supra n Bali p 443

The long term reform strategy that Iraqi economy needed had been absent during the transitional period and it became a new challenge for post conflict Iraq.

The discussion about CPA actions that led to this economic malfunction for Iraq must not deviate attention from the fact that those orders were made without authority, in violation of international law. The Transitional authorities' actions, besides bringing concerns over legitimacy contradict with the notion of sovereignty.

The reconstruction of essential services was another major task that the CPA took over. Lack of adequate preparation had its effect on this. In the words of the CPA Administrator,

*“The reconstruction job proved to be harder than we anticipated because American prewar planning had not anticipated the enormity and difficulty of the tasks ahead of us”*<sup>103</sup>.

According to the Committee on Oversight and Government Reform of the US House of Congress, \$20 billion was disbursed to the CPA during its 14 months stay in Iraq as Iraq Development Fund (IDF) and others<sup>104</sup>. Stressing that the IDF were not ‘appropriated American funds’ rather ‘Iraqi Funds’ Mr. Bremer answered the allegations of mismanagement of the money in very simple manner

*“It was not a perfect solution. But there were no perfect solutions in Iraq”*<sup>105</sup>

Involvement of US corporations in the reconstruction effort from the very beginning of Iraq situation has raised many eyebrows. The CPA, however denied its

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<sup>103</sup> Oral Remarks by the Honorable Ambassador L Paul Bremer, III before the committee on Government oversight and Reform, U.S House of Representatives , February 6 2007 ;retrieved from Committee’s official website <http://oversight.house.gov/Documents/20070206131720-22115.pdf> (last visited April 5, 2007)

<sup>104</sup> Oversight Committee report

<sup>105</sup> Id

involvement in awarding the contracts and maintained that the Army had been in charge of reconstructions contracts<sup>106</sup>. This fact, however, complements the growing trend of UN –World Bank advocacy of engaging private enterprises in war torn societies for bringing about economic reform.<sup>107</sup> Truly the private sector can attract flow of capital, employment and necessary services in most cases; at the same time it may also create indecent disparities of income between different groups and aid government corruption. The negative effects of ill managed privatization may range from lack of native industries to a destabilized society on the verge of civil war. Random economic globalization promoting free market economy had divided functioning societies. In case of Iraq it may have even contributed to aggravate the sectarian divides.

Disagreement with UN about the Iraq invasion or arrogance of doing it alone, whatever the reason may have been the UN had a very limited role to play in CPA dominated sovereign Iraq. In the beginning of recognizing the invasion, the Security Council envisioned a greater involvement and requested appointment of a special representative for the country<sup>108</sup>. The Council also mandated the representative's Responsibilities to be coordination of the activities of the UN in post conflict processes, coordination among UN and other international agencies engaged in reconstruction and humanitarian activities and coordination with the CPA in matters of return of refugees and displaced persons, restore and establish institutions for representative governance,

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<sup>106</sup> In the Oral Remark, Mr. Bremer mentioned, "*Before I left for Iraq, the Pentagon designated the Department of the Army as the executive agent for the CPA, including "Management oversight for the acquisition and contracting support". The Army's contracting responsibilities extended to both the Iraqi funds and the appropriated funds.*" Oversight Committee Report

<sup>107</sup> For discussion of the joint effort by the UN and World Bank, see Allen Garson, *Peace Building : The private sectors role* in 95 Am. J. Int'l L. 2001 (102-119)

<sup>108</sup> SC/REG/1483

economic reconstructions etc<sup>109</sup>. A subsequent resolution established the United Nations Assistance Mission in Iraq (UNAMI)<sup>110</sup>. Unfortunately the good start didn't last long as UN pulled out of Iraq following the bombing of its compound in Iraq that resulted in deaths of fifteen UN staff members including the Special Representative Sergio Vieira de Mello. Just a month back he mentioned the need for UN to communicate their independent identity and will to help the Iraqi people as a prerequisite for success<sup>111</sup>. After the unfortunate event UN withdrew for some time and then went in again only to maintain a very low profile in the country. At present UNDP, UNICEF, UNIFEM, WHO, FAO, UNHCR and few other UN agencies are running numerous project in Iraq. This role, however, is very limited compared to traditional peacekeeping and nation building involvement of the UN.

Involvement of development organizations or NGO's in the reconstruction phase may come as a relief. As Professor Monshipouri observed about Afghanistan,

*"Without cooperation between NGOs, international organizations, civil society and the state, it is virtually impossible to deal effectively with the country's humanitarian crisis"*<sup>112</sup>

-same could be argued about Iraq. In describing how NGOs are contributing to the peace building and reconstruction effort in Afghanistan, he mentions the PEACE (Poverty Eradication and Community Empowerment) initiative of the UNDP which sets

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<sup>109</sup> Id Para 8(e)

<sup>110</sup> SC/Res/1500

<sup>111</sup> In the report he stated, *"The United Nations presence in Iraq remains vulnerable to any who would seek to target our Organization, as recent events in Mosul - described in the Secretary-General's report - illustrate. Our security continues to rely significantly on the reputation of the United Nations, our ability to demonstrate, meaningfully, that we are in Iraq to assist its people, and our independence"*. Briefing to the Security Council by Sergio Vieira De Mello, July 22, 2003

<sup>112</sup> Mahmood Monshipouri, *NGOs and Peace building in Afghanistan* 10 International Peacekeeping 139 2004

up village development committees (VDCs) to identify and supervise various reconstruction efforts thus introducing national problem solving at the grass root level<sup>113</sup>.

While much attention had been given to economic reconstruction, the issues of environment and protection of cultural heritage have gone unnoticed. During the first few weeks of the occupation, Iraqi national museum was looted and valuable artifacts went missing. Despite warnings from experts and previous experience from the 1991 Gulf war, the coalition forces failed to take any measure to protect key archeological sites, libraries, museums and historical buildings. Though the existing Iraqi laws offered adequate protection for these possessions, priority of the occupying forces seem to favor protection of the oil fields over these ancient heritage.

At the end of the 'Historic Review', there is a comparative chart of reconstruction milestones for Post Saddam Iraq and Post WWII Germany. Though the case studies are far from being of similar kind and thus not to be judged by the same yardstick, the comparison itself speak of the mismanagement that went into Iraq (See the chart in Annex 2). A rushed job in all spheres, the nation building exercise was bound to meet this troubled conclusion.

### **The Transitional Administration in East Timor**

East Timor had been a Portuguese colony (or mentioned as being administered by Portugal) until Indonesia intervened militarily and integrated the territory as its 27<sup>th</sup> Province in 1976<sup>114</sup>. Followed by a failed attempt to impose autonomy in East Timor under a unified Indonesian Government, The United Nations intervened and United

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<sup>113</sup> Id p142

<sup>114</sup> United Nations Transitional Administration in East Timor @ <http://www.un.org/peace/etimor/UntaetB.htm> retrieved on March 23, 2007

Nations Transitional Administration in East Timor (UNTAET) was established through SC Res. 1272 of 1999<sup>115</sup>. Endowed with 'overall responsibility for administration of East Timor' and empowered to exercise all legislative and executive authority including the administration of justice<sup>116</sup> the UNTAET consisted of governance and public administration civilian police force of 1640 policemen, a humanitarian assistance and emergency response component, and an armed UN peace keeping force of up to 8950 troops and 200 military observers<sup>117</sup>.

The UNTAET has been given a very specific mandate to 'provide security and maintain law and order throughout the territory of East Timor', 'to establish an effective administration', 'to assist in the development of civil and social services', 'to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance', 'to support capacity building for self-government', and 'to assist in the establishment of conditions for sustainable development'<sup>118</sup>. The Transitional administrator, who was appointed by the UN Secretary General, exercised the power to enact new laws and amend, suspend or repeal existing ones. One of the first regulations he decreed in this regard provided that until replaced by UNTAET or democratic institutions of East Timor, laws in force in the region prior to October 1999 would continue to be applied<sup>119</sup>. At the same time he ordered that certain Indonesian security

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<sup>115</sup> For details on the unfolding of events in East Timor as described by the Peace and Security Section of the Department of Public Information in cooperation with the Department of Peacekeeping, <http://www.un.org/peace/etimor/etimor.htm> retrieved on March 23, 2007.

<sup>116</sup> SC/Res/1272 (1999) retrieved from <http://daccessdds.un.org/doc/UNDOC/GEN/N99/312/77/PDF/N9931277.pdf?OpenElement> on March 23, 2007

<sup>117</sup> Id

<sup>118</sup> Id

<sup>119</sup> Michael J. Matheson, *United Nations Governance of Post Conflict Societies* 95 Am. J. Int'l. L. 82 2001

laws would no longer be applied in East Timor<sup>120</sup>. Among the priorities of the UNTAET administration was facilitating return and care of the refugees and displaced persons, restoration of public services, rebuilding of the judiciary and law enforcement systems and revival of economic activities.

## **Conclusion**

A questionable invasion, a SC mandated authority over the occupied territory, drafting of a permanent constitution and installing an elected government later the US led occupiers are believed to be liable of multiple violations of international law. In order to determine the development if any of international legal regime through these events, answers to the questions posed at the beginning of this discussion it at utmost importance.

### **1. The coalition did not have the authority to go into Iraq:**

Though legal scholars are divided in the issue, a careful reading of the UN Charter and its relevant provisions on use of force clearly render the occupation illegal. The Secretary General of the UN maintained from the beginning of the events leading to the invasion that military action without the Security Council authorization would violate the Charter, diplomatically avoiding the term 'illegal'. He broke his silence more than after a year of the event stating in a BBC interview

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<sup>120</sup> Matheson p 82

*"I have indicated it was not in conformity with the UN charter. From our point of view and from the charter point of view it was illegal."*<sup>121</sup>

International law is clear in this issue. The charter outlaws the threat or use of force in norms, which are recognized as jus cogens, or *peremptory norms* of international law. The obligations to settle disputes through peaceful means<sup>122</sup>, and refrain from using or threat of using force against territorial integrity or political independence of other states<sup>123</sup> are absolute for UN member states. Only the Security Council has the authority to determine threat to peace and take actions accordingly<sup>124</sup>. States may act on their inherent right of self-defense if an armed attack occurs<sup>125</sup>.

The last two points have been argued by the US led coalition. The argument that SC Res 1441 provided an implied authority to use force against Iraq in case of non-cooperation of the government, does not stand the test of legitimacy. As the resolution warned Iraq of severe consequences but left the option open, it required another resolution specifying the action. As per the self-defense argument, it did not meet the test of necessity as decided in the Caroline case that necessity of self defense must be

*"..Instant, overwhelming, and leaving no moment for deliberation"*<sup>126</sup>. The claims of Iraq's link to al Qaeda, carrying weapons of mass destruction, buying nuclear raw materials from an African country all proved to be fabricated. The UN weapons Inspector Hans Blix in Iraq never found any weapons of mass destruction, neither was there any imminent danger of terrorist attacks from Iraq to any other state. The UN Secretary

<sup>121</sup> See the report in September 16 2004 issue of Guardian newspaper @ <http://www.guardian.co.uk/Iraq/Story/0,2763,1305709,00.html> (Last visited April 10, 2007)

<sup>122</sup> Article 2(3) of UN Charter

<sup>123</sup> Article 2(4) of UN Charter

<sup>124</sup> Chapter VII of UN Charter

<sup>125</sup> Article 51 of UN Charter

<sup>126</sup> The Caroline Case, cross posted from International Law case book p 923

General commented correctly that such trends of pre-emptive self-defense might lead to a breakdown of international order. Around the fourth anniversary of Iraq invasion, there is little doubt that the occupation was illegal as was the attack a clear violation of international law.

## **2. The occupying power assumed legal authority to govern Iraq:**

Though the Security Council refused the request of the US and UK to pass a resolution authorizing an attack in Iraq, after the occupation was established the UN organ seem to have changed its tone towards the coalition. Within months of the attack, effective occupation followed and UN recognized their authority under laws of war. It is interesting to observe that war has been outlawed in the previous century; even the term has been replaced by armed conflict. The Security Council called upon the 'Authority' as it called the occupiers to 'promote the welfare of the Iraqi people through the effective administration of the territory' consistent with the Charter and other relevant international law. The resolution goes on to prescribe Geneva Conventions of 1949 and Hague Regulation of 1907 to the authority notwithstanding the fact that the basis of the formation of such authority was a mere violation of the Charter.

After the formal recognition from the UN, the occupiers were to govern Iraq within the mandate of the SC resolution, laws of war and relevant international law. All the international human rights instruments that both the occupiers and Iraq have ratified should have been applied in Iraq. The authority, however, have shown indifference to these rules and argued that the Geneva Conventions should be the only legislation applicable under the circumstances. As a result, the authority interpreted the SC mandate

at its advantage and governed the occupied territory. It can be argued that the authority's legality was contingent upon the observance of international humanitarian and all relevant international law. The failure to take that fact in account rendered this authority legal yet exercising illegitimate power.

### **3. The Transitional Authority governed exceeding its scope and limits:**

The SC resolution and laws of occupation conferred upon the CPA responsibility to restore law and order in the first place and to facilitate a smooth transition to democratic institutions without amending fundamental structures of the government. CPA itself mentioned its priorities to be reconstruction the areas of Security, Governance, Essential services and Economy.

Whereas the CPA and subsequently the Governing Council, Interim Administration and Transitional Government all failed to provide minimum security and essential services for the people, drastic changes have been made to the country's governance and economic structure. As the authority brought about new laws permitting absolute privatization in Iraq, US companies like Halliburton, Bechtel, DynCorp and like harvested the profit to the extent that \$19.6 billion used for reconstruction was mismanaged. Iraq's economy went into becoming market economy from a protective socialist system almost overnight.

The governance structure also met with new challenges. The TAL drafted by the Governing Council under heavy influence of the CPA introduced Islam as an influential source of legislation, brokered a sectarian electoral system many blame for Iraq's current civil war situation and prescribed a weak federal government system. Though the TAL

was meant for the governance of the transitional period, many of its provisions found their way to the permanent constitution.

The transitional authority left behind a legacy of gross human rights violation, prison abuse, extrajudicial killing together with awarding immunity for the multinational force. Today's Iraq is a painful reminder of the ill planning and strategic mismanagement of the transitional period.

#### **4. The transitional authority added new dimension to the existing sovereignty principle:**

International law recognizes the notion of sovereignty established by the treaty of Westphalia (1648) and bases its principle of non-interference by other states on this traditional approach. The occupation force attacked the territorial and political independence of Iraq violating the non interference principle mandated by the UN charter. This violation was overridden by the Security Council as it vested the occupying power with responsibilities of governance in accordance with international law. Whether the Security Council acted within its authority to supersede the violation is another area that must be explored; but in this case there is nothing to suggest otherwise.

The modern approach to sovereignty subject the states to its people and "...states are bound by many rules which have not been ordered by their will"<sup>127</sup>. As the concept of state sovereignty evolves around globalization and international co-operation, "The State is now widely understood to be the servant of its people"<sup>128</sup>. This approach dictates that

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<sup>127</sup> Individual Opinion by Judge Alvarez in Corfu Channel Case (United Kingdom v Albania), ICJ 1949 Para 43

<sup>128</sup> UN Secretary General Kofi Annan's Annual Speech to the UN General Assembly on September 20 1999

sovereignty in law always remained with the Iraqi people even during the occupation. Sovereignty in fact or the power of executing state's will switched hands multiple times as different bodies assumed the roles of transitional authority. Since the elected transitional administration was the only body directly responsible to the Iraqi people, it may be regarded as the only time during the transitional phase that the sovereignty of the Iraqi people was truly respected. Thus more questions arise as I try to find the answer posed as the beginning of this section. This unique situation presented by the legitimacy and governance issues of the transitional authority in Iraq requires further attention to the research on the principle of sovereignty.

As I move forward with a discussion of the constitution making, treatment of women and attempt to secure post conflict justice in Iraq, I will present the new developments and concerns faced by the transitional authority through this process.

## **Chapter III**

The Constitution of Iraq: A feeble document born to a hasty process

## Introduction

*“The Constitution is a fundamental document. ....the purpose of a Constitution is not merely to create the organs of the State but to limit their authority, because, if no limitation was imposed upon the authority of the organs, there will be complete tyranny and complete oppression. The legislature may be free to frame any law; the executive may be free to take any decision; and the Supreme Court may be free to give any interpretation of the law. It should result in utter chaos”*

(Dr. Ambedkar, Framing of India’s Constitution, vol 1 p 832)<sup>129</sup>

Constitution is considered to be the most important legal document for any country. In most parts of the world it is the supreme authority that is expected to define the authority of state officials, affirm the claim to sovereignty and build legitimate and effective institutions<sup>130</sup>. This probably explains the urgency that the transitional authority in Iraq felt to draft a new constitution at the earliest opportunity. On October 15 2005 the Iraqis adopted a constitution through referendum that was drafted by members from elected National Assembly<sup>131</sup>. The ‘historical legacy of deeply flawed constitutionalism’<sup>132</sup> under colonial or dictatorial regimes helped to create expectation among Iraqis for a due process and truly progressive constitution after the fall of Saddam

<sup>129</sup> *Legally Speaking*, Justice V.R. Krishna Iyer, Universal Law Publishing Co Pvt Ltd. P 27

<sup>130</sup> For more on this see in general, Nathan j. Brown, *Constitutions in a Neoconstitutional World: Basic Laws and Prospects for Accountable Government* (2002)

<sup>131</sup> The Elected Iraqi Transitional Government appointed members of the constitution drafting committee from among the National Assembly and few Sunni members from outside the Assembly as they boycotted the January '05 election. See Annex 1 for the complete list of members.

<sup>132</sup> *Iraq’s Constitutional Challenge*, ICG Middle East Report No 19, 13 November 2003, p2

Hussein.<sup>133</sup> The success of drafting a new constitution for Iraq was conditional to proper attention to divergence in Iraq (Shiites, Sunnis, Kurdish and other minorities), The Iraqi exile community, regional interests, Islam factor, internal conflicts and international agendas while confirming the participation of the commoners in mind. The outcome was a feeble constitution born in a hasty process.

In this chapter I argue that neither the constitution nor the constitution making process met the expectations of the Iraqis or those of the observers of the event. That the new constitution failed to provide solutions for existing problems in a divided community and in many cases further exacerbated the conflict of interests among rival groups. While looking at the Iraqi constitution making process, I draw from the experience of another conflict stricken country Afghanistan and compare the two in order to provide a real life analysis of the phenomenon. In case of the constitution itself, I talk about the previous constitutions of Iraq to explain the points of departure from earlier oppressive regimes and try to analyze the effect of that in the Iraqi society.

## **Inside the Constitution**

### **Preamble:**

Derived from the Latin word 'praeambulum' meaning 'walking before', Preambles are important features of constitutions. They are not merely introductory paragraphs and bear long reaching effects. They are sometimes described to hold the mission statement of this important document. There are many different types of Preambles written; some describe

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<sup>133</sup> Constitutions of 1876, 1925, 1958, 1970 and 1990 together with few other interim constitutions were in force in Iraq before the occupation.

the struggle for creating a national identity, some talk about historical journey to a constitution, some remember the colonial oppression and vow to create a society that will ensure justice for all its citizens. There are exceptions as well. For example, in the case of the constitution of India, the largest constitution of the world consisting 560 Articles and amendments, the preamble simply mentions the fundamental principles yet serving two purposes:

- A) It indicates the source from which the Constitution derives its authority;
- B) It also states the objects, which the Constitution seeks to establish and promote.

The Preamble of the Iraq constitution begins with Islamic connotation 'In the name of God, the Most merciful, the Most compassionate' followed by 'We have honored the sons of Adam' putting a secular character of the State in question. It goes on to describe historical events supporting ancient national identity, remembering atrocities committed in its soil and aspiring to build a new country from the ruins " *...so we sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq for the future, free from sectarianism, racism, complex of regional attachment, discrimination, and exclusion*". It is interesting to note that nowhere the occupying force is mentioned.

The Preamble mentions the future system to be, " *republican, federal, democratic and pluralistic*" and considers the principles of respecting the rule of law, establishing justice and equality, casting aside the politics of aggression, paying attention to women and their rights, the elderly and their concerns and children and their affairs, spreading culture of diversity and defusing terrorism to be the determination of Iraqi-population.

Controversy arose around few of its underlying meanings- "we, the people of Iraq, of all components and across the spectrum,.....decide freely and by choice to unite our

future..." being subject to much of it. The Iraqi union being a voluntary decision according to those lines may have been inserted as a Kurdish agenda because it can imply right of secession.<sup>134</sup> Even the history version of the preamble seems to favor Shiite and Kurdish interpretations of it.<sup>135</sup> Unlike the preamble of the Afghan constitution, it fails to specify objectives in clear and concise manner and omits promise of observing the United Nations charter and adherence to the Universal Declaration of Human Rights<sup>136</sup>.

### **Section 1: Basic Principles**

**Article 1:** Despite demands from Islamic groups in the drafting committee, and emphasis on religious traditions, the country's name was not changed into Islamic State of Iraq. According to the first Article, the name remains "The Republic of Iraq" same as since the overthrow of the Monarchy in 1958<sup>137</sup>. This Article describes Iraq as a single federal, independent and a sovereign state with a republican, representative, parliamentary and democratic system of government. It also establishes the constitution as one of the guarantors of the unity of Iraq. It may, however, be interesting to follow whether the course of Kurdish demand of a separate state derives strength from the preamble or faces significant challenge from this provision.

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<sup>134</sup> Nathan J. Brown, Senior Associate, Carnegie Endowment for International Peace. "The Final Draft of the Iraqi Constitution: Analysis and Commentary"

<sup>135</sup> Id

<sup>136</sup> Preamble of Afghan Constitution promises observance of the UN Charter and respect for the UDHR.

<sup>137</sup> The British installed Monarchy that ruled Iraq since 1932 was overthrown by a bloody military coup in 1958.

**Article 2:** This Article declares Islam to be the official religion of Iraq. Though majority of the population adhere to Islamic faith, Iraq had been avoiding religious connotations at the state level for a long time. It was hailed to be the only secular country in the religion-dominated Middle East. Through this declaration Iraq not only lost its secular character but also opened the door of uncontested religious teachings at school, funding for religious institutions etc.

This Article also bars enactment of any law that may contradict any established provision of Islamic law. This provision leaves the option of problematic interpretations of established provisions of Islamic law. For example, if the Iraqi parliament has a majority of Shiites who decide to follow Iranian interpretation of Islam; women may lose their right to be judges<sup>138</sup>. Interestingly the next few provisions appear to contradict each other. They bar enactment of any law that may contradict principles of democracy and rights and freedoms stipulated in the constitution. It will be an interesting task for scholars to observe how the claim of Islam being '*a foundation source of legislation*' plays out in this regard. Whether Islamic rules, democratic rights or constitutional freedoms will dominate future Iraqi citizens' lives, will depend on the interpretation of this Article. One breathing point, however, is that this provision does not have retrospective status, accordingly applying only to new legislation. It may still be a concern if previous legislation is put forward for a judicial review and found to be unconstitutional under this provision.

Center of a great deal of attention, this provision may seem contradictory in some respect but it may have little practical effect on existing Iraqi legal structure.

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<sup>138</sup> After the Islamic Revolution of 1979 in Iran, women judges lost their jobs; one of them being Noble Laureate Shirin Ebadi.

**Article 3:** Confirming with previous constitutions, this Article recognizes Iraq's multiple nationalities, religions and sects. Subject to many protests from the Sunni sectors, this provision fails to mention Iraq as an Arab state yet recognizing its binding responsibilities under the Charter of the Arab League. A constitutional expert calls this compromise '*ironic*' as binding the country constitutionally to an international document like the Charter of the Arab League could have far more practical implications than allowing it to a symbolic status of Arab State<sup>139</sup>.

**Article 4:** The Constitution stipulates both The Arabic and the Kurdish language to be the official languages of Iraq which involves recognizing rights including publication of the Official Gazette in both the languages, speeches, conversation and expression in official domains in either of the two languages, having bank notes, passports and stamps in either of the two languages etc.

Other language groups like Turkomen, Assyrians and Armenian have also been awarded the right to be educated in their mother tongues. The Turkik and Syriac languages are also official languages in administrative units where these groups constitute density of population. The Constitution allows each region discretionary power to adopt other local languages as official ones if people of that region approves of it in a regional referendum.

**Article 5 & 6:** These two provisions reiterate the democratic pillars of the new Iraqi Constitution, "The people are the source of authority and legitimacy", they shall exercise the authority through constitutional institutions and authority will be transferred through

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<sup>139</sup> Nathan Brown, Article 3: Identity.

democratic means. Though they appear to be safeguards against hostile take over of the government, constitutional guarantees have never prevented revolutionaries, military leaders or terrorists from toppling a democratic government<sup>140</sup>.

**Article 7:** The Constitution bans the Saddamist Ba'ath in Iraq, its symbols and other like organizations or programs that "*adopts, incites, facilitates, glorifies, promotes or justifies racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing*". There is no clear indication of prohibiting Ba'ath party ideology reintroducing itself under a different name.

**Article 8, 9:** The constitution stipulates Iraq's observance of principles of good neighborliness, adherence of principle of non-interference in the internal affairs of other states, settlement of disputes by peaceful means, respect for international obligations.

Article 9 deals extensively with Iraqi armed forces, security services and intelligence services. The Constitution tries to keep the armed forces out of governing power by measures that include prohibiting their interference in political affairs and banning them from taking part in national election for public offices. This Article also goes to the heart of the alleged conflict by reiterating Iraq's obligations relating to the non-proliferation of nuclear, biological and chemical weapons.

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<sup>140</sup> For example, despite constitutional guarantees of a democratic government elected by the people, Bangladesh has suffered multiple military dictatorships between 1975 and 1982 during which the Constitution remained suspended for the most part.

**Article 13:** This Article declares Constitution the supreme law of Iraq and stipulates that laws that contradict the constitution cannot be enacted. This provision may provide sense of security to Iraqis who think Kurds may want to override constitution and also to those who are worried about Islamic law prevailing over the Constitution.

## **Section 2: Rights and Liberties**

In modern Constitutions, especially in the ones under profound western influence<sup>141</sup> placing emphasis on the rights regime is a popular phenomenon. Safeguarding those rights or structural guarantees is not taken seriously. As a result many Constitutions offer promising liberties without securing their enjoyment for the citizens. Similar thoughts may arise while reviewing the chapter 2 of Iraqi Constitution.

The Constitution guarantees (notwithstanding with the exceptions) the following rights to Iraqi citizens among others:

### **Civil and Political Rights**

1. Right to equality before the law without being discriminated on the grounds of gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status;
2. Right to enjoy life, security and liberty;
3. Right to equal opportunity;
4. Right to privacy and protection of the sanctity of homes;

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<sup>141</sup> For example, consider the Constitution of the Peoples Republic of Bangladesh where numerous human rights have been awarded to citizens , the implementation of which are not duly supported or monitored by an effective infrastructure.

5. Right to Iraqi citizenship through father or mother, right to multiple citizenships except for special cases;
6. Right to independent judiciary; litigation, public trials, defense lawyer at the expense of the state in cases of inability to pay, safeguard from unlawful detention etc;
7. Right to participate in public affairs, vote, elect and run for office;
8. Right not to be extradited;

### **Economic, Social and Cultural Liberties**

1. Right to work;
2. Right to enjoy, benefit, exploit and dispose of private property;
3. Freedom of movement;
4. Right to exemption from taxes for low income earners;
5. Right to preservation of family, religious, moral and national values;
6. Right to social and health security;
7. Right to health care;
8. Right of the handicapped to rehabilitation;
9. Right to live in safe environmental conditions;
10. Right to education with mandatory primary education;
11. Right to practice sports;

### **Liberties:**

1. Protection of liberty and dignity of man;

2. Protection from extrajudicial imprisonment or investigation;
3. Protection from psychological, physical torture and inhumane treatment;
4. Protection from intellectual, political and religious coercion;
5. Protection from forced labor, slavery, slave trade, trafficking and sex trade;
6. Freedom of expression, press, printing, advertisement, media, publication, assembly, peaceful demonstration etc;
7. Freedom to form and join associations and political parties;
8. Right to avoid forceful subscription to any party, society or political party;
9. Freedom of communication;
10. Freedom of thought, conscience and belief;
11. Freedom of practice of religious rites, worship etc
12. Freedom of movement;

Some guarantees of the Constitution can be hailed as progressive and complementary to internationally guaranteed rights, in many cases overcoming shortcomings of regional patterns. Offering Iraqi citizenship to children born from an Iraqi mother is a rare right available to Muslim especially Middle Eastern women around the world. There are other promising provisions as well. For example, prohibition against economic exploitation of children, State's responsibility to rehabilitate the disabled and people with special needs, undertaking the duty to protect and preserve the environment, support for indigenous Iraqi cultural orientations, prohibition of torture and inhumane treatment, prohibition of forced labor, slavery, trafficking of women and children, sex

trade etc, strengthening the role of civil society and support them in many ways, prohibiting tribal traditions violating human rights<sup>142</sup> etc.

Similarly, some provisions may seem too conservative for world standards such as prohibition on expropriation of private property, restrictions on extradition and allowing political refugees to stay as long as they are not accused of international or terrorist crimes. In the last scenario, it is not clear if Iraq would entertain a warrant against a political asylum seeker from the ICC since it is not a signatory of the treaty.

Few provisions may raise eyebrows as they deal with topics usually dealt with by regularly elected government. The State undertakes to guarantee reform of the Iraqi economy in accordance with modern economic principles ensuring the full investment of its resources, diversification of its sources and the encouragement and development of the private sector without reserving exclusive government control over any sector of the economy.

The common human rights guarantees in the Constitution seem to have inherent problems in them. The right to personal privacy is guaranteed *so long as it does not contradict the rights of others and public morals*<sup>143</sup>-without explaining the standard for determination of public morals. The freedom of communication in all its forms is subject to monitoring, wiretapping or disclosing for *legal and security necessity and by a judicial decision*<sup>144</sup> - a reminder of the Patriot Act in the USA in the aftermath of the Twin tower attack<sup>145</sup>. Public order and morality are conditions for the enjoyment of freedom of

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<sup>142</sup> In many parts of the world women suffer from genital mutilation as part of cultural tradition.

<sup>143</sup> Article 17

<sup>144</sup> Article 40

<sup>145</sup> The Uniting and Straightening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) or Patriot Act of 2001 curtailed civil rights of citizens significantly through surveillance. For a complete text of the ACT as revised in 2006 and official

expression as well as many basic rights. Critics point out that some basic freedoms have been left to be determined by law, *a phrasing that many of Iraq's neighbors have turned into gaping loopholes*<sup>146</sup>.

Last but not the least of the concerns is no where in the Constitution its mentioned how these rights and liberties are to be safeguarded, no structural guarantees are mentioned anywhere.

### **Section 3: Federal Powers**

Federal legislative, executive and judicial powers are exercised on the basis of the principle of separation of powers.

Legislative authority is vested in the Council of Representatives (COR) and Federation Council. The members of the COR, 1 in every 100,000, are elected through secret ballot representing different groups of the people of Iraq. The COR is also expected to host at least one fourth women members in its composition. The members elect the speaker and two of his deputies by absolute majority of the Council. The COR is empowered enact a law by two third majority of its members to establish the 'Federation Council' which includes representation from the regions and governorates that are not organized in a region. The COR also regulates the FCs formation, membership conditions, components and everything relevant to it.

Among the powers of the COR, the following are noteworthy:

- Enacting federal laws

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documents relating to that see US Department of Justice website at <http://www.lifeandliberty.gov/index.html>

<sup>146</sup> Nathan Brown

- Monitoring the performance of the executive authority
- Electing the President of the Republic
- Regulating the process of ratification of international treaties and agreements
- Impeaching the President by an absolute majority of members after he has been convicted by the Federal Supreme Court on the grounds of perjury of the Constitutional oath or violating the Constitution or high treason etc.

Federal executive power is vested in the President of the Republic and the Council of Ministers.

The President is the Head of the State and guarantees *“the commitment to the Constitution and the preservation of Iraq’s independence, sovereignty, unity, and the safety of its territories...”*<sup>147</sup>. The COR elects the President for four years.

The nominee from the largest COR bloc forms the Council of Ministers (COM) within 15 days from the election of the President. After the formation of the COM, it must gain the vote of confidence from the COR, individual Ministers and the ministerial program. As the direct executive authority, the Prime Minister deals with the general policy of the State and performs as the commander in chief of the armed forces at the same time.

The Federal judicial power is independent and is comprised of many Federal courts including

- The Higher Judicial Council
- The Federal Supreme Court

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<sup>147</sup> Article 67

- The Federal Court of Cassation
- The Public Prosecution Department
- The Judiciary Oversight Commission etc.

The methods of establishment of these courts, their authorities and modes of operation are left in many instances to enactment of laws by the COR and not provided in the Constitution. The Higher Judicial Council manages the affairs of the Judiciary and supervises the Federal Judiciary. Among its other responsibilities are presenting the nominations to the COR for the Chief Justice and members of the Federal Court of Cassation, the Chief Public Prosecutor, and the Chief Justice of the Judiciary Oversight Commission and propose the draft of the annual budget of the Federal Judicial Authority To the COR.

The crucial responsibility of interpreting the Constitution and overseeing the constitutionality of laws and regulations in effect lie with the Federal Supreme Court which is composed of experts in Islamic jurisprudence and legal scholars together with a number of judges.

The Constitution prohibits laws stipulating immunity from appeal for any administrative action or decision. The Constitution provides for the establishment of independent commissions- the High Commission for Human Rights, the Independent Electoral Commission and the Commission on Public Integrity which are to be monitored by the COR. There is also provision for a Martyrs' Foundation which is to be established and attached to the COM.

Section 4 of the Constitution deals with the powers of the Federal Government who is to  
 "...preserve the unity, integrity, independence, and sovereignty of Iraq and its federal

*democratic system*"<sup>148</sup>. The areas where the Federal government exercises exclusive authority include formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing and ratifying debt policies; formulating foreign sovereign economic and trade policy; formulating and executing national security policy; formulating fiscal and customs policy; drawing up the national budget of the state; formulating monetary policy; regulating issues of citizenship, naturalization, etc; planning policies relating to water sources from outside Iraq and its just distribution inside Iraq etc<sup>149</sup>. The policy regarding oil and gas management, the subject of much speculation, is to be determined by the federal government with the producing governorates and regional governments whereas people of Iraq are declared the owner of the asset in the Constitution<sup>150</sup>. Several powers are shared between the federal government and regional authorities such as managing customs; regulating the main sources of electrical energy and its distribution; formulating environmental policy; formulating development and general planning policies; formulating public health policy; formulating the public educational and instructional policy and formulating and regulating internal water resources policy etc<sup>151</sup>. Antiquities, archeological sites, cultural buildings, manuscripts, coins etc are regarded to be national treasures under the jurisdiction of the federal government and are managed in cooperation with the authorities of regions and governorates.<sup>152</sup> The Constitution leaves a loophole in the system by providing that powers that are not stipulated as the exclusive powers

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<sup>148</sup> Article 109

<sup>149</sup> Article 110

<sup>150</sup> Article 111, Article 112

<sup>151</sup> Article 114

<sup>152</sup> Article 113

belonging to the federal government belong to the authorities of the regions and governorates that are not organized in a region.<sup>153</sup>

Section five of the Constitution sets out the framework for regional powers. The Iraqi Federal system is described to be made up of a decentralized capital, regions and governorates as well as local administrations.<sup>154</sup> At the moment Kurdistan is the only region existing in Iraq and recognized by the Constitution as such.<sup>155</sup> The establishment of regions is regulated by the law the COR created within six months of its first session. Kurdistan and other regions that may form in accordance with the prescribed law are required to adopt their own Constitutions which will define the "*structure of powers of the region, its authorities and the mechanisms for exercising such authorities*" without contradicting the federal Constitution.<sup>156</sup> Kurdistan and all future regions are entitled to the right to exercise executive, legislative, and judicial powers in accordance with the federal Constitution as long as it does not overlap with the exclusive authority allowed to the federal government; right to an equitable share of the national revenues considering their resources, needs and percentage of their population; right to establish and organize internal security forces of the region etc.<sup>157</sup>

Iraq has 18 governorates which are made up of districts, sub districts and villages. The formation of the Governorate Council and the governor as well as their powers is determined by the law enacted by the COR. The Constitution takes a step ahead of many

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<sup>153</sup> Article 115

<sup>154</sup> Article 116

<sup>155</sup> Article 117

<sup>156</sup> Article 120

<sup>157</sup> Article 121

as it guarantees the administrative, political, cultural and educational rights of various minority nationalities namely Turkomen, Chaldeans, and Assyrians etc.<sup>158</sup>

Section 6 of the Constitution holds the final and transitional provisions. It is safe to assume that amendment of the Constitution is discouraged as the requirement suggest.

The President and the COM collectively or the one fifth of the COR members may propose an amendment. Fundamental principles and the rights and liberties awarded in the Constitution may not be amended by the first two elected federal governments. At the third term, the proposal to amend must be approved by two-thirds of the COR members, passed in a general referendum by the people and ratified by the President of the Republic within seven days.<sup>159</sup> All other provisions may be amended without the prohibition on first two terms following the same approval process of the COR, people and the President. What may prove to be controversial in terms of Kurdistan is the Constitutional safeguard against taking powers away from the regions that are not exclusively awarded to the federal government except where the legislative authority of the region approves such decision and the people of the region ratifies it. The Constitution guarantees all existing laws at the time of the Drafting of the Constitution to be in force unless annulled or amended in accordance with the Constitution.<sup>160</sup>

The last few provisions of the Constitution deal with the transitional provisions. Among the unique features are care for the families of the martyrs, political prisoners and victims of the Saddam regime; compensation for the families of the martyrs and the injured

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<sup>158</sup> Article 125

<sup>159</sup> Article 126

<sup>160</sup> Article 130

victims of terrorist acts.<sup>161</sup> This special feature fails to mention victims of terrorism and armed intervention during the transitional phase.

### Dissecting the process of Constitution Making

Gone are the days of traditional Constitution making also referred to as 'old Constitutionalism' where few elite members of a society prescribe their view points on the future of a society, its perceived virtue being "Constitution making as an act of completion"<sup>162</sup>. In the 21<sup>st</sup> Century, Constitution making is not limited to a few members of a society; it has almost become the mandate of any democratic society to involve its population in what is known as 'participatory Constitution making'. To meet the challenges of modern societies facing ethnic violence, economic liberalization, and globalization in general, constitutions must not only include the pillars of legal and social institutions within a country but also take into account people's opinion of it. This new Constitutionalism is both international and comparative in nature in the sense that they involve experts from around the world and derive from experiences of other communities like never before in the history of constitution making<sup>163</sup>. Constitutions created confirming to this new process have been called merely 'constructed' rather than 'designed'<sup>164</sup>. It is debatable which mode of Constitution making is more successful

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<sup>161</sup> Article 132

<sup>162</sup> Democratic Constitution Making: Vivian Hart, Special USIP Report, p 2

<sup>163</sup> Donald L. Horowitz, Constitutional Design: Proposals Versus Processes, in Andrew Reynolds, ed., The Architecture of Democracy: Constitutional Design, Conflict Management, And Democracy (2002), p 15

<sup>164</sup> Id p 16

between the two but it may be agreeable that “ the process does move incrementally closer to the needs of the present day”<sup>165</sup>

International law has long advocated for people’s participation in the political processes and public affairs of their country<sup>166</sup>. The Office of the High Commissioner for Human Rights further stressed the right recognized in Article 25 of ICCPR, “ Peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution and government”<sup>167</sup>

Where drafting a Constitution is a difficult undertaking for any country, the Iraqi attempt of participatory Constitution making met with multiple challenges doing the same. The complex mosaic of ethnic religious composition of Iraqi society, post-conflict reconstruction measures, presence of foreign troops posed as hurdles for the drafters. They fought to introduce a document that could unify different groups under the ‘Iraqi nationality’ theme as well as to rebuild a state structure destroyed by over two decades of authoritarian rule. The main points of consideration were

- Introducing democratic state rule
- Unifying different ethnic-religious groups
- Establish human rights regime & state structures for safeguarding the same
- Facilitating the growth of civil society

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<sup>165</sup> Democratic Constitution Making: Vivian Hart, Special USIP Report, p 2

<sup>166</sup> Article 21 of the Universal Declaration of Human Rights; Article 25 of the International Covenant on Civil and Political Rights; Article 4 of the African Charter on Human and Political Rights; Article 5.2 of the Commonwealth Harare Declaration; Article 7.2 of the Asian Human Rights Charter; Article 6 of the Inter American Democratic Charter all advocate for people’s participation in state’s political framework.

<sup>167</sup> “The right to participate in public affairs, voting rights and the right of equal access to public service,” *General Comment*, Office of the High Commissioner for Human Rights, No.25, 1996 at Para.2. Retrieved from <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument> on 12/08/06

As predicted by experts, “ *The efforts to overcome these hurdles and find common ground among Iraqi political interests will occur in the context of a lack of democratic history in Iraq and the absence of suitable regional models*”<sup>168</sup> the drafting process met with severe shortcomings.

### **Political Will:**

Recent examples of Cambodia, Bosnia & Herzegovina, Kosovo, East Timor & Afghanistan suggest that international community or foreign powers play a great role in post conflict constitution making as part of their roles in the conflict resolution. With the agenda of an early exit from the territory international community involved may advocate a “simple procedure involving a comparatively small number of stake holders and a narrow agenda” rather than a procedure that includes a large number of individuals and groups discussing a wider agenda<sup>169</sup>. It can be argued that same interests dominated the case of Iraq. Though Iraqi National Congress (mostly comprised of formerly exiled Iraqis), the Kurdish political parties and the formerly exiled Shi’a community released their versions of draft constitutions aspiring a democratic Iraq. The views of the majority of Iraq’s population not being publicly available make room for the speculation of whether they had been consulted at all. Among these views, the Kurdish one can be credited as comprising the opinions of majority, which is representative of only 15-20% of Iraqis. Though all the proposals demanded fully democratic Iraq, they varied in the format of expected federalism. The INC draft called for a heavily centralized federalism;

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<sup>168</sup> *Establishing a stable democratic constitutional structure in Iraq: Some basic considerations*, report by Public International Law and Policy Group and the Century Foundation, May 2003, page 2, retrieved from <http://www.pilpg.org>

<sup>169</sup> Ghai, Yash, Lattimer, M. & Said, &Y. “Building Democracy in Iraq,” *Minority Rights Group International Report*, United Kingdom, 2003 at 27

the Shi'a segment mentioned federalism only in its broadest sense in a unified Iraq and the Kurdish proposal advocated an equal power sharing between Kurdish and Arab provinces at the federal level. The compromise is a federal government where the Kurdish region enjoys important powers with many fundamental authorities remaining with the federal government.<sup>170</sup> From the process described by numerous sources, it is apparent that the political will of the elites dominated the constitution making process where the common people experienced everyday bloodbath in the aftermath of the Iraq occupation.

### **Participatory Constitution making:**

In post Saddam Iraq, the Iraqi media, exile political voices, existing interested parties together with US administration and the UN shared an understanding that the first reconstructive effort in Iraq should be establishing constitutional democracy. This enthusiasm may be compared with the situation in Afghanistan, a country with rather '*remarkable history of constitutional activism*'<sup>171</sup>. Unlike its 7 other constitutions since 1923, the constitution of 2004 emerged from a participatory process trying to uphold national unity in a multi ethnic state in post conflict situation. The expectation of Afghan people of a participatory process rose because of the UN involvement after the fall of Taliban and progressive language of the Bonn Agreement.<sup>172</sup> The international community involvement had a similar effect on Iraqi population. The pressure from Iraqi shiia leader Grand Ayatollah Sistani successfully resisted a Constitution by US

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<sup>170</sup> For more on this see the Report n 165

<sup>171</sup> *The Role of Constitution Building Processes in Democratization*, International Idea Report, 2004; retrieved from <http://www.idea.int/conflict/cbp/>; page 6

<sup>172</sup> P 12

appointees as envisioned by the Coalition Provisional Authority<sup>173</sup> Confirming with present trend of participatory constitution making, the TAL hinted on a transparent drafting process. Article 60 of the TAL stipulates that in writing the draft of the permanent constitution for Iraq, the NA shall be responsible for “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 as it writes the constitution.”<sup>174</sup> The Security Council joined the appeal in resolution 1546 where it mandated the special Representative of the Secretary General and UNAMI on the request of the Iraqi government to play a leading role to “promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq”<sup>175</sup>. The demand for public participation got momentum among other interested parties because of the non-transparent and secretive process that the CPA applied in drafting the TAL. In their focus group report published in June '05, the NDI stated that among the Iraqi men and women citizen participation is seen as important and the Iraqis wanted their voice to be heard<sup>176</sup>.

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<sup>173</sup> USIP Report Page 5, retrieved from <http://www.usip.org/pubs/specialreports/sr155.pdf>; Accessed on 29<sup>th</sup> November, 2006

<sup>174</sup> Article 60 of the TAL retrieved from <http://www.cpa-iraq.org/government/TAL.html>. Accessed on 29<sup>th</sup> November, 2006

<sup>175</sup> SC/RES/1546 (2004); Retrieved from <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>; Accessed on 29<sup>th</sup> November, 2006

<sup>176</sup> Iraqi Voices: Public Attitudes and Political Opportunity in Transition, Findings from Focus Groups with Iraqi Men and Women (Conducted April 13-15, 2005); National Democratic Institute for International Affairs. P-9. Retrieved from [http://www.accessdemocracy.org/library/1921\\_iq\\_focusgroups\\_060105.pdf](http://www.accessdemocracy.org/library/1921_iq_focusgroups_060105.pdf), Accessed on 29 November, 2006

### **Iraqi Constitution Drafting Committee:**

Iraqi transitional government that exercised authority over Iraq from 3<sup>rd</sup> May '05 to 20<sup>th</sup> May '06 appointed members of the Iraqi Constitutional drafting committee to draft a new constitution for post conflict Iraq.

The members by political affiliation were:

United Iraqi Alliance - 28

Democratic Patriotic Alliance of Kurdistan - 15

The Iraqis - 8

Communist Party of Iraq - 1

Iraqi Turkmen Front - 1

National Rafidain List - 1

Sunni Arab nominee - 1 (later expanded to 15)

Iraqi Sunni groups comprising about 15-20% of the total population boycotted 2005 election on the grounds that it was heavily under US influence. They however expressed interest in participating in the Constitution drafting process only to be included in the process by late July '05. In a similar situation, the Afghan Constitutional Committee created by a Presidential decree in October '02 consisted of 9 experts including 2 women.<sup>177</sup> After this committee presented a draft in March '03, the President created a review commission of 35 members of whom seven were women consisting of legal experts, tribal leaders, religious scholars, professionals, academics and community

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<sup>177</sup> Idea Report p 13

## Timeline:

Guided by the Bonn agreement<sup>178</sup> and its promise of participatory Constitution making to heal Afghan wounds, four different phases were adopted to introduce a new Constitution. The adoption of the Constitution at the Loya Jirga<sup>179</sup> was preceded by an initial drafting process, consultation with interested parties, revision of the draft and final debate<sup>180</sup>. In case of Iraq the concerned authority was allowed very little time for the drafting process. The TAL required the NA to complete the drafting process by August 15, '05 unless it appeals to the Presidency Council for an extension of maximum six months with the approval of majority of the members<sup>181</sup>. As pointed out by USIP, "The US Government's strong demarches stand out as the principal reason for the Assembly ultimately declining the TAL extension provision on August 1"<sup>182</sup>. Though it is doubtful whether the drafting committee, facing resignations, walkouts by Sunni Arabs, Kurdish and other representatives over their differences over federal arrangements would have been able to utilize any extended period to its benefit, compressed timeframe affected many issues.

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<sup>178</sup>On December 5, 2001 a few weeks after the US and its allies toppled Afghan Taliban Government the 'Bonn agreement' was signed among representatives of various Afghan factions under the auspices of Special representative of the UN Secretary General to decide the course of Afghanistan's future. Full agreement can be retrieved at <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>.

<sup>179</sup>Traditionally Loya Jirga in Afghanistan is meant to refer to meetings of religious, political and government leaders belonging to different tribes to decide on important issues. In this case, /loya Jirga refers to the 502 elected and appointed delegates to consider the Afghan Constitution in 2003.

<sup>180</sup> P 12

<sup>181</sup> Article 61 A & 61 F of the TAL, retrieved from <http://www.cpa-iraq.org/government/TAL.html>, Accessed on 29 November, 2006

<sup>182</sup> USIP report P 10.

There was not enough time to understand Sunni Arab groups' objection to federalism and their concerns of it leading to divided Iraq and civil war. Looking at today's reality of widespread sectarian violence, the importance of that step is well felt.

As the Sunni groups got involved very late in the drafting process, there was little time to prepare for a useful dialogue on the issues. The negotiations as well as the drafting process as a whole suffered from this.

### **International Involvement:**

The timeframe also did not allow the UN and international experts either to mediate the negotiations or to provide informative inputs from around the world to the benefit of the process. The UNAMI led by Nicholas Haysom got involved only in June after being invited by the Iraqi Govt. USIP brought in Constitutional expert Yash Ghai<sup>183</sup> who referred extensively to comparative constitutional models explaining that "federalism far from precipitating the break up of the state, in fact might hold Iraq together"<sup>184</sup>. Both of these valuable resources failed to leave useful impact on the process because of the short timeframe. After the NA denied request for an extension of the framing period, the US administration got directly involved in the drafting phase only to increase resentment within the Sunni groups. On August 12, the US Embassy went as far as circulating their version of a Constitution for Iraq<sup>185</sup>. The visibility of US influence on the draft constitution created a negative feeling among many Iraqis and was felt during the ratification phase.

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<sup>183</sup> Introduction

<sup>184</sup> P 14

<sup>185</sup> P 15

International presence was felt in Afghanistan Constitution making through funding, substantive advice and space availability by the United Nations and few other foreign entities<sup>186</sup>. World-renowned constitutional experts Guy Carcassonne, Yash Pal Ghai and Barnett Rubin were present and assisted the process significantly yet *“The process has not been in any way akin to that of foreigners writings and nationals rubber stamping a new Constitution”*<sup>187</sup>.

### **Representation of Groups:**

Though civil society organizations were able to raise their points but they did not leave adequate influence on the draft because of the lack of institutional framework. Iraq foundation for Development and Democracy<sup>188</sup>, a well reputed organization proposed an independent Constitutional Commission to work alongside the official one and raise civil society views. The Thaqaalayn Research Institute a Shiia religious NGO created a forum to educate religious Shiia community on the value of constitutionalism and bring its views to the Commission.<sup>189</sup> Both these initiatives along with others failed to represent the civil society views in a useful manner.

### **Participation of Women:**

The drafting committee had Six Women members and did not pay much attention to women’s groups’ demands with regards to the draft Constitution. In a statement released by Iraqi Women’s Network on July 21 ’05, concerns are expressed that none of the issues

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<sup>186</sup> Afghan Report p 23

<sup>187</sup> P23

<sup>188</sup> Iraq Foundation for Development and Democracy is a regional non governmental organization that supports dialogue between decision-makers and citizens on different issues of national interest.

<sup>189</sup> USIP report P 16

that this group discussed with the sub committee of chapter on rights, duties and liberties were taken into consideration<sup>190</sup>. The group even complained of the reception they got from the committee, *“At the beginning of the meeting they tried to prevent us from reading our memo under the pretext of shortage of time! The meeting was held upon our request and we're astonished of a good number of Islamist women have been invited to attend it as an attempt to confuse the meeting. It was the first opportunity for us as representing active part of the civil society orgs to meet with the sub-drafting committee. We've expressed our worry about very short time behind the drafting committee to accomplish its work in a close door”*<sup>191</sup>

In the Afghanistan scenario women were reasonably represented, forming approximately one fifth of the delegates and assuming position of authority<sup>192</sup>

#### **Participation by common people:**

The Constitutional committee, National Assembly and the leadership council always met in high security areas practically making it impossible for general public to participate.

The Constitutional Committee secretariat was to house an outreach unit for disseminating information regarding the constitution and receiving public feedback. Lack of office space, delay in hiring staff led the unit only to release a 7 point questionnaire. Within the very limited time, they were able to receive 150,000 submissions, 20,000 of which came from Kurdish region and 10,000 from Sunnis of Falujah<sup>193</sup>. Even this limited outreach

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<sup>190</sup> WHRnet Resource, Retrieved from <http://www.whrnet.org/fundamentalisms/docs/action-iraq-sitin-0507.html>; Accessed on 29<sup>th</sup> November, 2006

<sup>191</sup> Id

<sup>192</sup> Afghanistan Report. P 25

<sup>193</sup> USIP report 19

activity had no effect in the drafting process as by April 13 the committee had a draft version ready before the outreach committee prepared a report<sup>194</sup>.

Unlike the Iraqi situation, the Afghan Constitutional Commission had a public education unit, which began to operate in May 2003. Regional offices helped campaigning ‘ *on the significance of a constitution for Afghanistan, with an overview of past constitutions, the on-going constitution making process, the importance of people’s views, and the impact on their lives*’<sup>195</sup>. This campaign is claimed to have reached all 32 provinces and refugee camps in Iran and Pakistan<sup>196</sup>. Public consultation followed the education phase during June and July ’03<sup>197</sup>. The consultation was carried out through meetings where possible and by distributing questionnaires among people. Approximately 532 meetings were attended by as many as 150,000 Afghans whereas 80,000 to 100,000 questionnaires were received<sup>198</sup>. After a final joint review by the Review Commission and National Security Council consisting of select numbers of the ministry of defense, foreign affairs, the interior and the justice; a draft constitution was released on November 3<sup>rd</sup>, ’03 for consideration by the Afghan people and Loya Jirga. On the 22<sup>nd</sup> day of the Constitutional Loya Jirga, a Constitution was adopted unanimously on January 4<sup>th</sup>, ’04<sup>199</sup>.

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<sup>194</sup> Id

<sup>195</sup> Id p 14

<sup>196</sup> Id

<sup>197</sup> Without any actual draft of the constitution how this consultation helped the process is doubtful. Under criticism from media and public in general, the CC promised to explain how people’s views were taken into consideration but failed to do so. P 15

<sup>198</sup> Id

<sup>199</sup> A written version of the Constitution was signed and published on 26<sup>th</sup> of January ’04.

## Referendum:

Enthusiasts described the referendum as , "... a civilized step that puts Iraq on the path to democracy, to rebuilding our new Iraq."<sup>200n</sup> Enthusiasm flew high as the Constitution got approval from 79 % of Iraqi voters on October 15<sup>th</sup>. Voters in Sunni majority areas overwhelmingly rejected the proposal whereas the Shiites and Kurds supported it indicating signals of 'political polarization',<sup>201</sup> in Iraq. Even though the United Nations expressed concerns over the rules of referendum being changed without proper representation in the Parliament, they did not find enough evidence to oppose the results. The rules stipulated that simple majority 'yes' votes from registered voters would pass the measure if two thirds of registered voters in at least three provinces would not vote 'no',<sup>202</sup>

## Conclusion:

After more than a year of the referendum adopting the Constitution, looking back at the process and substance of the document is painful. Iraq is in civil war and more divided than it ever appeared to be in history. Did it meet any of the criterions mentioned at the beginning of this paper? The answer is no-it did not clarify the authority of state officials,

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<sup>200</sup> Independent Electoral Commission spokesman Farid Ayar at a new conference on October 25, 2005; retrieved from [http://www.bloomberg.com/apps/news?pid=10000087&sid=amqz7dZlEx3w&refer=top\\_world\\_news](http://www.bloomberg.com/apps/news?pid=10000087&sid=amqz7dZlEx3w&refer=top_world_news) on 12/12/06

<sup>201</sup> "Results of the referendum have indicated the degree of political polarization in Iraq," the United Nations Assistance Mission for Iraq said in an e-mailed statement in which it also praised Iraqis for turning out to vote. "This poses an ongoing challenge for all Iraqis and underscores the importance of an inclusive national dialogue." Id

<sup>202</sup> Article 4 of the 'Law on the Referendum on the Constitution' stipulated the rules for the referendum. Later VOA news agency reported that an amendment was passed in the Parliament with only half of its members present and how Kurdish and Shiites lawmakers tried to ensure the language to be 'registered voters' rather than 'total voters'. <http://www.voanews.com/english/archive/2005-10/2005-10-05-voa3.cfm?CFID=11314358&CFTOKEN=71539737>, retrieved on 12/12/06

failed to build focused claim on sovereignty and left most part of institution building to the legislature.

The mostly criticized provision of the Constitution is probably its institution of federalism. Unexplained, not properly defined claim of a federal government raises questions about the unity of Iraq. The powers awarded to Kurdistan indirectly through regional mask may very well lead to division of the country. As *'under the impetus of globalisation, migrations, rights consciousness, gender politics, powers of imitation, and suffering, the question of diversity has forced itself on politicians and policy makers, and the international community'*<sup>203</sup>, this Constitution does nothing to preserve the common vision of a unified Iraq. Allowing regional power over natural resources revenues create more chaos than it solves. Creation of an undefined federalism where many important institutions are left to the creation of legislatures, power sharing between the central and regional government that particularly benefits one segment of Iraqi society as well as lack of common vision added to the sectarian violence that is a everyday reality in Iraq today.

Islam has been awarded an important place in Iraqi legal and social structure through this Constitution. Depending on the interpretation of the legislative branch, it may turn into another Middle Eastern country degrading women's position in the society.

The process of Constitution making for Iraq has not been an ideal one. The Committee worked within a very short time, could not engage one of the largest segments of Iraqi society and lacked proper representation from civil society including women's

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<sup>203</sup> Yash Ghai, 'A Journey around constitutions: Reflecting on Contemporary Constitutions', p 11 retrieved from <http://www.idea.int/conflict/cbp/upload/journey.pdf> on 2006/12/5

groups. The undeniable US influence over the process had added a flavor almost comparable to the colonial constitutions.<sup>204</sup>

What could be done now? The notion of Constitutional review has emerged in important forums. The issues that have been 'swept under the rug during the drafting phase'<sup>205</sup> must be dealt with now. Sharing power in terms of governance, revenue sharing in oil and taxation are matters that must be reconsidered.

The Constitution building exercise in Iraq may serve as caution for any society trying to rush into a magic framework that will provide post conflict solutions for a multi ethnic country. As for the wronged, Constitutional review together with education of the common people leading to their informed approval of it must be secured. Failure to revisit the needs of Iraqi society and offer adequate framework for it will meet with undesirable future for the region and the world at large.

Putting the criticisms aside, it must be noted that initiating the complex task of constitution making in a country that was under authoritarian rule for longer than most of its citizens have lived is an achievement in itself. The culture of participating in government decision-making once introduced will mature and offer true democracy to its citizens.

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<sup>204</sup> The economic interest is overriding, although it finds little expression in the constitution—which is designed to give maximum discretion to the legislature and the executive—', Ghai, N 76 p4

<sup>205</sup> Kofi Annan, BBC interview 2006.12.06

## **Chapter IV**

Iraqi Women: The captives of Democracy

## **Introduction:**

*“To disregard women and bar them from active participation in political, social, economic and cultural life would in fact be tantamount to depriving the entire population of every society of half its capability. The patriarchal culture and the discrimination against women, particularly in the Islamic countries, cannot continue for ever”<sup>206</sup>.*

In most societies of the world, women are the most disadvantageous groups among all. Poverty, famine, natural calamities as well as lack of development in legal and social segments affect women more gravely than their male counterparts. In a peaceful environment of a country, women are constantly struggling for their equal rights to state resources and for adequate legal protection from violence and discrimination. In a country caught between post conflict rebuilding and civil war situation, the challenges of survival and empowerment for women are far greater. The fact of a temporary government making important decisions regarding issues that will make significant impact on Iraq's future policy towards women made the situation even more complex.

The story of Iraqi women is tragic if not horrifying. Under political repression and international sanctions they have tried to thrive for decades; ironically it's democracy that's threatening their potentials as human beings as well as survival. This chapter purports to communicate the roles played by the transitional authority in dealing with the “woman question” in Iraq. I look at issues that women in Iraq face today in the context of Transitional authority including Survival in its very basic sense; legal status and protection; political participation in the reconstruction effort; and plight during the

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<sup>206</sup> Shirin Ebadi's Nobel peace prize acceptance speech, 2003, retrieved from [http://nobelprize.org/nobel\\_prizes/peace/laureates/2003/ebadi-lecture-e.html](http://nobelprize.org/nobel_prizes/peace/laureates/2003/ebadi-lecture-e.html) on December 23, 2006.

conflict and justice afterwards etc. For a fruitful discussion, I take into account constitutions of Iraq from different periods, acceptance of international legal standards, reports from international and local non governmental organizations as well as personal accounts of prominent scholars. Most of the secondary sources I refer to for this section belong to the 'feminist jurisprudence' category. My preference to this particular area of scholarship stem from my own interest in feminism and it was only natural that I found these writings more agreeable than others. This chapter is divided into three parts. First I look at the situation of women existing prior to 2003 as found in the legal structures and international texts. Then I investigate the current situation and changes both positive and negative as brought about by the transitional authority taking into consideration comparative analysis with the Afghan administration. Lastly I voice my concerns and put forward recommendations referring to international legal standards.

### **Iraqi Women: Prior to 2003**

Legal status: Women have played important roles in Iraqi society throughout history. The interim Constitution of 1958, which was drafted after the Iraqi revolution of July 14th, 1958,<sup>207</sup> awarded women equal status to men. The revolution changed the marriage, inheritance and divorce laws along with many others and made them subject to the jurisdiction of civil courts instead of Islamic family matters<sup>208</sup>. The early years of Baathist socialism saw women's status and rights further enshrined in legal

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<sup>207</sup> 1958 revolution

<sup>208</sup> Dr. Shakir Hanish, *The July 14<sup>th</sup> 1958 Revolution in Iraq*, retrieved from <http://www.iraqcp.org/0030711shE.htm> on December 29, 2006 cross referenced from UNIFEM gender profile.

infrastructures. The Constitution of 1970 awarded women equality before the law<sup>209</sup>, equal opportunities in the society<sup>210</sup>, free education up to university level<sup>211</sup>, right to work<sup>212</sup>, right to hold public offices<sup>213</sup> as well as right to maternal and child care through the state<sup>214</sup>. As a result of these progressive steps, during Saddam Hussein's rule, "*Iraqi women were widely considered to be among the most educated and professional women in the Arab world*".<sup>215</sup> According to reports of The Iraqi Bureau of Statistics in 1976, women constituted approximately 38.5 percent of those in the education profession, 31 percent of the medical profession, 25 percent of lab technicians, 15 percent of accountants and 15 percent of civil servants.<sup>216</sup>

The situation of Iraqi women in the professional and state sectors, who had enjoyed the highest literacy rate in the region before 1991 changed dramatically after the UN sanctions<sup>217</sup> came into operation. The Iraqi invasion of Kuwait led to UN mandated armed intervention in Iraq causing severe consequences for women in all parts of their lives. Together with women's education and work opportunities suffered family lives when number of widows increased significantly. According to a report by UNESCO, the literacy rate among women plunged down to less than 25% in 2001 from a 87% in 1987.

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<sup>209</sup> Article 19 of 1970 Constitution; retrieved from <http://www.iedc-ig.org/english/paper.php?source=akbar&mlf=interpage&sid=10195> on December 28, 2006

<sup>210</sup> Id

<sup>211</sup> Article 27, 1970 constitution

<sup>212</sup> Article 32, 1970 constitution, a 1974 government decree further stipulated that all university graduates, male and female will be employed automatically.

<sup>213</sup> Article 30, 1970 constitution

<sup>214</sup> Article 11, 1970 constitution

<sup>215</sup> UNIFEM Gender Profile- Iraq, retrieved from <http://www.womenwarpeace.org/iraq/iraq.htm> on December 28, 2006

<sup>216</sup> Rassam, "Political Ideology and Women in Iraq," p 87 cross posted from HRW report

<sup>217</sup> In response to Iraq's invasion of Kuwait, the UN imposed economic sanctions on Iraq by Security Council Resolution 661. S/RES/661(1990)

Women's advantageous status under the Constitution suffered a set back when then leader Saddam Hussein introduced anti women legislation for gaining support from the conservative groups of Iraq. In 1990 such a presidential decrees granting immunity to men guilty of committing honor crimes<sup>218</sup> claimed almost 4000 lives of women.<sup>219</sup>

### **Political Participation:**

Since 1958 women in Iraq have regularly participated in state responsibilities though in few numbers. There was a vibrant civil society including number of women's organizations prior to the secular Baath party's rule in 1968<sup>220</sup>. Instead of allowing civil society groups to thrive General Federation of Iraqi Women (GFIW) was created and it ran more than 200 urban and rural community centers throughout Iraq offering job trainings, educational and other social programs<sup>221</sup>. Though different groups have argued that the GFIW had been merely an arm of the oppressive Iraqi government and did not represent the struggle of Iraqi women<sup>222</sup>, the organization and its officers played a significant role in implementing state policy and lobbying for changes in the legal system. Iraqi women got the right to vote and run for office in 1980 even though they continued to be ill represented in state offices. In the first parliamentary election women won 16 seats followed by 33 seats in the next election in a 250-member council<sup>223</sup>.

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<sup>218</sup> Honor killing is a practice prevalent in many societies of the world mostly among Muslim population where a person may be killed by a family member without legal implications where the victim is accused of bringing shame to her family. Women are the primary prey for honor crimes but some men also fall victim to this custom. According to United Nations Populations Fund, annually about 5000 women are murdered by their relatives for 'Honor' around the world.

<sup>219</sup> Unifem Gender Profile, Article 111 of Iraqi Penal Code granted immunity for honor crimes.

<sup>220</sup> <http://www.hrw.org/backgroundunder/wrd/iraq-women.htm> from UNIFEM Gender Profile

<sup>221</sup> id

<sup>222</sup> HRW report

<sup>223</sup> UNIFEM Gender Profile

Iraq's invasion of Kuwait, Gulf war of 1991 and Saddam Hussein's growing dependence on religious groups' support caused women to suffer severe setback in their lives during 1990s. Along with the return of Islamic personal laws, single sex education system instead of co education women were encouraged to return to their traditional roles as home keepers. Legislation was also introduced to restrict women's work outside their homes and curtailing their right to mobility<sup>224</sup>. Politically women participated less than before, only amounting to 8% of total members in the council in 2003<sup>225</sup>. They faced arbitrary arrests or imprisonment regularly for belonging to opposition groups, refusing to join or attend Baath Party meetings or simply for the purposes of intimidating male family members.

#### **Social Status:**

*"For women of low-income classes within urban areas or poor women living in the countryside sheer survival has become the main aim of their lives. There is no doubt about the fact that it is particularly the poor mothers whose children are more likely to become yet another statistic in the incredibly high child mortality rates or who suffer from disease and malnutrition. Yet even for educated women who were part of the broad and well-off middle-classes of Iraq, feeding their children has become the major worry and focus"*<sup>226</sup>.

During the 90s Iraqi women did not only loose their previous educational and professional positions but also faced basic survival challenges. To add to the misery of

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<sup>224</sup> HRW reported that women under the age of forty five were prohibited to leave Iraq without being accompanied by a male relative.

<sup>225</sup> UNIFEM Gender Profile

<sup>226</sup> 'women, gender relations and Sanctions in Iraq', Nadjie Al-Ali retrieved from <http://www.acttogether.org/Womengender&sanctionsinIraq.htm> on January 3, 2007

growing divorce, domestic violence<sup>227</sup> and polygamy rates, women were deprived from any family planning methods leading to abandonment of unwanted children because of lack of food. Prostitution grew both inside and in neighboring countries<sup>228</sup>. Beheading of women became a common phenomenon in the early 2000 primarily aiming to combat prostitution<sup>229</sup>. According to the United Nations High Commissioner for Refugees (UNHCR) by 2000 Iraqis comprised the second largest refugee groups after Afghans<sup>230</sup> with a significant number of women and children.

### **The Survival Strategy:**

Despite deteriorating economic, security and social conditions women tried to cope with the new realities. Informal grassroots business, women's organizations particularly in the Kurdistan flourished and worked towards improving living situations for women<sup>231</sup>. The exile women communities have been active throughout the Saddam regime in protesting and letting the world know about the plight of women in Iraq.

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<sup>227</sup> Though since 1991 till the occupation, no fact finding mission had been allowed inside Iraq, UNICEF cautioned that it was "...probable that incidents of domestic violence have increased in conjunction with economic austerity"; "Situation Analysis of Children and Women in Iraq" UNICEF, 1998 p 100.

<sup>228</sup> In her Article Nadjé Ali comments that legislation restricting women's movements without male relatives came about after Jordan complained about increased rate of prostitution by Iraqi women in its territory.

<sup>229</sup> International Federation for Human Rights and Human Rights Alliance France, "Iraq: an intolerable, forgotten and unpunished repression", 2000 p23 retrieved from <http://www.fidh.org/magmoyen/rapport/2002/iq315a.pdf> on January 4 2007. This report estimated the number of beheaded women in the period of June 2000-April 2001 as between 60 to 2000. Though the punishment was aimed at prostitutes, beheading had been used to repress any hint of opposition to the government.

<sup>230</sup> FIDH report, p 5. The report also mentioned the number of refugees being 580,000 in Iran, between 120,000-300,000 in Jordan, 27000 in Syria, between 5000-7000 in Saudi Arabia, more than 2500 in Lebanon and 1500 in Pakistan. 300,000 Christians are also believed to be expatriate and the number of internally displaced people is approximately a million.

<sup>231</sup> For example, in semi-autonomous Kurdistan about 400 learning centers were established for adolescent girls, conferences were organized calling for more participation from women at all levels of society and shelters were established for violence victims with the help of women organizations.

## In the Occupied Territories

It is unpleasant truth that with the occupation of Iraq, which is being largely justified on the arguments of gross human right violations, rape rooms and ill treatment of women by the Saddam government, Iraqi women have remained the same and deteriorated from their previous positions in many segments of society. Beginning from the CPA rule continuing till the elected government, women's rights were sacrificed in favor of gaining political support in the eyes of the powerful religious groups. The opportunity to create an exemplary democracy with equal participation from women in the Middle East has been traded off over popularity gain with the religious conservatives.

As Birgitte Sorensen suggests, "*Women's main concerns in relation to post-war reconstruction can be summarized in the following two questions: Will the emerging political system recognize and protect women's rights and interests? And will women be enabled to influence and participate in the political process?*"<sup>232</sup> I look at each of the transitional authority in Iraq to paint a picture of neglecting and in many cases overlooking the issue of women in Iraqi society.

### CPA:

During the CPA administration, the first constitutional document to govern occupied Iraq was drafted. The 24 member constitutional committee appointed by the occupying forces was responsible for drafting the interim constitution and the task did not involve any

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<sup>232</sup> Birgitte Sorensen, *Women and post conflict Reconstruction: Issues and Resources*, WSP Occasional Paper No 3, 1998 p 13

women member. The affirmation of the Preamble thus falls short of its promise<sup>233</sup>. The document uses improper terms to describe unity of Iraqi people<sup>234</sup>, makes religious tenets superior to law<sup>235</sup>, and fails to recognize legal and social discrimination against women among the vestiges of the fallen regime.<sup>236</sup> Perhaps the most damaging aspect of the document for women in Iraq was to condition equality of women before law<sup>237</sup> subject to Islamic interpretation by mentioning Islam as a source of legislation and the superior authority over enacted rules during the transitional period. These provisions had far reaching effect beyond the CPA and in the permanent constitution; many of these discriminatory features were reproduced. Though the CPA appointed Iraqi Governing Council<sup>238</sup>, a 25 member provisional government, was largely accountable to the CPA they managed to pass a Directive that transformed the family law according to Islamic provisions. Despite conflicting reports from Human rights groups, the CPA claimed

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<sup>233</sup> The TAL preamble affirms Iraq's respect for international law which entails upon a state responsibility to engage its women in political processes along with many other rights. For example, Fourth World Conference on Women 1995 recommended measures for countries to take to enhance women's participation in politics and decision making through the Beijing Platform for Action. The 1979 Convention on the Elimination of all sorts of Discrimination Against Women, of which Iraq is a state party requires states to eliminate discrimination in women's political participation through legal and special measures (Article 2-Article 4), take all necessary measures to eliminate discrimination in all segments of public life (Article 7).

<sup>234</sup> Preamble states "...have endeavored at the same time to preserve the unity of their homeland in a spirit of fraternity and solidarity in order to draw the features of the future new Iraq..."

<sup>235</sup> Article 3 of TAL states, "...no amendment may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two; extend the transitional period beyond the timeframe cited in this Law; delay the holding of elections to a new assembly; reduce the powers of the regions or governorates; or affect Islam, or any other religions or sects and their rites."

<sup>236</sup> The Iraqi Transitional Government shall take effective steps to end the vestiges of the oppressive acts of the previous regime arising from forced displacement, deprivation of citizenship, expropriation of financial assets and property, and dismissal from government employment for political, racial, or sectarian reasons.

<sup>237</sup> Article 7 A states, "Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period" defeating the promise in Article 12 that reads, "All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law. Discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin is prohibited. Everyone has the right to life, liberty, and the security of his person. No one may be deprived of his life or liberty, except in accordance with legal procedures. All are equal before the courts."

<sup>238</sup> The CPA established a Governing Council for Iraq through regulation 6 of 13 July 2003. Available @<http://www.iraqcoalition.org/regulations/index.html#Regulations>

victory over women's empowerment<sup>239</sup>. Appointing three women members in the Governing Council was publicized widely before one of them was killed in a deadly attack<sup>240</sup>.

As the occupying power the CPA was under an obligation to restore and maintain public order and safety as well as respect the fundamental rights of the territory's inhabitants<sup>241</sup>. Protecting women "*against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*"<sup>242</sup> or introducing necessary amendments to the Penal code<sup>243</sup> were also sectors that the CPA failed to implement for the betterment of women's rights. Throughout the duration of the CPA administration, controversial penal structure that allowed reduced punishments for *honor* crimes or allow male perpetrators of severe sexual crimes to escape punishment by marrying their victims remained in force<sup>244</sup> exposing the failure of the administration's obligation to ensure basic human rights for women and girls.

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<sup>239</sup> For example see "Climate of Fear: Sexual violence and abduction of women and girls in Baghdad" Human Rights Watch Report July 2003 Vol. 15, no 7 (E) retrieved from <http://hrw.org/reports/2003/iraq0703/>; "Iraq: Decades of suffering, now women deserve better" retrieved from <http://www.amnestyusa.org/countries/iraq/document.do?id=9E865CC4FD535B2880256F73005E4047> on Feb 1 2007 and CPA official document "CPA accomplishments 2003-2004" retrieved at [http://www.iraqcoalition.org/pressreleases/20040628\\_historic\\_review\\_cpa.doc](http://www.iraqcoalition.org/pressreleases/20040628_historic_review_cpa.doc) pages 51-55

<sup>240</sup> UNIFEM Report. Page 4

<sup>241</sup> See Article 43 of Hague convention (IV) Respecting the Laws and Customs of war on Land and Article 29 and 47 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.

<sup>242</sup> Article 27 of the Geneva Convention in Time of war retrieved from the website of the Office of the High Commissioner of Human Rights @ <http://www.unhchr.ch/html/menu3/b/92.htm> on Feb 1 2007

<sup>243</sup> Article 67 of the same

<sup>244</sup> HRW Report '03 n 34 p 19

**Iraq Interim Government:**

A 37 member Interim Government took over Iraq's governance on June 30<sup>th</sup> when the CPA dissolved. The members, chosen through consultation among the CPA, IGC, United Nations and Iraqi people consisted of politicians, former IGC members, tribal leaders, exiles out of whom six were women. The TAL was the constitutional framework for this government, which was recognized as the sovereign authority for Iraq by the United Nations, Arab league, United States and several other countries. Interestingly the armed troops of the coalition did not leave raising speculations of a de facto control by the occupying forces. The Interim government did not take any specific measure to ensure safety and empowerment of women; neither did it overrule any discriminatory provision of the existing framework.

**Iraq Transitional Government:**

An elected Transitional government took power in Iraq on 3<sup>rd</sup> of May 2005 serving till 20<sup>th</sup> May of 2006 only to transfer sovereignty of Iraq to a permanent structure of governance. This government operated according to the TAL and was entrusted with the responsibility of drafting a permanent constitution for new Iraq. The Constitutional drafting committee had six women members and the government itself did not have significant participation from women. The Constitution made women's rights subject to religious consent and rather than addressing previous regimes' discriminatory regulations encouraged Islamic ideology to decide on women's position in society. Iraqi women suffered a serious set back at the beginning of a new era; where even an autocratic

government could not undermine women's role in the society a democratic process stripped away potentials from them.

All three bodies of the transitional authority failed to address the most important issues regarding women; political participation, education, health concerns, security needs to name a few. Despite calls from women's organizations within Iraq, exile Iraqis and international organizations women did not have any important role to play in the political process from the very beginning<sup>245</sup>. Women considered being the highest ranking in terms of empowerment within the Arab world suffered during the sanctions and remained significantly neglected in the rebuilding of a society. The De' Baathification requirement for the candidates for government positions and other civil affiliations may have played a negative role in women's participation in politics and other social advancement programs. Under the previous government, women's organizations operated as Baath party wings in various parts of the country to provide education and trainings to women<sup>246</sup>.

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<sup>245</sup> For example, in a report by Refugees International titled "Iraq: Focus on Women's needs" published in April '03 it is mentioned that at the first post Saddam political meeting in Nasiriya only 4 exile women took part in a group of 123 attendees. The trend continued throughout other gatherings where future of Iraqi politics was being discussed. For more on this see <http://www.interaction.org/newswire/detail.php?id=1570>

<sup>246</sup> For example, 'General Federation of Iraqi women' was the most active women's organization with 1.5 million members during Saddam and operated under Baath Party. see <http://www.interaction.org/newswire/detail.php?id=1570>

## Recommendations

- 1 **Defining Peace for Women:** What constitutes peace for women? Is it absence of war by foreign invaders or internal rivalry? In answering this, Donna Ramsey points finger at the right answer “ *The definition of peace as ‘not war’ ignores the high levels of domestic and societal violence suffered by women even in times not characterized by violent political conflict or in the period immediately following a conflict*”<sup>247</sup>. In Iraqi situation women are facing the aftermath of a deadly conflict both at home and outside. Rapes, domestic violence, religious prejudice, unemployment and above all lack of security at every step have dominated Iraqi women’s lives since the occupation claimed victory over previous repressive regime. Mere military presence may help reduce sectarian violence or civil war whatever we call it, but true peace for women will prevail when both the legal and social structure supporting equality will complement secure lives that can reach full potential.
- 2 **Political Participation:** As discussed before women’s voices must be heard in decision-making processes for a society to advance in the direction of gender equality. In order to achieve adequate participation from women in the political arena, countries have adopted different measures in post conflict situations. For example during post conflict rebuilding South Africa, Mozambique and Namibia

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<sup>247</sup> Donna Ramsey Marshall, ‘ Women in war and peace: Grassroots peace building’ USIP Peace works no 24 August 2004 p 8

sought quota system whereas Timor-Leste concentrated on training women to participate effectively in official positions<sup>248</sup>. Women in the Muslim societies have been less involved in politics because of the social stigma and lack of education. The picture outside the Arab states may be different but today's Iraq is necessarily carrying the primary identity of an Islamic state where women have to deal with the realities of discrimination in many respects. The Afghanistan scenario may look awfully familiar to today's Iraq where the only female presidential candidate was prevented from delivering speeches at religious shrines<sup>249</sup>. Yet the rich culture of previous secular Iraq maybe revived through education and institutions for preparing Iraqi women to participate in governmental decision-making process. Even the liberal interpretation of Islamic rules as described by the Iraqi government in 2000 as part of the CEDAW implementation report may play a positive role regarding women's role in politics<sup>250</sup>. In trying to move forward with this agenda the US influence may prove to be detrimental to the goal. US is one of the few countries in the world that has not ratified the CEDAW<sup>251</sup>, does not support the affirmative action steps towards women's empowerment which is a salient feature of the treaty and has only 14% congressional representation of women in its national parliament<sup>252</sup>. Informed policy making, consultation with international, regional and local

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<sup>248</sup> Marcia E Greenberg and Elaine Zuckerman, "The Gender Dimensions of Post Conflict Reconstructions: The challenges in Development Aid" WIDER Research Paper No 2006/62 p3.

<sup>249</sup> Masouda Jalal was the only female candidate and could not run a fruitful campaign because of the prejudices against her as a Muslim woman. For a general discussion on this, see Hilary Charlesworth, 'The missing voice: women and the war in Iraq' 7 Oregon Review of International Law 14 2005.

<sup>250</sup> Reference to the CEDAW UN document: Islam awards equal rights to women in relation to education, divorce and political participation.

<sup>251</sup> Which other countries are not parties to the CEDAW convention?

<sup>252</sup> Hilary p 14

interested bodies before taking actions and respecting relevant international documents may improve the situation for women in Iraq as well as the country to find stability in the post conflict scenario<sup>253</sup>.

**3 Reviewing the Constitution:** As the most important framework and Supreme law for a country, the Constitution dominates the legal system. The 2005 Constitution of Iraq guarantees women equality and numerous rights subject to Islamic law. Islamic law clearly discriminates against women in relation to family matters such as inheritance, marriage and divorce etc. Depending on the interpreting authority it may mean restricting women's access to judicial or leadership positions stretched into limiting simple everyday things like driving or traveling without male companions<sup>254</sup>. Despite promises made in the Bonn agreement in 2001 and equal rights subject to Islamic beliefs enshrined in the Constitution, Afghan women saw little improvement of their situation since the Taliban regime<sup>255</sup>. The Constitution must be reviewed and given a secular outlook rather than making it a compromise document with the religious groups. Reviewing the Constitution and making necessary amendments will open the door to abolish discrimination in the existing legal system. Unfortunately many laws denying women's equal status in the Iraqi society has gone unnoticed during the Transitional administrations. It is necessary to revisit the legal system and address the issues of honor killings,

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<sup>253</sup> Rwanda took effective steps to involve its women, 60% of total population after the ethnic cleansing, that resulted in 49% representation in its national parliament in 2003 making it the largest female representation in Parliament worldwide. N 43 Greenberg and Zuckerman.

<sup>254</sup> For example, Most of the Middle Eastern countries do not allow women to be judges or rulers as well as banning them from exercising voting rights, traveling or driving on their own.

<sup>255</sup> Hilary p 14

inheritance, marriage and divorce rights, traveling in and outside the country and many more provisions that are archaic on the face of them. Introducing new laws to benefit the underprivileged and distressed women may be another option to explore<sup>256</sup>.

4 **Taking women's experience in account:** People experience events within the purview of their race, class, gender etc. Women's sufferings in times of war are not limited to physical or emotional abuse, many times they are forced to take over household responsibilities in the absence of male members without ever being exposed to such duties before. During post conflict nation building measures, women's experience in war must be given due attention to prescribe reconstruction effort. In most cases women's different experiences of war are not taken into account in drafting peace agreements, post conflict reconstruction efforts, humanitarian aid distribution or even in the day-to-day governance scenario<sup>257</sup>. Just as women constitute a significant number in Iraqi society today, their voices and accounts must be given serious consideration in dealing with any issue in the post conflict society.

5 **Adopting UN mandated standards:** Iraq had been a signatory of numerous international human rights treaties for decades<sup>258</sup> that ensure women's human

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<sup>256</sup> Followed by post conflict legal review, countries like Eritrea, Namibia, Rwanda, South Africa and Uganda sought amendments to property rights whereas Chinese and Vietnamese governments introduced new laws banning employment discrimination based on gender. Greenberg and Zuckerman p 4-5

<sup>257</sup> Donna p 8

<sup>258</sup> Iraq is a party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Rights of the Child (CRC), International Convention against Torture (CAT), International Convention on the Elimination of all forms of Racial Discrimination (ICERD), International Convention on the Protection of the Rights of all Migrant workers and members of their families (ICPRMW) etc.

rights in the most basic sense. Iraq has also ratified CEDAW<sup>259</sup>, known as the bill of rights for women with reservations to granting women equal rights in personal aspects like marriage, divorce, spousal rights, nationality and all sectors regulated by religious law and to submitting to compulsory jurisdiction of the international court of justice (ICJ) in case of dispute. Though 185 UN member countries have signed the treaty, the highest number of reservations of all treaties makes it look almost like an excuse to get away with the agenda of equality of women. The treaty itself declares it impermissible to have reservations incompatible to the object and purpose of the treaty but merely puts the burden on states to challenge each other on this rather than declaring ratification with reservations void<sup>260</sup>. Iraq maintains reservations to provisions that go to the heart of the convention and yet by declaring reservations to mandatory jurisdiction of the ICJ they escape the questioning of any state party. It is not surprising that during the CPA, Iraqi Governing Council or even the Iraq Interim Government questions of withdrawing reservations did not come up since the leading force of the coalition, the USA never ratified the treaty after signing it in 1980. Unfortunately during the elected transitional authority the issue became more distant than ever because of the rise of religious power in the government. Now it is very unlikely that discrimination suffered by women with the excuse of Islam will be removed from Iraqi society soon.

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<sup>259</sup> Iraq became a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 13<sup>th</sup> August 1986 with reservations to Article 2(f, g), Article 9 (Para 1&2), Article 16 and Article 29 (Para 1).

<sup>260</sup> Article 28 Para 2 of CEDAW adopts the impermissibility principle of the Vienna Convention on the Law of the Treaties but leave them on state parties to challenge before the ICJ. Reservation on mandatory jurisdiction of the ICJ makes the mechanism cripple.

Both the occupying powers and transitional administrations failed to confirm to the standards of SC resolution 1325. Inclusion of women in decision making process for preventing, managing and resolving conflict<sup>261</sup>; voluntary financial, technical and logistical support for gender sensitive training efforts<sup>262</sup>, respect international humanitarian laws in times of conflict<sup>263</sup>, adopt measures to end impunity and seek justice for genocide, war crimes including sexual violence against women and children<sup>264</sup> -almost all of the binding provisions of the UN resolution have been ignored by the authorities. The transitional authorities also missed the opportunity to sign the statute of International Criminal Court (ICC), a gender sensitive human rights instrument that can answer some women's grievances during armed conflict. As has been mentioned "*while other human rights instruments have mechanisms to deal only with violations by states, the ICC represents new possibilities for the international enforcement of human rights as it has the jurisdiction to prosecute individuals directly*"<sup>265</sup>, the ICC might have addressed sexual violence against women by the coalition forces or various ethnic groups. To right the wrongs of the transitional administrators Iraq's elected government may still become a state party to the treaty and recognize the need for protecting women's human rights at its best.

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<sup>261</sup> SC Res. 1325 Para 1

<sup>262</sup> SC Res. 1325 Para 7

<sup>263</sup> SC Res. 1325 Para 9

<sup>264</sup> SC Res. 1325 Para 11

<sup>265</sup> Zakia Afrin and Amy Schwartz, "A human rights instrument that works for women: ICC as a tool for gender justice" in Wilson, Sengupta and Evans edited "Defending our dreams : global feminist voices for a new generation" p 155

## Conclusion

A world that was convinced of "*Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace*"<sup>266</sup> stood by as Iraqi society traveled backwards and adopted primitive measures for the women. The civil war, western domination and regional power dynamics have dominated the discussion of Iraq since the transitional administration handed over power to an elected government. The damaging policies of the interim governments have exited the discussion table and apart from few insistent human rights groups, Iraqi women's plight are not considered as important issue any more.

From the beginning of this conflict, women were excluded as decision makers both in the coalition forces and Iraq. The only woman leader consulted during the coalition forming was Megowati Sukarnoputri and she was discredited as 'unreliable and erratic' because of her doubts about participating<sup>267</sup>. Referring to the coalition forces as "boys only club" Professor Charlesworth finds deep connection among all the "war mangers" including the US and Iraq as they exclude women from foreign policy making<sup>268</sup>. This under representation of women in deciding to launch an armed attack and misrepresentation by the media throughout the conflict where Iraqi women were depicted

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<sup>266</sup> Para 13 of Beijing Declaration on Fourth World Conference on Women, "Action for Equality, Development and Peace" held on Beijing China September, 1995 retrieved from <http://www.un.org/womenwatch/daw/beijing/beijingdeclaration.html> on February 6, 2007.

<sup>267</sup> Hilary Charlesworth, "The Missing Voice: Women and the War in Iraq" 7 Oregon .Review of international Law 2005 p 9

<sup>268</sup> Id

as victims of Saddam Hussein's oppressive regime followed by the silence about grievances during the transitional authority. As civil war escalates in Iraq, women disappear from the focus of the international community as they do from the streets of a free country. During the Saddam regime, they were persecuted solely based on political beliefs while awarded the right to education, work and a secular environment; in the democratic Iraq, they have been reduced to bear identity of Muslim women first before everything else. Is democracy worth it? Where is the accountability of the transitional governments who proactively chose the mechanisms that's minimizing the potentials of Iraqi women?

We can only hope that the elected government will confirm to international standards regarding women's rights and a future without discrimination will emerge from within Iraq.

## **Chapter V**

### **Post conflict Justice**

## Introduction:

It was just like another video from the extremists showing beheading of human beings lives on camera. Or it may have been a replica of the episode of Roman Empire when crowds enjoyed people being eaten alive by beasts in the coliseum. Instead the hanging of Saddam Hussein was an act of a special tribunal and elected government. On 6 am Iraqi time December 30 2006, when Muslims in many parts of the world were celebrating the most important holiday of their faith Eid ul Fitri<sup>269</sup>, The Iraqi President was humiliated in front of the world and hanged. For many, this is the picture of post conflict justice in Iraq. I beg to defer. The final moments of Saddam Hussein are in no way representative of an otherwise impressive effort.

In the endeavor to create democracy based on the notion of 'Rule of Law', perhaps the most daunting task of the transitional authority in Iraq had been the one of administering justice. The traditional definition of justice as discussed by Plato<sup>270</sup> can be stretched in the setting of a post conflict situation. Paul Van Zyl, the executive secretary of the Truth and Reconciliation Commission of South Africa solicits a very broad definition of justice as moving

*"...beyond focusing purely on the conduct of perpetrators, to include the needs of victims and the imperative to reform state institutions to ensure that human rights abuses does not recur"*<sup>271</sup>.

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<sup>269</sup> Popularly known as Eid, this is the most significant Muslim festival that is celebrated once a year after a month long fast known as Ramadan.

<sup>270</sup> In his 'The Republic' Plato discusses the notion of justice through conversation between Socrates and his interlocutors. Plato's own arguments may be summarized to mean justice as the task of society according to one's natural abilities.

<sup>271</sup> For Paul van zyl's analysis of the Velasquez Rodriguez judgment at 4 Iner-Am. Ct. H. R. (Ser.C) 1988 defining justice see *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa* in Bassiouni edited *Post-Conflict Justice* p 745-746

This definition can be meant to understand two aspects of justice,

- a. Retributive and restorative justice leading to peaceful future.<sup>272</sup>
- b. Repairing and enhancing the judicial system.

In a post conflict situation, the second approach is usually given less attention<sup>273</sup>. And the first aspect is criticized by many scholars as part of the ongoing debate that evolves around the notion whether seeking justice in a post conflict situation is impediment to peace!<sup>274</sup>In case of Iraq, however, the expectation of retributive justice was undisputed among the population. At the same time, the role of occupiers required compliance with international obligation to restore law and order, which translated into restoring and enhancing the judicial system. Thus in the post conflict situation in Iraq, justice necessarily meant holding Saddam's government liable for their atrocities against Iraqi citizens over the period of 35 years and reconstructing the judicial system while introducing the aspect of independence of judiciary.

In this chapter I analyze the TA's approach to post conflict justice in Iraq and their initiatives. Describing the actions of the authority I advance to answer three questions; first, did the statute of the special tribunal meet international standards? Second, did the trial of Saddam Hussein serve to satisfy goals post conflict justice? Third, did the TA

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<sup>272</sup> Retributive justice seeks to inflict punishment on the offenders for violations of law whereas restorative justice puts major emphasis on the harm committed to human relationships and aims to achieving social harmony in the aftermath of a conflict. Restorative justice may include Truth and Reconciliation Commissions.

<sup>273</sup> As Cherif Bassiouni observed, "major western powers find it more politically congruent to their interests to establish ad-hoc post-conflict justice systems which are essentially focused on the past and without much regard for justice capacity building of national systems" p xvii, Cherif Bassiouni edited *Post-Conflict Justice*, Introduction, Transnational Publishers Inc. Ardsley, New York 2002

<sup>274</sup> For a detailed description see Neil J Kritz, *Progress and Humility: The ongoing Search for Post-Conflict Justice* in Bassiouni edited *Post-Conflict justice* 2002.

actions for reconstructing the justice system comply with its mandate under international law?

### **Establishing the special Tribunal for prosecuting Saddam**

*"In the short span of ten years between 1992 and 2002, the values of international criminal justice have taken hold as an essential component of the international legal order"*<sup>275</sup>

Truly the world has come a long way from the days of Nuremberg trial<sup>276</sup>, the first international criminal tribunal of its kind, which was criticized for its partiality and attitudes towards the victors. The establishment of ICTY<sup>277</sup> and ICTR<sup>278</sup> in the 1990s not only supported criminal liability for atrocities committed towards citizens by their own governments but also integrated the rules of fair trials, rights of the accused, compensation for the victims and many other progressive features in international legal order<sup>279</sup>. The ICC treaty<sup>280</sup>, however, elevated international criminal law to a new high standard when it came into existence in 2002. Quoted as the first gender sensitive legislation in international law, the ICC has strengthened the concept of international

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<sup>275</sup> Cherif Bassiouni edited *Post-Conflict Justice*, Introduction p xvi, Transnational Publishers Inc. Ardsley, New York 2002

<sup>276</sup> Nuremberg Trial

<sup>277</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN through SC Res. 827 on May 25 1991 to prosecute the perpetrators of the Yugoslav war in 1991. For more information on the Court see <http://www.un.org/icty/>

<sup>278</sup> International Criminal Tribunal for Rwanda (ICTR) was established by the UN through SC Res.955 of November 8, 1994 to prosecute the perpetrators of the Rwandan genocide in 1994. For more information on the Court, see <http://69.94.11.53/>

<sup>279</sup> For example, Both the ICTY and ICTR provide broad definitions of war crimes, crimes against humanity, rape and other sexual assaults.

<sup>280</sup> The international Criminal Court, a permanent tribunal to prosecute genocide, crimes against humanity, war crimes and crimes of aggression was created by an international treaty in 2002. Independent of the UN, the current member of this court is 104. For more information on the Court see <http://www.icc-cpi.int/>

responsibility for domestic affairs of governments. The trend continues today with several tribunals set up to address post conflict justice issues<sup>281</sup>.

In this backdrop, it was only natural that Iraq's fallen government had to face special tribunal kind justice for the killings of its' own citizens. The first issue before the transitional authority was to choose the right forum for it. Among the choices were an ICTY type international tribunal, an East Timor type combination of national and international tribunal and an Iraqi tribunal created solely for the purposes of trying international crimes without any international influence.

Despite expectations of an international criminal tribunal from the NGO communities, the Transitional authority favored an Iraqi tribunal<sup>282</sup>. The US administration reportedly preferred the local institution for the Iraqi people to feel more in charge of the events. Besides, anything less than the death penalty for Saddam might not have been acceptable to the people and yet impossible under international standards.<sup>283</sup> Tom Parker, the Head of CPA's crimes against humanity unit noted that after verifying the interest level for different types of tribunals, idea of a national tribunal was preferred by the authorities<sup>284</sup>. He also argued that after a brutal sanctions regime,

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<sup>281</sup> Consider the case of Sierra Leone. After a ten year long bloody civil war the government of Sierra Leone in agreement with the UN SC Res.1315 of 2000 set up the Special Court for Sierra Leone that combined both international and domestic legal traditions to prosecute serious violation of international humanitarian law. See <http://www.sc-sl.org/>.

<sup>282</sup> See Bassiouni Cherif M, *Post Conflict Justice in Iraq: An appraisal of the Iraq Special Tribunal* in 38 Cornell Int'l L. J. 328-368 (2005) for a detailed discussion on the process of choosing to establish an Iraqi tribunal as observed by the author in the capacity of director of International Human Rights Law Institute's reconstruction of legal education program funded by the USAID in Iraq.

<sup>283</sup> Id p 344

<sup>284</sup> According to Tom Parker, as early as April 2003, OHRTJ began to reach out to Iraqi legal community and local human rights groups. By August 2003 report titled 'Iraqi Voices' from International Centre for

there was little interest on any UN involvement among the people. He failed to answer, however, why a court set up with the blessings of an occupier will be more acceptable than a recognized world institution.

The proposal for the tribunal initiated from CPA allies and the Governing Council. The Iraqi High Tribunal (IHT) that carried out the infamous trial of Saddam Hussein first came into existence as the Iraqi Special Tribunal (IST) in December 10, 2003. The CPA authorized the statute of IST promulgated by the Governing Council to 'to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi law'<sup>285</sup>. Before being revoked and replaced by the national assembly of the Transitional Government with IHT in August 2005, the IST was set to utilize a combination of international and domestic criminal laws. The added emphasis on Iraqi domestic law is the main difference between the two.

The IHT has jurisdiction over Iraqi citizens and residents accused of genocide, war crimes and crimes against humanity between July 1968 and May 2003 as defined by the ICC treaty<sup>286</sup>. The IHT also declares jurisdiction over various crimes punishable under Iraqi criminal law<sup>287</sup>. The inclusion of offences mentioned in the 1958 Iraqi penal code, which lack transparent definitions, raised concerns of being abused for political

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Transitional Justice (ICTJ) and Human Rights Centre (HRC) @ UC Berkeley, claimed overwhelmed support for a national tribunal to try Saddam. For a detailed discussion see Tom Parker, Prosecuting Saddam: The CPA and the Evolution of the Iraqi Special Tribunal @ 38 Cornell Int'l. L. J. 2005

<sup>285</sup> CPA Order 48

<sup>286</sup> Article 1, 11, 12 and 13 of the IHT

<sup>287</sup> Article 14 of the IHT

purposes<sup>288</sup>. The trial is to be regulated by the Iraqi criminal procedure, which derived its roots from civil legal traditions. According to the rules, an investigative judge collects all evidence, witness testimonies to use in the trial proceedings<sup>289</sup>.

There are five judges in the trial chamber who decide on the appearances of the witnesses and questions they answer<sup>290</sup>. After being presented with the documents collected by the investigative judge, witness testimonies and prosecution and defense arguments trial judges deliver a verdict and a written opinion on the case. The verdict may be appealed before the Appeals chamber of the IHT that consist of nine judges including a President of the Tribunal<sup>291</sup>. According to the statute judges, prosecutors, principle defense lawyer of the accused and all staff members of the SICT must be Iraqi nationals<sup>292</sup>. Non-Iraqi international law experts may be appointed in advisory role to assist judges and prosecutors in matters of international legal issues<sup>293</sup>

The IHT grants impressive set of rights to the accused including equality before the law, presumption of innocence until proven guilty and a fair trial. Armed with international criminal law elements and promise of a fair trial, the IHT must be hailed as an exemplary domestic institution to try war crimes and like of government entities. The Saddam trial generated a lot of interest among international legal experts who waited keenly to witness the advancement of international criminal law in a domestic forum.

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<sup>288</sup> In its October 16, 2005 briefing paper on *The Former Iraqi Government on trial* Human Rights Watch mentions crimes mentioned in Article 14 as 'political offenses and of a breadth and vagueness that makes them susceptible to politicized interpretation and application'

<sup>289</sup> Iraqi code of Criminal Procedure, Para 51-129 cross posted from HRW paper n 19

<sup>290</sup> Article 4.1 of IHT

<sup>291</sup> Article 4.2 of IHT

<sup>292</sup> Article 28, Article 22.4 of IHT

<sup>293</sup> Article 9.2, Article 10.9, Article 11.7 of IHT

## Trial of Saddam Hussein

Saddam Hussein's government was infamous for systematic killing of political dissidents. It is estimated that between 1968 and 2003, Iraqi government was responsible for the disappearances of 500,000 Iraqis<sup>294</sup>.

The first case in front of the tribunal was Dujali case, where Saddam and other members of his regime were accused of killing 148 Shias in Dujali in 1982. Among the much-criticized Saddam trial were its legitimacy, fair trial, and capital punishment and execution issues.

The legitimacy of the previous IST was harshly criticized by Bassiouni, a leading expert in the field on international criminal law. Mentioning the CPA's illegal invasion of Iraq he quoted

*No norms or precedents exist in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal*<sup>295</sup>.

He predicted that as soon as the tribunal is repromulgated by a national legislative authority the legitimacy problem might be solved. It can be argued that the IHT is indeed promulgated by the elected national assembly, thus perfectly legitimate in the legal sense. This seems to be problematic as the election of the national assembly was administered during a period dominated by the CPA and the occupation. During its Appellate Chamber opinion, the IHT tried to answer the question of legitimacy as put forth by the accused by

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<sup>294</sup> Bassiouni, Cornell p 330

<sup>295</sup> M Cherif Bassiouni, *Post Conflict Justice in Iraq: An appraisal of the Iraqi Special Tribunal* 38 Cornell Int'l. L.J 359 (2005)

pointing out that this court existed as a step taken by the elected government whom 78% of Iraqi population supported in the election<sup>296</sup>. Yet, the tribunal as one of the initiatives of the transitional government is most likely to always have the legitimacy stigma with it.

Apart from the execution of the death penalty, it was criticized from two different aspects. First, the retention of death penalty contradicting a well-established rule of international law is questionable. It has been mentioned that despite CPA's dissatisfaction with the move, the Governing Council and later on the Interim administration insisted on retaining the capital punishment consistent with the existing penal code of 1969 in Iraq. Tom parker also argued the decision as a prerogative of the sovereign. Though it is tempting to believe in the superiority of the sovereign, this argument can not be given weight as it would justify all the human rights advocated by international law states avoid in the name of sovereignty<sup>297</sup>.

Second, according to a view the death penalty was carried out in violation of the Iraqi code of criminal procedure, which allows additional 30 days to the convicted after the first appeal to request to correct errors in the judgment<sup>298</sup>. In a rebuttal, Professor Scharf pointed out that provision of the tribunal requiring execution within 30 days of the

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<sup>296</sup> Appellate Chamber Opinion of IHT, December 26 2006

<sup>297</sup> For example states do not ratify ICCPR, CEDAW etc.

<sup>298</sup> Professor Kevin Jon Heller argues that according to Paragraph 266 of the Iraqi Code of Criminal Procedure "the convicted person... may request the correction of a legal error" in the decision issued by the Court of Cassation, provided the request is submitted within 30 days, counted from the date a convicted, imprisoned or detained person is notified of the Court of Cassation decision" which means after the Appeals Chamber rejected Saddam's plea, he had another thirty days to ask the court to correct its legal errors. As Rule 66 of the IHT Rules of Evidence and Procedure explicitly requires the judgment to be in accordance with the Code of Criminal Procedure, executing Saddam before the lapse of thirty days violated the IHT procedure. For more on his argument see Grotian Moment Blog , Dujali Issue #46 @ <http://law.case.edu/saddamtrial/>

Appeals chamber decision prevailed over any domestic law as it was a special court independent of the domestic court system<sup>299</sup>.

Another criticism of the court draws on the sovereignty issue again. The visible involvement of the CPA authorities and US officials afterwards met with the argument that the tribunal could not act without their influence. Bassiouni argues that the visible role of the US was due to the fact that experts from US DOJ, who went in March 2004 to gather evidence to be used in the trial and to train the judges and prosecutors of the tribunal, did not have adequate knowledge of Iraqi legal system let alone the legal culture of the region<sup>300</sup>. Whatever the reason may have been, the US involvement continued till the end of the trial damaging the notion of independence of the court.

Besides few international legal experts, Human rights organizations kept a close watch on the Dujali trial. Fierce critic of the invasion of Iraq, these entities have sought greater UN role in prosecuting Saddam Hussein or at least a court independent of US influence<sup>301</sup>. Human Rights Watch reported that the US neither follow a transparent process of consulting Iraqis nor assess Iraqi attitudes about justice and accountability<sup>302</sup>. Multiple requests from HRW and other human rights organization to comment on the draft were turned down. In a report titled 'Iraq: Dujali Trial Fundamentally Flawed'

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<sup>299</sup> Professor Michael P. Scharf further mentioned, "This was an important approach as the IHT Statute was written to import the rights enshrined in the International Covenant on Civil and Political Rights, and there were many provisions of the Iraqi Criminal Procedural Law of 1971 that were not consistent with those rights. The drafters thus intended the provisions of the IHT Statute to control." See Grotian Moment Blog , Dujali Issue #46 @ <http://law.case.edu/saddamtrial/>

<sup>300</sup> Bassiouni p 346

<sup>301</sup> Two of the most influential NGO's worldwide Amnesty International and Human Rights Watch (HRW)

<sup>302</sup> The Former Iraqi Government on Trial, A Human Rights Watch briefing paper, October 16, 2005 retrieved from <http://hrw.org/backgrounder/mena/iraq1005/> (Last visited April 16, 2007)

released on November 20 2006, It also argued that the trial had enough serious procedural and administrative flaws to render it unfair and requested overturning of the verdict<sup>303</sup>

Calling the trial deeply 'flawed and unfair' Amnesty International's Middle East and North Africa Director quoted

*"[Saddam Hussein's] overthrow opened the opportunity to restore the basic right [to a fair trial] and, at the same time, to ensure, fairly, accountability for the crimes of the past. It is an opportunity missed and made worse by the imposition of the death penalty"*<sup>304</sup>

Amnesty also voiced concerns about Saddam Hussein being denied right to defense attorney for the first year of the trial, assassination of three defense lawyers in the process, resignation of a judge on ground of partiality of the proceedings and overall political interference of the US with the whole process.<sup>305</sup>

The IHT promises fair trial for the accused. As a state party to the ICCPR, the notion of fair trial entails a handful of rights to Iraqis including right to an impartial tribunal and adequate time for the preparation of defense<sup>306</sup>. Media around the world has reported throughout the trial about the killings of defense lawyers, boycott of the trial by them and open proclamations of the judges about the guilt of the accused well before the

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<sup>303</sup> In the 97 page report, HRW reports procedural flaws in the trial including:

- Regular failure to disclose key evidence, including exculpatory evidence, to the defense in advance
- Violations of the defendants' basic fair trial right to confront witnesses against them
- Lapses of judicial demeanor that undermined the apparent impartiality of the presiding judge; and
- Important gaps in evidence that undermine the persuasiveness of the prosecution case, and put in doubt whether all the elements of the crimes charged were established.

View the full report @ <http://hrw.org/english/docs/2006/11/20/iraq14589.htm>

<sup>304</sup> See Amnesty International's press release on November 5 2006 'Amnesty International deplores death sentences in Saddam Hussein trial' @ <http://news.amnesty.org/index/ENGMDE140372006>

<sup>305</sup> N35

<sup>306</sup> Article 14 (1), Article 14 (3)(a)-(g)

verdict was delivered. The mode of execution further strengthened the claim of an unfair process of the Dujali trial.

Apart from the practice of the fair trial provision, in theory the tribunal met international standard for holding a fair trial<sup>307</sup>. Dujali trial had a public hearing by an independent tribunal where Saddam Hussein exercised the right to retain defense counsels and call witnesses. Saddam Hussein was found guilty after all the evidences were considered and witnesses testified to that effect and his punishment was consistent with the tribunal rules as well as the common practice of the country. The fact that Saddam Hussein was brought to trial without being arbitrarily detained or executed is a triumph for the notion of rule of law. The handling of the trial may have been unsatisfactory to human rights standards in today's civilized world but it falls short of an unfair trial.

### **Repairing the Justice system**

*"The effective reconstruction of the justice sector requires a coherent approach that places equal emphasis on all its elements: police, prosecution, judiciary, and the correctional system"*<sup>308</sup>

This comment of an expert involved in the reconstruction of East Timor and Kosovo communicates the huge responsibility that the transitional authority faced in Iraq. During political negotiations in a post conflict environment, regular criminal activities do not necessarily cease. In case of Iraq there has been a significant escalation of looting,

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<sup>307</sup> According to the UDHR(Article 10, 11), ICCPR(Article 14, 15)( and ECHR (Article 6), the basic components of fair trial include fair and public hearing in an independent tribunal, presumption of innocence, right to defense counsel etc.

<sup>308</sup> Hansjorg Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor 95 Am. J. Int'l. L (46-93) 2001 p 48

vandalizing, robbery etc. The risk of loosing valuable documents of the government or proof of abuses of the previous administration is also high. A working criminal justice system was thus a priority from any point of view.

One of the pillars of criminal justice system is policing. In the beginning of occupation, the coalition forces began policing for the courts without knowing anything about the legal system. Among their obstacles was lack of Arabic language skill, which prevented them from collecting any information from the arrested individuals<sup>309</sup>. Also the differences on the procedures made it almost impossible for the CPA to administer policing functions properly. As one of the members of Judicial Reconstruction Assistance Team (JRAT), a team created for assisting the CPA with reconstruction of criminal courts in Baghdad commented,

“As far as the criminal justice system in Iraq, in March 2003 we knew it was supposed to run according to a civil law system based upon a French model codified by the Iraqi Penal code of 1969 and that criminal procedure was pursuant to the Criminal Procedure Code of 1972. What we did not know was how these laws were in fact followed.”<sup>310</sup> To remedy many such functional problems, the CPA went about introducing changes in the system. Several political offenses were suspended together with numerous procedural changes<sup>311</sup>. Lack of expertise in few staff members were

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<sup>309</sup> Address by Captain Travis Hall given at the Georgia Journal of International and Comparative Law's conference of April 16, 2004, "From Autocracy to Democracy: The Effort to Establish Market Democracies in Iraq and Afghanistan" published in *Ga. J. Int'l & Comp. L.* 157-169 (2004-2005)

<sup>310</sup> *Id* p 159

<sup>311</sup> CPA Order 7 of 9 June 2003 suspended many political offenses as well as capital punishment while Memo no 3 amended the code of Criminal Procedure to allow rights to accused previously unavailable under Iraqi law. For example, right against self incrimination, right to remain silent, right to be represented by an attorney etc were introduced in Iraqi legal system. See CPA/ORD/9 June 2003/07 and CPA/MEM/27 June 2004/03 @ <http://www.iraqcoalition.org/regulations/index.html#Regulations>

tackled by a three-tier approach in UNTAET. Mandatory week long training prior to appointments, ongoing trainings and monitoring through an international team of experts<sup>312</sup>.

The challenges of reconstructing the judicial system of a conflict ruined country are also limitless. A similar scenario is found in testimony from East Timorese team of reconstruction

*“UNTAET staff members will never be able to forget the panorama of devastation that awaited them upon their arrival in East Timor: most public and many private buildings ruined and smoldering in the midst of what had once been towns and villages, now all but abandoned by their former inhabitants, cut off from transport and communication, and lacking a governmental superstructure.”*<sup>313</sup>

One of the first priorities of that mission was to appoint judges and prosecutors who are free from controversies. Consisting of three East Timorese and two international experts led by an East Timorese of high moral ground a Transitional Judicial Service Commission appointed candidates with necessary expertise and political acceptance among the people<sup>314</sup>. In the absence of a working broadcasting system, The UNTEAT staff dropped leaflets over the territory to invite applications from the population. The Iraqi reconstruction approach had been very different from any other similar cases involving reconstruction. The differences in-attitude may have been the result of a unclear mandate.

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<sup>312</sup> N11 p55-56

<sup>313</sup> N11 p 50

<sup>314</sup> N11 p 53

Sharing his experience as CPA senior advisor to the Iraqi Ministry of Justice John C. Williamson in his drew a comparison between the mandate under UNMIK and Iraq transitional authority<sup>315</sup>. In the case of UNMIK justice agenda, justice and police powers were reserved to the United Nations, management and control of the justice system was firmly within the capacity of the international community, much like in the UNTAET. In the Iraqi situation, the mandate was very unclear but to fill the power vacuum created by the fleeing of senior government officials, CPA exercised full control over the system rather than planned advisory role.

Under the same mandate, the TA went about introducing changes in the legal education system of Iraq.<sup>316</sup> They identified programs including improving the infrastructure of and materials in libraries, law school curriculum that has been unchanged for thirty years, and organizing conferences about recent legal subjects and fourth introducing clinical legal education. Rather than concentrating on the immediate need, CPA went about changing the basic structure again.

## **Conclusion:**

Considering the difficult environment on ground and cultural challenges faced by the TA at the beginning of its reconstruction effort, it must be hailed as a praiseworthy effort.

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<sup>315</sup> *Establishing rule of law in post conflict Iraq: Rebuilding the Justice System* @ 33 Ga. J. Int'l. & Comp. L. 229-244 (2004-2005),

<sup>316</sup> In his Article Haider Ala Hamoudi, *Toward a Rule Of Law Society in Iraq: Introducing Clinical Legal Education into Iraqi Law Schools* @ 23 Berkeley J. Int'l. L 112-136 2005 mentions that he went to Baghdad as a part of a team of educators sent by De Paul University's International Human Rights Law Institute (IHRLI) to reform and improve legal education.

Even with its shortcomings, the IHT can be considered as an important milestone for international criminal law. Though Saddam Hussein faced less than fair trial, his conviction is likely to serve as a deterrent for many abusive governments around the world. International and regional experts may have played an important role in the judicial reconstruction that was almost within the mandate. In this context I like to argue that

### **1. The Iraqi tribunal met with international criminal prosecution standard:**

A combination of international criminal law and Iraqi domestic procedure, this tribunal may serve as a model for other countries willing to deal with past violations of international humanitarian law. Involving international and regional experts may have added to the legitimacy of the court. Abandoning the provision for capital punishment and allowing longer period for appeal etc are few issues that need to be revisited. The inherent problem of legitimacy of this court is precisely captured in the words of Adel Safty,

*“(The) Iraqi Governing Council has been appointed by the occupying power; it has not been elected by the people. In this sense, it cannot claim to be competent to render justice on behalf of the people of Iraq. Therefore, the criminal tribunal set up by the Iraqi Governing Council does not meet the test of “independence and impartiality”<sup>317</sup>*

Whereas this court will have to carry the stigma even after being reestablished by the elected assembly for years to come, other countries may use the same model as prerogative of sovereign power.

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<sup>317</sup> Cross posted from Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq* 45 Va. J. Int'l. L. 493 (2004-2005)

## **2. The Trial of Saddam Hussein deviated from the goal of post conflict justice:**

According to Bassiouni, post conflict justice includes “ how the nation responds to the systematic violations of the previous repressive regime, how it deals with the regime’s victims, and how it transforms yesterday’s tragedies into lessons for tomorrow that will enhance future deterrence and prevention”<sup>318</sup>.

The motion to address the violations of Saddam government was followed by establishing a tribunal that drew from international criminal legal jurisprudence only to fall victim to partial conducts of individuals involved. It is unfortunate that despite potential to enhance social reconciliation and promote unity among Iraqi citizens, the trial of Saddam Hussein has served as an act of vengeance. Completely ignoring reparation for the victims it rather fuelled clashes between ethnic groups. Rather than address past wrongs, the trial created many of its own. Though it was a fair trial, the image of Saddam Hussein being taunted at his final moments is likely to stay in people’s mind as the legacy of the tribunal. The trial failed to satisfy victims of the crimes as there was no initiative to address reparation or reconciliation issues. It also failed to offer justice to victims of Saddam’s other cruel campaigns as he was hanged too soon without being held liable for all his atrocities.

## **3. The TA acted within and beyond its authority:**

While reconstructing the Justice system, the TA acted within its authority as it did not modify any fundamental provisions of law previously existing in the country. Though it suspended few provisions and introduced many new ones, it stayed within the recognized

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<sup>318</sup> N13 p 335

mandate. Introducing fundamental changes in the legal procedures, education and judicial accountability are moves ultimately focused on a better and independent system of judiciary.

Neutral international assistance, focused trial and most of all, waiting for a duly elected government to set up the tribunal might have resulted in a better process for holding Saddam accountable. Iraq may have been benefited from community courts or informal dispute settlement forums as they have proved to be successful in many post conflict environments<sup>319</sup>. Truth commission and other reconciliation forums for victims both before the conflict and during the TA will serve the true purpose of post conflict justice in Iraq.

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<sup>319</sup> See Jennifer Widner in *Courts and Democracy in Post conflict Transitions: A Social scientist's Perspective on the African Case* @ 95 *Am. J. Int'l. L.* 64-75 2001 for a discussion of various African cases in which the community courts played positive roles in rebuilding the society.

## **Chapter VI**

### **Transitional Authority's contribution to International Legal Developments.**

**Introduction:**

Throughout the dissertation, I have tried to identify and answer legal questions arising from the transitional authority in Iraq. In many instances, I stumbled upon a fact that could not directly be explained or justified by any existing provision. From the beginning of the invasion till the formation of an elected government experts argued over applicable legal provisions. More than once I could neither agree nor dissent from those; rather felt the need for another comprehensive rule. In this chapter, I briefly revisit the legal inquiries, list the contribution they may have made to the international legal jurisprudence and recommend development of international law to enrich future transitional phases of post conflict territories.

**Accountability for Violating *Jus Cogens*:**

After evaluating arguments both for and against the legality of use of force in Iraq, I reached a conclusion in the second chapter that the US led coalition forces' attack on Iraq was illegal and a violation of *jus cogens*. As a careful student of international law, I take into consideration the promise of maintaining international peace and security, the obligation to refrain from use of force unless mandated through a Security Council resolution or deemed necessary in conformity with the provisions of self defense. Though the UN Charter is clear on the prohibition or permitted use of force, it is quiet on the effect of a violation. The rule regarding the power of Security Council to take appropriate measure in case of a violation has always overlooked violations of its members by default. In case of the Iraq situation the Security Council was unable even to pass a resolution condemning the violation of this peremptory norm of international law let

alone suggesting any measure to hold the US and UK accountable. In contrast, Iraq's invasion of Kuwait in 1990 has met with adequate response from the Security Council. This lack of consistent practice in addressing violations of basic tenants of the UN Charter is a major flaw of international law today and needs sincere reexamination.

### **Rethinking the Security Council:**

The Security Council is the most influential body in the world. Since the formation of the UN, the five permanent members and ten members for every two year term have been entrusted with the primary responsibility of maintaining peace and security. The veto power of the permanent members has kept this council from acting in many crises situation. While the members are virtually immune from any such measure their preferences for other countries also come in the way of holding them accountable<sup>320</sup>. Besides this, the Security Council can be described as a less than democratic institution as it does not represent the world population at any manner. The permanent members reflect the reality of a post 1945 war rather than today. As democracy demands, the General Council consisting of all members of the UN should have deciding power over the Security Council. Inclusion of Latin American and African representatives may also make the Security Council more democratic than its present form. The veto power must be removed to avoid stalemate in conflict situations. In its current form, the Security Council has become a platform for justifying military actions, economic sanctions and peacekeeping operations in developing countries for violations of international norms while overlooking similar violations of the permanent members or their allies.

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<sup>320</sup> For example, due to US position in Israeli –Palestinian conflict, the Security Council has had no significant role in mitigating or resolving that conflict since 1967. For more on this see Security Council page of Global Policy Forum <http://www.globalpolicy.org/security/genesc.htm>.

Unfortunately the amendment allowing more countries membership to the Security Council and abolish the veto power, must be passed by the Council itself. Though it seems very unlikely at this point, for an effective UN this change must take place within.

### **Introducing framework for Post Conflict Transitional Governance:**

As I discussed in the first chapter, the UN has been involved in administering post conflict territories very recently. The increasing numbers of internal conflicts together with UN interventions in many cases demand a comprehensive framework by which governance of the post conflict territories can be carried out. The UN already has representatives, legal and operational experts from different parts of the world who may be appointed to this effect. From the Iraqi case, it is apparent that regional expertise is especially helpful during nation building; the CPA and its reconstruction effort have suffered because of the lack of language and cultural skills among the common people of Iraq. The UN with its multinational experts can remove this flaw without much difficulty. Another important matter in this regard is the acceptability of the UN among nations which may act as a catalyst for restoring law and order situation.

There are arguments suggesting the occupation law to become part of transitional period regulations and removing obstacles to make it more flexible in terms of introducing new laws<sup>321</sup>. In this argument the commentator ignores the fact that UN Resolutions and laws meant for violating parties do not carry the same weight. Whereas UN presence is welcomed around the world, an occupying force struggles to justify its authority in the occupied country. Calling UN intervention, which may very well be a

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<sup>321</sup> Breit H McGurk, *Revisiting the Law of Nation Building: Iraq in Transition* 45 Va. J. Int'l. L. 2004-2005 (451-463)

result of popular demand similar as occupation undermines the sovereign consent principle. Rather the trusteeship council of the UN seems to be a better institution to take over this new phenomenon. Its experience of governing previous colonies until their independence armed with regional and international experts, this suspended body may be turned into the new transitional authority Council. Through this Council the UN will be able to provide post conflict governance and security to affected regions while evaluating their needs on a case by case basis. Up-to-date information on almost all sectors of country and available resources necessary for governance put the UN on an advantageous position for nation building responsibilities.

#### **Revisiting Post conflict justice mechanisms:**

Through the establishment of the tribunal, the transitional authority in Iraq has contributed significantly in the development of international criminal jurisprudence for post conflict territories. The Iraqi High Tribunal (IHT) tried individuals for international crimes following national criminal procedures. Despite the inclusion of adequate fair trial guarantees, this tribunal has been criticized for retention of death penalty and biased trial. The combination of IHT structure, ICTY and ICTR model of victims and reparation unit and ICC's gender sensitivity will offer satisfying justice for victims of conflict. The most important aspect of such a system is that it does not require submitting to foreign or international jurisdiction; rather remains within the sovereign power. It also serves as an example of holding governments or individuals liable for past atrocities since such a

court, set up on ad hoc basis will not limit responsibility to any specific period like the ICC<sup>322</sup>.

### **Making women matter:**

Until recently international legal presence hardly included women in a decision making capacity. Within the UN, there were no women judges in the ICJ, only a few women were chosen as the highest executives of UN organs and fewer women joined as the representatives of their countries. Similar situation exists in the leadership of countries and in their parliaments. This scenario began to change with the passage of the statute of ICC, where specific measures have been suggested to include women in all the positions of the Court. In 2006 The General Assembly elected its first woman President<sup>323</sup> after 1969 and the ICJ appointed its first female judge who went on to become President of the Court<sup>324</sup>. The Security Council has mandated countries to include women in decision making in all aspect of peace processes<sup>325</sup>. In case of Iraq conflict, women have largely been invisible in the decision making with the exception of US Secretary of State Condoleezza Rice. The TAL and permanent constitution drafted during the transitional authority did not warrant gender perspective in decision making other than providing safeguard against discrimination on the basis of sex. International law has long ignored the question of women's political participation nationally and internationally. Despite passing of the 1325 resolution, states' did not pay much attention to it. The lack of

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<sup>322</sup> The ICC currently considers cases that happened on or after July 1 2002.

<sup>323</sup> H.E. Sheikha Haya Rashed Al Khalifa was elected President of the sixty-first session of the General Assembly on 8 June 2006

<sup>324</sup> Rosalyn Higgins of the UK has been a judge of the ICJ since 1995 and was elected President in 2006

<sup>325</sup> SC/RES/1325 (2000) calls for inclusion of women in all decision making levels in relation to prevention, resolution and management of conflict, protection of and respect for the human rights of women and girls in conflict situations, gender training of all peace keeping personnel , formation of gender units and inclusion of gender perspective for all post conflict reconstruction.

monitoring or reporting mechanism and timetable to present progress made the resolution more like a declaration without compulsory responsibility. The UN must take this issue seriously and provide the world with better measures to safeguard women's interest and secure their political participation at all levels of the government.

## **Conclusion**

The events in Iraq opened a door for discussion on the effectiveness of international law. Experts and students of international law are taking this opportunity to study its strengths and weaknesses resulting in recommendations to improve the body of law. The unfortunate subject of this case study, however, will have to live with the consequences of the experiment. The unplanned nation building exercise is taking its toll on Iraqi citizens, a complete account of which is still to unfold. The results of this invasion and events afterwards will be felt in the country and in the region for years, if not decades to come. The recent launch of the International Compact for Iraq<sup>326</sup> as a joint initiative of the Iraqi government and the UN may help to stabilize the country. The international community must come up with a political solution for Iraq, not just promises of reconstruction. The lesson from this case is simple; there is no alternative for international cooperation in today's world. To make that effective, international law must provide the basic framework for all legal actions.

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<sup>326</sup> UN Sponsored International Compact for Iraq is a five year national plan being launched in May 2007 where the SC permanent members, the UN, G8, OIC, The Arab League, Egypt, Bahrain and neighboring states including Iran and Syria come together to help Iraq consolidate peace, sound governance and economic reconstruction.

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