

INTERNATIONAL LAW IN
DOMESTIC COURTS:
RULE OF LAW REFORM IN
POST-CONFLICT STATES

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INTERNATIONAL LAW AND IRAQI COURTS

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1. INTRODUCTION - PROMISING CONDITIONS AND UNFULFILLED PROMISE

In a book that contains so many laudable chapters detailing the rising importance of international law applied directly in domestic courts, Iraq stands as a stark anomaly. Following the departure of the US and UK administered Coalition Provisional Authority (CPA) and the restoration of Iraqi sovereignty to a democratically elected government, Iraq's authorities seem to be at best equivocal and at worst somewhat hostile to the notion that Iraq's domestic courts should play a role in ensuring that Iraq abide by its international legal commitments, in particular as concerns the matters of human rights and criminal law that attract much scholarly attention.

This is rather surprising for two reasons. First of all, Iraq is not a nation that is wary of international commitments. This was very much the case historically, and even more so following the fall of the Saddam regime. Prior to 2003, Iraq was a signatory to most major human rights treaties, among them the Genocide Convention (acceded to in 1959), the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both ratified by Law 193 of 1970), the International Convention on the Elimination of All Forms of Racial Discrimination (ratified 1970), the International Convention on the Elimination of All Forms of Discrimination Against Women (ratified 1986), and the Convention on the Rights of the Child (ratified 1994).

If anything, the commitment to international law as a formal matter has grown more robust. Even a cursory glance at Iraq's legislative achievements over the past legislative term, running from 2006 to 2010, demonstrates a decided commitment to enter into international obligations and treaties of various sorts rather than, as regrettably happens all too often in the United States, to avoid

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them on the grounds that they are some sort of pernicious 'entanglement'.¹ In 2008 and 2009 alone, for example, Iraq's Council of Representatives, which serves as its legislature,² ratified or acceded to twenty-two separate international treaties or covenants, a number that I surmise would compare well with ratification rates in nearly any other nation over the same time period. In addition, Iraqi political leaders routinely speak proudly of their commitment to adhere to international law, eschewing the histrionic antics of some of the more colourful Middle Eastern leaders who prefer to rail at the United Nations as being some sort of imperialist project.

Moreover, the call to adherence to international law and international relations is very often grounded at least in part in the desire to adhere to broader global commitments and understandings respecting human rights in particular. Thus, in his address to the General Assembly in 2008, Iraqi President Jalal Talabani called for the assistance of 'countries around the world' in building Iraq into a 'modern nation which ensures justice, equality, the strengthening of the rule of law, the respect for human rights, and women's participation in all spheres of life.'³ Later in the same speech President Talabani speaks with pride of the number of international legal instruments to which Iraq was recently signatory, as well as an unspecified 'international compact to achieve economic growth and social justice in partnership with the international community.' These are not sentiments which would suggest any hostility to the conception of international law as domestic constraint, particularly inasmuch as human rights, women's rights, and even social justice are concerned.

Secondly, and equally importantly, Iraq's judiciary is robust and increasingly outspoken, willing to address core legal questions that constrain executive power. For example, in June of 2010, the Federal Supreme Court certified electoral results that reflected a parliamentary victory for the rival of the sitting Prime

¹ In fact, Iraq has even approved treaties that the United States has opposed under both Democratic and Republican Administrations. The first treaty approved by the previous Council of Representatives, in 2006, was the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (1997). To much international criticism, the United States did not sign the treaty under President Clinton when it was negotiated, and has not signed it to date, citing security guarantees to South Korea, and the need for mines to repel a North Korean invasion, as the basis for its refusal. S. Safrin, *The Unexceptionalism of U.S. Exceptionalism*, 41 *Vanderbilt Journal of Transnational Law* 1307-54 (2008) (arguing that the United States was not acting in an 'exceptional' fashion by refusing to sign the treaty given its existing international commitments on the Korean peninsula).

² Under Article 47 of the Iraqi Constitution, Iraq's legislative power is divided into two bodies – the Council of Representatives and the Federation Council. However, under Article 65, the Federation Council is to be created by legislation enacted by the Council of Representatives, and no such legislation has been enacted. This leaves the Council of Representatives as the sole legislative body for the time being.

³ Statement of H.E. Mr. Jalal Talabani, President of the Republic of Iraq, at the 63rd Session of the General Assembly Hall (25 September 2008), available at www.un.org/en/ga/63/generaldebate/pdf/iraq_en.pdf.

Minister,⁴ even as the Prime Minister had been contesting the results for weeks prior to this.⁵ The Prime Minister may have been disappointed in the results, but he made no public objection to the certification.

In a separate ruling, the Court declared that a key ally of the Prime Minister, the Provincial Governor of Salahuddin province, was validly removed after a vote of its Provincial Council, the Prime Minister's opposition to this decision notwithstanding.⁶ The most remarkable aspect of this episode was the Prime Minister's reaction to the Court ruling, and to subsequent and previous events related thereto. He refused to acknowledge the Provincial Council's vote dismissing the Provincial Governor initially, yielded only after the Court issued its decision, and then proceeded to take over the Governor's premises by military force, accepting the Court's judgment respecting dismissal, yet not allowing a replacement selected by the Provincial Council itself to be seated who did not meet with his approval.⁷ Stated differently, *everything that the Prime Minister did with respect to this episode seemed tainted with illegality, some of it rather blatant, except adherence to the order of the Court to remove his political ally*. That the Prime Minister finds it unobjectionable to occupy a local government building by force against the wishes of the local government and its Provincial Council, and yet still yields to Court orders that order the dismissal of his ally, speaks volumes respecting the legitimacy and authority of the Court. The Prime Minister thought nothing of dismissing the demands of the Provincial Council,

⁴ A. Shadid, *Iraqi Court Ratifies Parliamentary Election Results*, *New York Times* A7 (2 June 2010).

⁵ T. Williams and Z. Thaker, *Iraq's Premier, Trailing His Main Rival, Endorses a Recount of the Vote*, *New York Times* A4 (22 March 2010). Admittedly, and as others have pointed out, the Court in a separate ruling indicated that the electoral list that earned the most candidates (in this case, that of the Prime Minister's rival) was not necessarily the one that would be asked to form a government first, as one could imagine a post-election coalition of two electoral lists whose numbers combined exceed those of the winning list. See *Iraq Federal Supreme Court, Decision 25 of 2010*, available (in Arabic) at www.iraqja.iq/ifm.php?recordID=102. This decision is not unprecedented, as precisely the same conclusion was reached in Israel after the previous elections, where Netanyahu, a second place finisher, was charged with the task of government formation when it was clear that his bloc was able to secure more parliamentary allies than the first place finisher, Tzipi Livni. I. Kershner, *Netanyahu to Form New Israel Government*, *New York Times* A7 (21 February 2009).

More relevant for our purposes, a court captive to the interests of a sitting executive would not confirm electoral results that declare the sitting Prime Minister a second place finisher and then suggest that he might be able to retain his position and form a government if he finds sufficient numbers of allies among other electoral contenders with representatives. Rather, if the sole basis of decision-making was to keep the Prime Minister in his current position, the court rulings would be precisely reversed – the Prime Minister's party would be declared the winner due to some sort of alleged electoral fraud and the court would rule that by necessity his party would have to be given the first opportunity to form the government. That the Court did not adopt such an approach does suggest its willingness to separate itself from the Prime Minister in significant ways.

⁶ *Iraq Federal Supreme Court Decision No. 58 of 2009*.

⁷ S.L. Myers and A. Shadid, *Leader Faulted on Using Army in Iraqi Politics*, *New York Times* A1 (11 February 2011).

even when issued pursuant to constitutional authority, yet was willing to adhere to Court orders that contravened his interests.

This is not to say that judicial institutions in Iraq have *never* had their independence impugned in the post Saddam era – the disqualifications of hundreds of candidates prior to the March 2010 elections, and the approval thereof by the Court, are probably the most egregious example of executive interference. After a commission disqualified nearly 500 potential candidates for alleged ties to the Ba'ath, and the matter was brought before the judiciary for review, the relevant court set aside the ruling. Reasoning that it could not possibly review in a period of weeks before a pending election the evidence for so many putative candidates, it held that the more sensible course was to let all of them stand for office, where a vast majority seemed destined to lose in an election involving 7,500 candidates seeking 325 seats, and the courts could then revisit the matter after the elections. Following an outcry, demonstrations, and even a meeting between political leaders (and most prominently the Prime Minister) and the Chief Justice, the court reversed itself and agreed to review the matter. In the end, only 26 candidates were reinstated.⁸ Clearly, this was not a shining example of judicial independence, and cannot be defended as such. My point is only that, Iraq's own dysfunctions aside, over the process of dizzying transformation from totalitarian dictatorship to messy and imperfect democratic rule, the Federal Supreme Court, and supporting judicial institutions, have risen in prestige, importance, and legitimacy, such that their rulings are routinely followed by political actors even when contrary to their interests.

There is thus what appears to be a promising combination for the rise of international law as a source of law within domestic courts. On the one hand, Iraq is a nation favourably disposed to integrating itself further into the international community, and expanding its level of international commitments, particularly with respect to the matters of economic development, human rights, and social justice. On the other, it enjoys a largely independent judiciary rising in prominence. Given this, one would expect some level of encouragement of national courts to engage international law, and some willingness on the part of the courts to do just that. That nothing of the sort has happened, that in fact *both* political actors are not interested in widespread use of international law in domestic courts, *and* that the courts themselves seem quite reluctant to use it in any event, is worthy of some consideration.

I have divided the balance of this chapter, designed to explain this odd result, into three parts. The first discusses the use of international law historically within Iraqi courts. The second describes an interim phase, between the fall of the Saddam regime and the ratification of the current Constitution, where promising indications could be located that appeared to give recognition to a

⁸ S.L. Myers, Few Barred Candidates Are Restored to the Iraqi Ballot, *New York Times* A19 (14 February 2010).

new legal order wherein international law would play a more important role in domestic judicial practice, and the third part describes the manner in which that practice largely receded with the ratification of the current Constitution, rendering the position of international law, as a source of law in domestic courts, of marginal importance at best.

2. TRADITIONAL APPROACHES

At a formal level, there is no reason that the Iraqi judiciary could not use international law, or perhaps better stated, some number of sources within international law, as a basis for decision-making in the proper context. All of Iraq's treaties, after having been ratified, are given the force of law by being issued as 'laws' and published in full in the Official Gazette – copied, essentially, into a domestic act. Thus, for example, both the ICCPR and the ICESCR appear as Law 193 of 1970, as any other law would, and appear as if they had been enacted as an ordinary domestic law.⁹ Nothing would seem to prevent a judge from accessing and applying this law as she would any other. Such an approach could not be used for customary international law admittedly (nor for any treaty that had not been approved by the legislature or for any other reason had not been republished in the Official Gazette as domestic law), but the reference of the judge to a treaty which appears as a law in the Official Gazette *should be* no more and no less controversial than reference to any other law. Importantly, this was as true, as a formal matter, in the era of Saddam Hussein as it is now.

Moving from *formal* judicial empowerment to the *actual* application of international law in a domestic setting, however, has proven more difficult. It is starkly in contrast to Iraqi judicial *culture and practice* as it has developed over the past several decades. There are a number of reasons for this. First of all, there is the fact that Iraqi judges would be, during the Saddam era in particular, somewhat reticent to refer to international legal instruments that might offer additional procedural protections beyond those set forth in the relevant domestic codes. Even the idea of *domestic, constitutional* constraint on enacted law was highly disfavoured at the time, as current Minister of Justice Dara Nuruddin discovered when during the Ba'ath era, when he was a judge, he declared a particular piece of legislation unconstitutional. After refusing to reconsider his ruling, Judge Dara spent two years in prison for his offense.¹⁰

Nevertheless, this ground for judicial reluctance, while quite significant, can hardly serve as adequate grounds in all instances, in particular in those cases in which the regime had no obvious interest in the outcome. The reality is that

⁹ The Official Gazette can be accessed via the website of the Global Justice Project Iraq, www.gjpi.org/2009/02/02/official-gazette-of-iraq/ (last accessed 28 January 2011).

¹⁰ A Look at the New Iraqi Leaders, Baltimore Sun (16 July 2003).

political prisoners and other real or perceived opponents of the regime were never processed through the ordinary court system – to the extent that any courts were involved, they were part of a separate system known as the Revolutionary Courts, which were organized specifically to deal with security threats against the state.¹¹ The Saddam regime did not generally interfere in how the courts might deal with an ordinary defendant accused of an ordinary crime. As a result, the real protections afforded in the Criminal Procedure Code during this era, including a right to silence, the prohibition against the use of coercive methods to obtain a confession, and a right to be questioned within 24 hours of appearing before a judge, could be and were invoked, albeit intermittently in the opinions of some.¹² If this was the case for the rights contained in the Criminal Procedure Code, it is difficult to see why the regime would object, again with respect to these ordinary cases, to the application of rights contained in international law. International law provides more by way of protection, but the law *already* constrains particular police actions, and thus reference to international law as a *further constraint* might well be disfavoured by the regime, though it is not entirely clear by how much.

In addition, however, there was the broader resistance of Iraqi judges to look beyond a procedural code that they tended to view (in keeping with popular civilian mythology on the subject) as comprehensive, determinative, and complete. This is not to say that judges necessarily viewed any amendment to the Code as unthinkable or even unnecessary, but rather to the extent that some level of legal reform was necessary, it needed to be undertaken, in their view, in the instrument itself rather than through the extraneous use of material beyond the provisions of the Code. Certainly this is the view that immediately became apparent to me in my discussions with judges who were tasked by the Higher Judicial Council to work with international experts to produce suggested amendments to the Criminal Procedure Code.¹³

In any event, whether on account of either of these two factors, or any other factor that one might consider, the reluctance to employ international law was a very strong one, and in fact continues in force in large part to this day. Iraqi judges have never at any significant level relied upon international commitments to inform, much less supplant, relevant provisions of domestic law.¹⁴ Iraqi judges

¹¹ M. Cherif Bassiouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell International Law Journal 360 n 170 (2005).

¹² Law of Criminal Procedure of Iraq, No. 23 of 1971 ('Criminal Procedure Code'), at arts. 123, 127, 179.

¹³ This particular project was undertaken by the University of Utah S.J. Quinney School of Law in cooperation with the Iraq Higher Judicial Council from the spring of 2009 through March of 2010. The project was led on the international side by Andrew Allen and Sara Abdullah. I served as Deputy Chief of Party for the broader program organized by the S.J. Quinney School of Law and in that capacity had some limited interactions with the committee involved in developing the suggested amendments.

¹⁴ Naturally it would be impossible to state with any degree of certainty that domestic courts *never* applied a right contained in an international legal instrument to which Iraq is signatory

do not consider it their role to disregard the Code in favour of the ICCPR. In fact in my experience, even those judges who would prefer to see respect for the ICCPR's more protective positions in Iraqi courts frame their demands in the form of an amendment to the Code, not independent judicial recognition of the ICCPR.

In light of this background, in order to render meaningful the applicability of international law in domestic courts, forceful changes in both the law and the broader judicial culture would prove to be necessary. As is shown in the next two sections, an effort to exact such changes was made in the interim period, but ultimately abandoned by the time that the final constitution came to be negotiated and ratified.

3. THE CPA AND INTERNATIONAL LAW

The CPA administered Iraq from just after the fall of the Saddam regime, in April of 2003, until the end of June of 2004, when it turned over sovereignty to a transitional Iraqi government constituted through an interim constitution known as the Transitional Administrative Law (TAL). The TAL then created a mechanism through which a Transitional National Assembly would be elected, and would draft a constitution submitted for popular referendum.¹⁵

The CPA has been much criticized for being largely distant from the population it claimed to administer, and there is certainly much truth to this.¹⁶ Yet for all of the criticisms leveled against the CPA during the period that it ruled Iraq as the occupation authority, its own efforts, however fitful and in vain, to incorporate greater human rights protections guaranteed in international law into Iraqi judicial proceedings can scarcely be doubted. This was achieved in various ways. One of these was the enactment of CPA orders and memoranda which amended Iraqi law in various ways, some of dubious legality,¹⁷ and which incorporated the substance of international legal protections into existing Iraqi

in a domestic setting. However, based on my own extensive observations of Iraqi courts, as well as my many encounters and interviews with Iraqi criminal judges, I can say with some level of certainty that any such references are, to the extent they exist at all, exceedingly rare.

¹⁵ Transitional Administrative Law of Iraq (2004), Art. 2(B) (TAL).

¹⁶ See generally R. Chandrasekaran, *Imperial Life in the Emerald City* (Knopf: New York, 2007).

¹⁷ The CPA claimed that it had international legal authority to engage in the type of lawmaking that it did on the basis of Security Council Resolution 1483, which among other things called upon the CPA to 'promote the welfare of the Iraqi people through effective administration' of Iraq. SC Resolution 1483, para. 4 (S/RES/1483) (22 May 2003). Most legal experts have dismissed this reasoning as dubious, given that the next paragraph of the same Security Council Resolution requires conformity with the Hague Regulations IV, which require an occupying force to respect existing law 'unless absolutely prevented'. Hague Convention IV, 18 October 1907, 36 Stat. 2277, TS No. 539, art. 43. See also H.A. Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post Invasion Iraq*, 16

law. Hence, to take the simplest example, CPA Memorandum 3 amended the Criminal Procedure Code by granting to an accused the right to counsel during questioning (including paid counsel if the accused was indigent).¹⁸ This is not the use of international law in domestic proceedings so much as the conforming of domestic law to the substance of existing obligations as set forth in international instruments. It is worthy of much consideration, but unfortunately beyond the scope of this chapter. Fair treatment of the complex and nuanced relationship of Iraqi *domestic* law to evolving human rights norms requires far more attention than I am able to devote in these few pages.

The other means to ensure broader judicial recognition of international legal obligations, and the more significant one for our purposes, arose in the TAL. The TAL was drafted by a group of Iraqi leaders that the CPA had formed to advise it, known as the Iraq Governing Council, and approved by the CPA just prior to the transfer of sovereignty back to Iraq. Article 23 of the TAL marks a significant and in many ways remarkable departure from traditional Iraqi positions respecting the use of international law in domestic proceedings. It reads in relevant part:

The enumeration of the foregoing rights must not be interpreted to mean that they are the only rights enjoyed by the Iraqi people. They enjoy all the rights that befit a free people possessed of their human dignity, *including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations* (emphasis supplied).¹⁹

In some way, this appears to extend even beyond international legal obligations, strictly defined. That is to say, the rights are those 'that befit a free people possessed of their human dignity', which *include* international obligations, but do not seem to be limited by them. Moreover, the rights to which Iraq is obligated to adhere in addition to those that befit a free people may be divided into four categories:

1. Those 'stipulated in international treaties and agreements';
2. Those contained in *other* instruments of international law to which Iraq has acceded;
3. Those otherwise deemed binding upon it;
4. Those contained in the law of nations.

Transnational Law and Contemporary Problems 523, 528 n 22 and references cited therein respecting legality of CPA activities.

¹⁸ CPA Memorandum 3, Section 4(c) (2003).

¹⁹ Article 23 TAL, *supra* note 15.

Assuming that category 1 is not entirely subsumed by category 2 would mean that the rights contained in 'international treaties and agreements' would be beyond those in treaties *that Iraq had signed*. Assuming that category 1 is not entirely subsumed by category 3 would mean that such rights were also those that might otherwise be deemed binding on Iraq through custom or otherwise. Category 4 appears to be some sort of 'catch-all', though precisely what it might include that category 3 does not is unclear.

In any event, taken together, Iraqi judges were effectively called upon to add, to whatever rights might be contained in Iraqi domestic law, the following material:

1. Those contained in treaties Iraq had signed;
2. Those contained in treaties Iraq had not signed;
3. Customary international law;
4. Those that 'befit a free people possessed of their human dignity.'

The breadth is astonishing for a few reasons. First of all, it is baffling how the CPA, whose personnel in some cases were specifically vetted on the basis of *their opposition in the American context to the type of progressive judicial policymaking which such language specifically invites*,²⁰ could have any role in the promulgation of a clause of this sort. This is to say nothing of the fact that senior CPA personnel were themselves openly contemptuous of international law at times, in some ways in keeping with broad US exceptionalism, in this context of a more pathological variety.²¹ The only sensible explanation appears to be that the CPA placed much more faith in the secular Iraqi judiciary than the more generally Islamist Iraqi political classes who were likely to win an election. Allowing the judiciary to create rights and impose obligations in the Iraqi context may have therefore seemed appealing to the CPA personnel, even if they might have decried it as fundamentally undemocratic if attempted in the American context.

Unfortunately, however, the breadth of Article 23 seems to take almost no account of Iraq's legal history, where international law was given almost no recognition in domestic proceedings at all. To alter this would require something

²⁰ Specifically, two CPA personnel were asked how they felt about the American case of *Roe v. Wade*, the US Supreme Court decision constitutionalizing the right to abortion, as part of their interview process, presumably to ensure their adherence to Republican Party orthodoxy opposing that decision. Chandrasekaran, *supra* note 16, p. 91. The common criticism of *Roe* from American conservatives – that it extends the conception of constitutional rights well beyond those specifically enumerated in the US Constitution – would be obliterated under a theory pursuant to which judges were asked to recognize any and all rights 'befitting a free people possessed of their human dignity.'

²¹ Chandrasekaran, *supra* note 16, p. 142–43 (describing Thomas Foley, in charge of private sector development for the CPA, as indicating that he did not care about international law, and that his sole commitment was to fulfill the US President's directive to privatize Iraqi businesses).

of a cultural revolution within the judiciary, one that would be more likely to be successful the less it required by way of substantive change. Encouraging judges to apply treaty law to the extent enacted in Iraq and published in the Official Gazette would have been difficult, but potentially sustainable. Encouraging them to use customary international law as well would have been yet more difficult, and of questionable long term viability. However, a judge reluctant to use as the basis for decision-making source material beyond that presented in a domestic code is almost surely not going to readily incorporate rights 'befitting a free people' or rights contained in international agreements that Iraq has not signed, *to the potential derogation of domestic law*. Even to hope for the gradual realization of such a result, in a document enacted as the CPA was ceding authority to the Iraqis, seems fanciful and naïve.

Nevertheless, upon the departure of the CPA in June of 2004,²² such was the applicable law. I am not aware of any instance where a judge thought to apply it, though it is possible Article 23 was used somewhere, by someone, at some time. To the extent called upon, however, the references were never significant enough to merit public attention. In any event, the real issue would not be the use of any particular provision of an interim document which was only applicable law for a period only slightly exceeding fifteen months.²³ Rather, the matter would depend on the extent to which the *final* constitution, drafted not by handpicked Iraqi advisors but rather an elected National Assembly, and approved not by the CPA but by the Iraqi people in a general referendum, would adopt the formulation of the TAL respecting rights set forth in international law. This is the subject of the next and final section of this chapter.

4. THE FINAL CONSTITUTION AND THE REJECTION OF INTERNATIONAL LAW IN DOMESTIC PROCEEDINGS

I have indicated that one reason that the CPA may have been willing to countenance a rather broad conception of judicial policymaking as concerns the establishment of fundamental rights, with such a liberal reference to international law, is because it trusted the secular judiciary more than it did the Islamist politicians who were evidently poised to win the first election that Iraq held, in January of 2005.²⁴ Whether or not this is the case, it seems abundantly clear that

²² While the TAL was drafted in March of 2004, it did not take effect according to its terms until the departure of the CPA, in June of 2004. See Iraq Constitutions, Global Justice Project (Iraq), www.gjpi.org/library/primary/iraqi-constitution/ (last visited 25 October 2010).

²³ The final Iraqi Constitution was approved by a popular referendum on 15 October 2005.

²⁴ H.A. Hamoudi, *Identitarian Violence and Identitarian Politics: Elections and Governance in Iraq*, 51 *Harvard International Law Journal* (Online) 86 (2010).

the Islamic parties, who won these elections in the numbers that were expected,²⁵ were deeply and fundamentally distrustful of international law as a source of rights, particularly in the broadly articulated form set forth in the TAL. The matter was viewed as a means by a black robed elite to thwart the will and desire of the people to organize society by whatever religious or moral principles they deemed appropriate. Ironically, opponents of *Roe v. Wade* in the American context often adopt the same position, and it was *Roe v. Wade* itself that was a litmus test for at least some members of the CPA to obtain their positions.²⁶

In the Iraqi context, the religious or moral principles being referred to necessarily included the *shari'a*, that vast body of norms and rules developed by jurists from Muslim sacred text, some of which, at least as traditionally understood, does conflict with contemporary understandings of human rights. That international law was at least potentially hostile to *shari'a*, and that judges as a result must not be permitted to have recourse to it to make rulings in derogation of *shari'a*, was a perception that would prove to be of fundamental importance.

As a result, when the Islamist dominated interim National Assembly came to convene, and select a Constitutional Committee, and when that Constitutional Committee came to have its meetings to draft the final constitution, it was abundantly clear from the minutes of the meetings (to which I have been given access by the former chair of the Committee as part of ongoing research for a book respecting the drafting of the Constitution)²⁷ that nothing of the breadth of Article 23 of the TAL would be seriously contemplated. The Shi'i Islamic parties in particular voiced such serious and grave doubts that more secular forces on the Committee, most notably the Kurdish contingent, did not even try to revive Article 23 as originally formulated. Even a proposed compromise formulation that repeated the language of Article 23 in large part but limited its applicability to circumstances where the provisions did not contravene the principles of Islam was rejected, by both sides. The Islamists were concerned about the scope of the legal obligations that Article 23 might entail, and the Kurds were concerned that too many legal obligations would be curtailed by the *shari'a* proviso.

The discussion quickly narrowed to focus instead on *existing international legal commitments* that Iraq had already undertaken. Here, the secularist argument carried more force. The Islamist objection, as we have seen, had been

²⁵ A. Arato, *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq 2008* (New York: Columbia University Press, 2009) (showing election results).

²⁶ Chandrasekaran, *supra* note 16, p. 97.

²⁷ Specifically, I was permitted to review the documents *in the offices at the Council of Representatives* at my leisure, to take any notes I wished, but not to make any copies of the documents themselves. I spent weeks in the offices taking notes so as to comply both with the imposed limitations on access and with my own scholarly need to ensure proper attribution. I should also note in full disclosure that the former chair of the Constitutional Committee is my paternal uncle.

that Article 23 could very well reference rights and obligations that run counter to the settled matters (*thawabit*) of the *shari'a*. In meeting minutes, Islamist Jalaluddin Al-Saghir listed three examples – non-marital sex, homosexuality, and usury. Surely, however, the same concern could not apply, the secular forces countered, as for treaties to which Iraq was *already* signatory, and which it had *already* ratified. These are existing legal obligations, after all, and it could not be reasonably said that they include provisions unknown to the drafters and repugnant to the *shari'a*.

These arguments, supported by the US Embassy as well, turned out to be strong enough to result in inclusion of an article in a relatively late draft of the constitution that read largely as follows:

To each individual is the right to enjoy all of the freedoms contained in the conventions and relevant international treaties respecting human rights which Iraq has signed.²⁸

This is admittedly narrower than the TAL's Article 23, and refers exclusively to international legal material that has been approved by Iraq. Nevertheless, when combined with the Article 2 prohibition against the enactment of law that violates 'fundamental rights and freedoms' and the Article 94 grant of authority to the Federal Supreme Court to interpret constitutional text, the implication would have been, seemingly, to empower domestic courts broadly in the application of international law in the areas of human rights and criminal law in particular, if not so broadly as to grant them recourse to rights beyond those contained in the substantial number of treaties to which Iraq is signatory.²⁹

The provision, however, was ultimately removed, in a very late stage of negotiations known as the 'political kitchen', wherein a final text with a series of disputed provisions was provided to Iraq's chief political leaders, and they were tasked with making necessary amendments. Though this particular article was never slated as 'disputed' by the leaders, it was nonetheless removed in the process of these late negotiations. The meeting minutes contain little information concerning the cause of the late removal, even if earlier reports suggested some level of Islamist misgivings over the matter.

According to Ashley Deeks and Matthew Burton, who have written quite an informative piece on the drafting of the Iraq Constitution, the objection to the

²⁸ Article 44 Draft Constitution of Iraq, dated 21 August 2005.

²⁹ To be clear, and for purposes of emphasis, Iraq's Criminal Procedure Code *does* contain reference to human rights protections, albeit in different forms and using different language than that contained in prevailing human rights treaties. Judges making recourse to such material is uncontroversial. What is more controversial is the application of human rights provisions from international treaties, even those printed as domestic law in the Gazette, in a manner not specifically contemplated in Iraq's domestic procedural codes.

proposed article came from Najaf, the site of the seminaries and the home of Grand Ayatollah Sistani, who had insisted that if it were kept, there would have to be a limiting clause indicating that the rights so incorporated could not contravene other provisions of the Constitution.³⁰ (The provision of the Constitution the Grand Ayatollah had in mind would no doubt be Article 2, which prohibits the enactment of law that conflicts with the 'settled rulings' of Islam.) Unwilling to include any caveat as to the applicability of international law on Iraqi territory, the secularists preferred its removal to the inclusion of the limitation, and hence, according to Deeks and Burton, the article was removed.³¹

There are other provisions of the Constitution referencing international law as well. However, they are hardly encouraging as concerns domestic court application of international law. Article 8, for example – the one article that addresses Iraq's international obligations as a general matter – reads as follows:

Iraq shall observe the principles of good neighborliness, adhere to the principle of non-interference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and *respect its international obligations* (emphasis supplied).³²

In the first place, this hardly seems to be the basis for a broad assumption of international law within the domestic judicial context, in that the provision addresses primarily foreign relations with other nations rather than matters such as human rights or criminal protections afforded defendants. Admittedly, however, the language 'international obligations' could be read broadly enough to encompass both questions of relations with other nations and substantive international human rights obligations if a judiciary were so inclined to interpret it.

A second problem is that the term 'respect' (*tahtarimu*) is far more significant in the context of Middle East politics than has been recognized by commentators like Deeks and Burton, who seem to equate it with 'comply'. In fact, it arguably means something less. In particular, the Palestinian militant Islamist organization Hamas has made it clear that it will not accede to any framework with its more secular Palestinian competitor Fatah that involves it 'being bound by' (*taltazimu*) previous agreements with Israel, though it will agree to 'respect'

³⁰ A. Deeks and M. Burton, *Iraq's Constitution: A Drafting History*, 40 *Cornell International Law Journal* 37 (2007).

³¹ Deeks and Burton, *supra* note 30.

³² Article 8 Constitution of Iraq, available at www.uniraq.org/documents/iraqi_constitution.pdf (last visited 28 January 2011).

them.³³ The wordplay received a great deal of attention in the Arab world and on Arab television, and the term 'respect', when combined with legal obligation, was understood to suggest something short of a full commitment.

The linguistic nuance was not lost on the drafters themselves, who proved more than capable of strengthening the language when they found it expedient to do so. Article 9(e), for example, a late addition to the text, indicates that Iraq will 'respect' *and* 'implement' its obligations as concerns non-proliferation of chemical, biological, and nuclear weapons, implying that to 'respect' an international commitment is not quite to 'implement' it.³⁴ That weapons of mass destruction were a matter of significant concern to the United States, indeed at least a putative *casus belli* of the war with Iraq, and that comments were made on a draft in Arabic by a non-native speaker urging a stronger formulation, suggests that the United States may have been as aware as any of the potential limitations implicit in the term 'respect'.³⁵

To be clear, it certainly is *possible* to equate, in the original Arabic, the term 'respect' with the term 'abide by', just as it is *possible* to read Article 8 broadly to encompass all obligations imposed on Iraq by international law. Taken together, these would empower the judiciary to incorporate international obligations in the context of domestic proceedings. All hope for the use of international law by a local judiciary is not, therefore, lost. Yet against this reading lies a deep professional culture within the judiciary that does *not* involve reference to international law, a political reality wherein references to international law have been *reduced* as Iraqi sovereignty and democratic praxis has expanded, rather than the reverse, and a largely implacable (at least over the short term) belief that international law could be used as some sort of subversive attempt to thwart the core of the *shari'a*, however that core might be defined. It would seem unlikely to say the least that under the current circumstances one would expect very much by way of reference to international law in domestic courts.³⁶

³³ See eg K.A. Toameh, Pals at War, Jerusalem Post (24 April 2009).

³⁴ Article 9(e) reads as follows: 'The Iraqi Government shall respect and implement Iraq's international obligations regarding the non-proliferation, non-development, non-production, and non-use of nuclear, chemical, and biological weapons, and shall prohibit associated equipment, materiel, technologies, and delivery systems for use in the development, manufacture, production, and use of such weapons' (see *supra* note 32).

³⁵ Deeks and Burton indicate that the most likely party to have insisted upon this provision were the Kurds. Deeks and Burton, *supra* note 30, p. 34–35. Their own reporting indicates nevertheless that the United States did emphasize the importance the United States ascribed to Iraq's adherence to treaty obligations.

³⁶ It would be wrong to suggest that Iraqi courts will *never* make reference to international law under current conditions. In some instances, the Constitution requires it. Article 21 for example does not permit the granting of asylum to one who committed 'international crimes', and presumably a court would need to make that determination to deny asylum. However, the use of international law will, I suspect, be fleeting, limited, and for the most part, quite marginal.

5. CONCLUSION

Having established the relatively limited role that international law seems to play in domestic courts, and the seemingly deliberate decision on the part of the Constitution's drafters to keep it that way, it might behoove us to consider precisely what happened. That is, how did a nation seemingly willing, both before regime change and after, to undertake any number of international legal obligations through treaty and convention, and willing to entrust its judiciary with a fair amount of independence and legitimacy, end up reacting so coolly to the possibility that international law might become a part of the domestic judicial process?

The concerns, I suspect, might well be narrowed to two. The first is broader in nature and recurs throughout the Islamic world, and the second is unique to Iraq's anomalous circumstances immediately following an American occupation. Respecting the first concern, it appears that competing commitments on the part of the Constitution to Islam and Islamic law on the one hand, and largely transplanted constitutional rights and freedoms on the other, led to the decision to remove the reference to rights and freedoms contained in international law. All parties seemed relatively comfortable with the panoply of rights and freedoms offered in the Constitution, which included the standard set that one expects in any constitution. The concern, however, on the part of Islamist groups in particular, was that adding a reference to international law might enable a secular minded judiciary to *thwart* Islamic goals because there might be rights found within international law that might be to the derogation of what the Constitution refers to as the 'settled rulings' of Islam. This demonstrates an abiding suspicion of international law, and international human rights law in particular, as being some sort of Western imposed set of norms not necessarily applicable in the Iraqi context.

Naturally, given this concern, references to international law as a general matter, or to international custom, were the most suspect, precisely because the contours of those rights are potentially harder to identify and delimit. Somewhat less controversial were treaty provisions, particularly from treaties to which Iraq was signatory. Yet the concern was still present as it is difficult, absent exhaustive research, or so it was maintained, to know precisely the scope of even the existing international obligations, and thus important to make such rights *subsidiary to and not concomitant with* the 'settled rulings' of Islam. The failure of the parties to agree on that delimiting language led to the excision of the entire article.

Given this background, it seems that the CPA and the Iraq Governing Council may have committed what turned out to be, at least in hindsight, a grave strategic error in seeking such a forceful and radical change from existing judicial practice, where international law was all but unrecognized. This position

only fuelled suspicions further. The fact is that whether pleased with the departure of Saddam Hussein or not – and most politicians in Iraq's new political structure are necessarily pleased, given their opportunity to participate in the state in a manner that would scarcely have been imaginable less than a decade ago – there is understandable suspicion when there is substantial external participation in Iraqi affairs on the part of foreign governments, the United States in particular. Even the presence of the American ambassador at the Iraqi legislature on the eve of a crucial vote on amendments to the Electoral Law was viewed with some level of hostility on the part of one significant Shi'i Islamist parliamentarian, who came close to threatening physical violence.³⁷ That this same parliamentarian elsewhere objected to an NGO law because it did not account sufficiently for the fact that NGO's could be used as a front for foreign espionage³⁸ only demonstrates the rather extensive level of suspicion.

The wiser course it seems would have been to adopt a milder formulation, one that did not empower the judiciary to find rights to the extent that they 'befit a free people possessed of their human dignity', as that only furthered Islamist suspicions that what was being attempted was an undemocratic coup on the *shari'a* organized by the United States and its secularist allies. A less revolutionary (in the context of Iraq) approach might have yielded more success, or so it seems, given the near ability of the Kurdish secular forces allied with the United States to negotiate with the Islamists a provision respecting existing treaty obligations that was only removed at the last minute. One can only wonder whether or not, in the absence of TAL Article 23, Islamist opposition might have been less implacable and the Constitution thus more amenable than it is to the possibility of international law being used in domestic proceedings.

It is always best, however, to end not with regret but instead on an optimistic note. The constitutional language is sufficiently elastic to permit a reading

³⁷ On 9 November 2009, Naji interrupted a parliamentary session to raise what he declared was a 'point of order', which was in fact not a point of order at all (as he was told by Deputy Speaker and fellow Shi'i Khaled Al-Attiya, though it did not quiet him). Instead, it was a diatribe against the US and UK Ambassadors for helping to negotiate an election law without seeking prior authorization from the Presidency Council of the Council of Representatives, thereby subjecting Iraq to what Naji perceived was an attack on its sovereignty. Naji was willing to concede that in fact the Ambassadors may have done some good, but that their blatant disregard of protocol was inexcusable and that the Council of Representatives Presidency Council would be responsible if angry members zealously protective of Iraq's sovereignty, starting with Naji himself, decided to 'react' to any foreigner who approached him without prior approval of the Council of Representatives Presidency Council. As the entire episode took place in open session, much of it on television, and in full view of US Embassy observers, it was widely reported within political circles in Baghdad at the time.

³⁸ The law was ultimately enacted as Law No. 12 of 2009 but not before the accomplished and erudite (female) drafter of the bill, Maysoun Al-Damaluci, was treated to the humiliating spectacle of Mohammad Naji insisting that the bill be sent to the Committee of Security and Defense, with its, to use his words, 'mostly male' members who could then ensure that it was sufficiently protective of national security interests.

granting a more robust understanding of what the judiciary might use by way of international law to reach determinations in domestic courts. Equally importantly, the sensitivities respecting American imposition that work to limit the broad use of international law are somewhat limited as to their duration, and are likely to abate as US influence grows less pronounced following its military withdrawal. One can only hope that over time, as Iraq's judiciary develops its independence further and as Iraq itself grows in as a fully sovereign member within the family of nations, the broad reluctance to involve domestic courts in the application of international law will turn into a relic of the past.