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Constitution Making in Fragile States

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Over the last decade the international community has given much attention to the problems of constitution making in fragile states, or in quasi-states, or for territories in which the state has collapsed, or which have never been properly governed by a state. To get a feel for the diversity of this problem consider three examples: East Timor, from the withdrawal of Indonesian authorities in 1999 until its full independence, Iraq today, and also the European Union since the Treaty of Maastricht, or perhaps the Treaty of Nice.

I was directly involved in two of these (I had nothing to do with the failed EU constitution), and I think I have learned something from this experience. I have become convinced that among the chief problems facing us in such situation are not just the obvious: the interests of the powerful have to be accommodated, or else nothing happens. And when they are accommodated, the result may not be as attractive or as effective as we might wish. Long term prospects of democracy, peace and human rights might suffer. Interests are often a problem, but so are some broadly shared ideas relevant to constitution making in fragile states, which often do not seem to serve anyone's interests.

To fight those ideas we need to shift from the immediate concerns with the crises around the world, with the emergencies often associated with fragile states, to a discussion at a higher level of abstraction. And we need to look beyond law narrowly construed. This is what I propose to do in today's lecture. And having fought not a few battles over these issues, I have accumulated a certain amount of frustration, so please allow me an occasional polemical tone. With luck this will also help keep you awake.

To conclude my introductory comments: constitution making in fragile states is widely acknowledged to be an important issue in world politics. But the way we (almost everyone) understand what this means tends to undermine our efforts to achieve what we (almost everyone) want to achieve.

Our image of constitution making has become completely dominated by memories of the hot summer in Philadelphia in 1787, combined in some cases with those from another summer only two years later in Paris. Even Giscard d'Estaing, of all people, sitting at the podium while presiding over the Convention on the Future of Europe, which drafted the proposal for a European constitution, later rejected in the French and the Dutch referenda, daydreamed of Philadelphia and Paris. In 2002 he wrote (pardon my French): "Souvent de l'estrade ou je preside... je me dis que le spectacle qui se deroule devant mes yeux n'est pas tellement different de celui que David a depeint dans la salle du Jeu de paume, lors du serment fameux, ou de celui qui a pris place, de mai a septembre 1787, dans le hall de l'Independence de Philadelphie"

Let us call this the Philadelphia model. According to this model a constitution is the supreme law of a state, and we make a constitution when we write it and adopt it in accordance with proper and legitimate procedures. And in a fragile state one task of the constitution is to make the state less fragile, as in Philadelphia they replaced a loose and unworkable confederation with a federal state. If we have the Philadelphia model in our heads this is how constitution making in fragile states should look.

But that is a bad idea, the model is wrong in just about every way. If you come from the US and you believe in the Philadelphia model, you at least have the excuse of a provincial sort of patriotism (perhaps you think the best any country can do is what the US has already done). If you come from some other country, you have no excuse. But everyone, including myself, is to some extent in the grips of the

Philadelphia model.

So what is wrong with the Philadelphia model? It is wrong about what a constitution is, wrong about how you make it, and wrong again about the desirable result. Let me explain

First claim: a constitution is the supreme law of a state. That may well describe the US constitution and perhaps Stalin's constitution for the USSR, but it does not really describe the British constitution. And that is a problem: Stalin's constitution was not a constitution, and the British constitution is. Certainly that is what we must believe if we want to distinguish reality from fiction and propaganda. The risk we take here is that we will take institutional Potemkin villages as real. Because there is a document formally recognized as the highest law, we will conclude it must be a constitution even if it is universally ignored. And we will take as unreal constitutions that are not so easy to identify even if they are real, in the manner of the British constitution.

Taking Potemkin villages seriously may seem harmless enough, but it isn't. We want a world at peace, governed democratically and we want human rights protected. A document that says it guarantees all these things is not really a good substitute, although sometimes it can be a useful means, of course.

The world is full of institutional Potemkin villages, states that are recognized by states in the international system but are really states in name only, lacking both the firepower and the legitimacy to be real states, or property systems that exist on paper only while real economic life consists of efforts to bypass them, and constitutions that serve as manifestoes or false advertising, but have otherwise no relationship to reality.

Part of our problem in these cases is that our concepts and theories reflect a division of labor, intellectual and professional, that has evolved in wealthy democratic countries, relatively well protected from violence, and with strong commitments to democracy and the rule of law. Lawyers study law and legal institutions, economists study markets. The easiest thing to do when we try to help poor countries, with fragile states, often on the brink of, or in the midst of civil war is simply this: we transfer to the poor country with a fragile state what works in the rich country with an effective state, supported by concepts and theories developed in that context. But this does not work, at least not often and not well. It produces institutions as Potemkin villages, all appearance and no substance. Not just constitutions, but entire legal systems are largely fictitious, a combination of laws that are too rigid, and largely ignored, and a world that operates independent of law. So this is a larger problem not limited to constitutions. But my subject is constitutions, and how to think about constitutions in a way that will not have us providing aid and comfort for the construction of Potemkin villages.

So let me suggest an alternative way of thinking about constitutions: They are commitments, and they are constitutions only to the degree they are serious commitments. Hence the popularity in discussions of constitutions and constitutionalism of the imagery of Ulysses binding himself to the mast in order to be able to hear the sirens and survive the experience, or the frequent repetition of the slogan that in constitutions the people sober restrain the people drunk. We make a commitment to something when we make changing our mind more difficult than it would otherwise be. Without that element, there is no constitution I would say, it is all fiction and mirage. To make a constitution is to make a certain kind of commitment. The key question is: to what are constitutions commitments and what form do these commitments take.

Let me suggest a double answer which is I believe faithful to the constitutionalist tradition, and practical in difficult situations, such as fragile states. It is not, I should warn you, a lawyer's answer. If we need a one sentence summary we could perhaps say: they are commitments largely in legal form (the lawyer is not entirely lost) to a peaceful and principled politics. But that is not quite right. The first commitment is to diminish the use of the means of destruction in politics. The second commitment is to more use of impartial principle. Both commitments are largely legal in form, which means they can be enforced by courts, or by court-like institutions, like the Constitutional Council in France. But their legal form is not sufficient.

Serious commitments develop incrementally and in stages. The making of constitutions is no different. In the transition from communism in Poland, say, we had first the commitments of the Round Table agreements of early 1989. Then a series of agreements as an immediate response to the unexpected results

of the June 1989 elections. Then a series of new laws and amendments to the communist constitution at the end of that year. And that still was not the end of the slow development of a new constitution. There was after all, much later and really much less important, an actual new constitution adopted in 1997.

The South African case is also well known: an interim constitution was adopted in 1994 which significantly constrained the provisions of the permanent constitution, putting the South African Constitutional Court in the unusual position of ruling in 1996 that a new constitution is unconstitutional.

Iraq, too provides us with an example of constitution making in stages. First, the Transitional Administrative Law, an interim constitution of doubtful legitimacy, but quite workable as a transitional document . Our pal the TAL was what a Kurdish member of the Iraqi government called it in a conversation at a time last summer when the constitutional negotiations were getting a bit frustrating, and TAL looked good by comparison. And then the current constitution, which is incomplete in some obvious ways: crucial details about the workings of the second chamber of the federal legislature and of the supreme court still need to be decided. So the Iraqi constitution has been developing in stages too. There was nothing like one hot summer in Philadelphia. Certainly last year's hot summer in Baghdad was not it. Enough examples: serious commitments typically develop in stages and over time.

And this brings me to one final deficiency of the Philadelphia model, which I will mention only briefly, though it is a very big topic. But a topic for another time. Constitution making should not be seen as necessarily a part of state building either. The product of a constitution (so to speak) need not be a state. A commitment to principle and peace is often well served by effective legitimate states, but it might be better served over any given territory by alternative institutional arrangements, of which states may be only component parts, and the European Union could be a prototype for such arrangements. Somalia may be an example of such territory. Iraq might be too.

So here are my three theses about constitution making in fragile states.

First: Constitutions are double commitments: to diminish the use of the means of destruction, and to enhance impartial principle..

Second: Commitments are likely to develop in stages, not in one constitution-making convention.

And, **third**, the result may not be a strengthened state, but rather a union of states, akin to the contemporary European Union. Constitution making is not necessarily state building.

More needs to be said about all of these, but especially about the commitments that define a constitution. So for the remainder of my lecture today I will elaborate on those two commitments.

Means of Destruction

I will discuss first the commitment to diminish the reliance on the means of destruction in politics. What does it mean to use guns less? We begin an answer by noting that there are two rather different uses of guns in politics, and both are at issue here. I use a gun in one way when I kill you with it. And that is a common use of guns. But even more common is a different use: I threaten you with death if you don't give me your wallet. You remain alive, but I get to be richer. This is what we know as coercion. Both violence and coercion are pervasive in politics. Both uses of guns are common. Constitutions, and constitutionalism more broadly, involve a commitment to diminish both uses.

Traditionally this has created some tension. Faced with a threat of a Hobbesian war of all against all, or just with a bloody and protracted civil war (one use of guns) it is natural to turn to what we might call a Hobbesian solution: a hegemonic power capable of rule through overwhelming coercion. So, to take an example from my own experience, faced with massive violence and destruction in East Timor as a result of the independence referendum in 1999 the United Nations Security Council created what seemed like a perfectly Hobbesian solution to a Hobbesian situation. It established UNTAET to govern the country, and

gave its head, the Special Representative of the Secretary General all executive, legislative and judicial power. Not even the most absolute of monarchs ever claimed such powers. On the surface, and at least transitionally, massive war was replaced with massive coercion.

But a constitution, as I see it, must be a commitment to limit both actual violence and coercion. Traditional constitutionalism is unbalanced here. It tells us a great deal about creating a limited state, through a variety of mechanisms, such as the separation of powers or checks and balances. It also tells us about making the state predictable, and thus making it easier for individuals to avoid being punished or otherwise damaged and harmed by the state. But it does not provide us with many guidelines on how to diminish the propensity to violence, other than by imposing the sort of overwhelmingly coercive sovereign that constitutions are supposed to guard us against.

This imbalance makes sense when the starting point is not a fragile state but an absolute monarchy or a dictatorship, a very specific form of too much use of the means of destruction. But in a fragile state the potential use of the means of destruction typically requires different measures.

It is useful to think of all constitutions as being simultaneously peace treaties, settling a war or a potential war, whether between ethnic and nationality groups, regions or classes. But in the context of fragile states this way of thinking becomes crucial. In defending the Iraqi constitution I have said again and again: all constitutions are in part peace treaties. Think of the Iraqi constitution as a peace treaty in the making. I don't want to take back anything I have said. But there is much that needs elaboration. Constitutions need to be not simply peace treaties but more generally effective mechanisms for diminishing the role of violence and threat of violence in the politics of a country. Peace treaties can be such mechanisms. But they are not the only ones. To understand how constitutions ought to work, especially in fragile states, we need to take a step back, and consider more generally the forces that strengthen the propensity to violence, and the variety of ways these forces can be neutralized. This will tell us what commitments should be part of constitution making.

Violence Producing Mechanisms

We can identify three mechanisms that can lead to violence. Let us call them: the logic of fear, the logic of optimistic ambitions, and the logic of moral outrage. And we can identify for each a family of interventions that can weaken or block the operation of each mechanism.

- a. Logic of fear The logic of fear begins operating when the perceived first strike advantage in an inter-group conflict is sufficiently strong. This will occur only in settings where the underlying conflict between groups is sufficiently great that there is much to gain from a war. And the strategic situation, the distribution of resources, is such that there is an advantage to striking first. A group then will attack first in order to defend itself. Fear produces a preemptive or preventive war. This logic is dramatically expressed by an old woman in Sarajevo in the midst of the post-Yugoslav wars: "The Serbs will kill us all, we need to slaughter them first." (Melander, 1999: 192)
- b. The logic of optimistic ambitions We find this logic in political movements confident they are on the verge of creating a Heaven on Earth. The prize is so worthy that for these movements even the most extreme sacrifices are worth imposing on others and on themselves. Where the typical example of the logic of fear will be found in ethnic wars, a typical example of this logic will be found in ideological wars, with revolutionary movements aiming at a deep transformation not just in the political system, but in economics and society at large. But ambitious ethnic groups (Greater Serbia), or self-aggrandizing thugs (Charles Taylor in Liberia) can also add their costs and expected benefits and conclude in favor of war.
- c. The logic of moral outrage. Moral outrage, a product of injury or humiliation, can be channeled and given satisfaction in a variety of ways. Criminal prosecution and truth and reconciliation commissions are two prominent examples. But it can also fuel powerful outbursts of violence.

Let me say something about what we can do to block each one of these mechanisms.

The Logic of Fear

We can distinguish two methods of keeping fear in check in deeply divided societies. One method is for a dominant group to keep all others subordinate. Fear leads to violence when it prompts preventive or preemptive war. But fear of a hegemonic power does not produce this response, since a preventive strike against a hegemon has no chance of success. When the dominance of the hegemonic group (which may be the state) declines however, fear begins to argue in favor of preemption and violence, unless some alternative institutional framework is found. This happens typically when the coercive capacity of the state falters, and the security apparatus of the state is no longer capable of effective deterrence. The declining effectiveness of the military and police constitutes a key element in the initial conditions for the violence generating mechanism of the logic of fear to get started.

The most often used, and the most effective, alternative to coercive hegemony as an instrument to block the logic of fear is now conventionally called “power sharing,” but it involves in fact some combination of power sharing (checks and balances), resource sharing, and power separation (including decentralization).

It is misleading to think of power sharing as one alternative. We have rather a wide variety of arrangements, which perform at least two functions. They allow the groups involved in conflict to act separately, without interference from others. And they also allow the groups to act jointly, in a way that does not undermine the security of any of them. This involves some combination of power sharing (checks and balances, veto powers, organizational integration, and so on), power separation (mainly territorial and personal autonomy), and resource sharing. The key is to combine sharing (in pure case: each group retaining veto power over all central decisions) and separation (shifting decisions out of the center, separating the groups in conflict, giving them decision-making power).

A security dilemma arises -- in the standard account -- when each party builds up their military capacity to gain security, and in the process diminishes the security of others. The security dilemma is avoided if the military assets that are built are purely defensive, such as walls or fortifications. Having surrounded oneself by a wall I can feel more secure, without threatening others. Boundaries that are hard to cross have this effect, but so do other resources that work like walls, fences, boundaries or shields; or resources that allow us to hide; or resources that give us mobility, allowing us to run. These defensive weapons can also be institutional boundaries that are hard to cross, establishing the autonomy of various sub units of a polity. I will come to them in a moment. It should be remembered, however, that hard to cross boundaries are not the only instrument of separation. The capacity to run and to hide can be quite significant, both politically and economically. The capacity of capital to move across borders (capital flight) can certainly be important: when the Chinese in Indonesia started getting massacred, Chinese capital moved out fairly quickly, giving extra incentive to the government to stop the riots.

When we introduce significant internal boundaries in a political system we can call the result “federal”. There are many forms of such federalism largely distinguished by the powers they allocate to the center and those they distribute among the “pillars” or the provinces. But we need to make also a more basic distinction between territorial and non-territorial (personal or corporate) divisions.

In non-territorial (personal or corporate) systems, boundaries are defined not territorially but in terms of personal membership. A member of an ethnic or religious group, say, can be governed (on some issues) by his or her “pillar” no matter where they live. If we want homogeneous pillars, and the ethnic groups are not separated territorially, this is the method of division that we must use. The pillars can be given powers in areas where territoriality is not a significant constraint (as in the provision of education). The Ottoman millet system is a much cited historical precedent. Among contemporary examples are systems that give ethnic minorities the right to establish and control their own schools, supported by public funds, as in Belgium or India. A voucher system could be seen as a more flexible alternative (in which there is no need to negotiate ahead of time which groups have this right and which do not), with each person having a choice of education system to join, and all those systems with sufficient membership to be viable gaining the support of the state. A different set of examples of non-territorial decentralization is provided in countries (Lebanon or India are among them) that recognize for their various religious groups autonomous

legal systems that govern such matters as marriage and divorce, children, or inheritance.

The more common federal systems have internal divisions that are territorial, and we have a variety of choices in boundary determination. In many federal systems state and ethnic group boundaries mostly coincide, thus providing as large a degree of autonomy to these groups, as the powers given to the states in which they live. Perhaps the purest examples are Belgium and Czechoslovakia in its dying days. There are many more examples where boundary determination is more mixed, but often follows linguistic lines (Switzerland, India, and -- of course -- Canada)

The Logic of Optimistic Ambitions

The propensity to violence of an individual or a group increases the greater are the gains (the improvements of the world, as they see it) they are pursuing, and the more optimistic they are about achieving those gains. Violence is costly, but the greater expected gains justify the cost. So when deep political and social transformation enters the agenda of major players, or when players with such an agenda become major, the prospects of violence and of breakdown of constitutional order increase.

When is this likely to occur? First, it is likely as a response to deterioration, as in failing states. Second, it is also possible as a response to emerging opportunities of improvement, as in revolutions of rising expectations.

Two important examples of the latter pattern are familiar from European history. The Renaissance unleashed an enthusiasm for improvement and reform in many spheres of life, including religion. But effort to reform eventually led to increasingly brutal wars of religion, in which the issues at stake were much bigger (and hence worth fighting for) than the issues that prompted the original efforts at reform.

A second prominent example can be found within the French Revolution. The sequence of events that begins the revolution is clearly a response to deterioration. But again, this provides an opportunity for improvement on a scale much greater than the original decline suggested (a program of rationalization of the state and the society, recognition of natural rights and new principles of constitutional design, replacement of a monarchy with a republic, and so on). And those large stakes then support the political logic of turning to violence.

One way to undercut this logic of large stakes and optimistic ambitions is to incrementalise programs for improvement and transformation. Many examples of deep transformation successfully achieved without violence involve various forms of such incrementalisation, including transitions to democracy in Mexico, Spain, and Portugal, the collapse of communism in some countries of Europe (Hungary, and in some respects Poland would be examples), and the collapse of the apartheid regime in South Africa.

A second way to undercut the logic of large stakes is to decentralize improvement, and to establish programs of improvement separate from the state. There are two key examples: civil societies and the market. Both allow multiple individuals and groups to invest time, money, energy and other resources into making a better world by their lights. Instead of a central authority controlling all investment decisions, making the stakes at the center immense, you have in a market multiple smaller actors making smaller decisions. And at the heart of civil society we find a similar decentralization of efforts to improve the world, though in this case not driven by the profit motive.

4. The Logic of Moral Outrage

We find the most dramatic efforts to respond constructively to moral outrage in situations where a great deal of this outrage has accumulated: a thoroughly outrageous regime has just collapsed, or a genocidal war has just ended. And the response has been some combination of the following elements:

1. Criminal justice: Nuremberg, Yugoslavia, Rwanda
2. Amnesty and reconciliation
3. Establishing the truth about the past

4. Restitution, rehabilitation, compensation
5. Purifying the body politic: denazification, lustration, etc.

This list gives us a good idea of the range of choices available to deal with moral outrage. To understand what needs to be done it helps to keep in mind that courts, and the criminal justice system in general (including courts, but also police and prosecutors) are at the heart of the task of preventing the accumulation of moral outrage in a well functioning state. A typical reason for the accumulation of moral outrage is that some group in the population is protected from the reach of criminal law, or some range of activities is illegitimately protected. Some people and some criminal activities are de facto above the law.

The solution is some combination of, first, repairing of the routine means of response to moral outrage, and second, establishing extraordinary means of response which have sufficient neutrality and effectiveness. An example of the first strategy would be a reform of the court system, of criminal law and procedure or of the police. An example of the second strategy would be a special investigatory commission set up in response to a scandal.

Moral outrage can have powerful distorting effect on people's perception of reality, and it is itself subject to powerful distortions. It can be therefore the basis of very distorted analyses of how the offending injury or humiliation occurred, and how responsibility for it ought to be allocated. This is why the determination of facts is such a central feature of the courts of law. And it is why this feature is preserved in the various "Truth and Reconciliation" commissions. More generally, moral outrage cannot be properly handled without neutral and effective (i.e. thorough and reliable) investigative efforts, whether it is in courts, investigative commissions or by journalists and historians.

In fragile states, almost by definition, the risk of civil war and other forms of violence is considerable. We must above all work on commitments that will reduce that risk, and more generally reduce the role of the means of destruction in politics. Constitutions that make such commitments can be seen as peace treaties in an extended and deeper sense. But constitutions are not simply peace treaties, even in this extended sense.

Neutral Ground

The second task of constitutions is to enhance the role and influence of impersonal principles and impartial institutions or persons. To do the latter is to diminish the bite of Madison's famous "problem of faction." Madison wrote in Federalist #10:

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment,... With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations... concerning the rights of large bodies of citizens...

This problem can be solved only to the extent we can arrange governmental institutions, and their social context, in such a way that impartial principles, neutral decision-makers and impartial institutions, have a chance to exist and to be effective in influencing outcomes. We must build neutral ground, which can include institutions of various kind (including of course the institutions of the state), as well as persons, groups, ideas, places and even objects which are seen as neutral within the most important and divisive conflicts in a country. In a deeply divided country we may find no neutral ground at all: no impartial persons, or institutions and ideas. By contrast, in countries with highly developed neutral ground, the state will be both neutral (NEUTRAL ENOUGH) and powerful, so that the institutions of the state, and its officials, will constitute a powerful neutral ground.

In modern constitutional democracies the power of impartial principles takes the form of a commitment to free and fair elections, one person/one vote, equal human dignity and basic human rights. In fragile state we must build toward such commitments in stages, which include introduction of the appropriate legal forms and building social realities that can eventually give these forms the appropriate principled content. We

might call this building neutral ground. This includes institutional neutral ground (impartial media, especially radio stations, autonomous professional associations, especially lawyers, an autonomous university). Building a cultural neutral ground would be even deeper: transforming human attitudes to allow for more impartial “loyalties to what the situation requires” in addition to existing group loyalties.

“Why do you hire only people from your tribe?” an African politician in office was once asked, in an effort to understand the roots of the corrupt practices that make effective governing so difficult in many African countries. “Who else would hire them?” he famously answered providing a vivid example of what happens when the idea of impartiality is so weak that hiring on the basis of merit is not even an alternative to be seriously considered. Before we can get a constitutional court to challenge political institutions on the grounds of high universal principle, we need to have a social setting in which something other than protecting one’s own is imaginable, otherwise high principle will have no chance to be seen as such. It will be only the Tutsis favoring the Tutsis, or the rich favoring the rich.

Neutral ground is composed of those elements of the social life of the country which are nonpartisan in ways relevant to the social conditions of that country, and which contain a range of neutral legitimating factors such as legality, erudition and technical or professional competence. Neutral ground may need to be built up wherever it happens to be found. This could be anywhere from the traditional monarch to the association of market women, from a university and a professional association to the soccer league.

In a country with a well functioning legitimate state, the state will be perceived as relevantly neutral (NEUTRAL ENOUGH) and will dominate neutral ground. But when we are starting from nothing, we may not be able (for example) to establish independent and neutral courts or bureaucracies because there are no judges or civil servants who are seen as neutral in relevant ways.

Neutrality requires at least two elements: a relevant form of non-partisanship in the large conflicts of the society, and another form of non-partisanship of a more personal kind, no corruption (or, more realistically, limited corruption). The effectiveness of neutral ground requires in addition that the key decision makers have the relevant skills and that the institutional arrangements give them incentives to exercise those skills, and make it possible to exercise them effectively.

A widely accepted conclusion in the literature is that when the state is not ethnically neutral civil war is likely. This conclusion needs to be both expanded and disaggregated. If we stick to large scale abstractions then we should say that not only an ethnically neutral state, but also an ethnically neutral market are important for preventing civil war. But especially for practical purposes it is useful to look into the component parts of the state, and outside the state, for the necessary neutral ground.

Potential elements of neutral ground include government institutions, such as courts, constitutional enforcement institutions (courts or otherwise), independent professional civil service, nonpartisan professional military and police, independent central banks, or electoral commissions. Other institutions independent of government can be also part of this neutral ground: universities, an autonomous legal profession, independent media. In the larger social context we may include in this category political moderates (in the most divisive conflicts), and people with a hybrid, intermediate or uncertain identity. When the key social conflicts are between the haves and the have-nots we would also include “the middle class.” Social scientists used to believe that a large middle class is crucial for a stable democracy. This does not appear to be true, but a large and powerful neutral ground does seem to help

CONCLUSION

It is time to conclude. Constitution making in general, but especially in fragile states is not to be understood by invoking the Philadelphia model. Constitutions are commitments, and they are supreme law only as an instrument of commitment. This commitment develops in stages, not likely in a two month session of deliberation. The outcome can be a strengthened state, but it does not have to be. It can be something more like a union of states, closer to the inchoate model of the European Union, still to be sure “an unidentified political object,” as Monet called it. Building a state may be an instrument, just like a constitution-as-supreme-law may be an instrument, BUT IT DOES NOT HAVE TO BE.

What does all this mean about constitution-making in places like East Timor and Iraq? First, Philadelphia-like events are not all that important. And, second, constitutional lawyers, with a constitutional proposal in their back pocket already when they arrive at the airport, are not all that relevant.

The work of constitution making is a work of building NOT NECESSARILY a stronger state, BUT a commitment to peace broadly understood, and to principle. Details will vary.

As it happens both working in East Timor and in Iraq I developed mantras I would repeat again and again. In East Timor I said: “Prepare for the fifth election,” and not just the first one, which was on everyone’s mind. In Iraq, I said: “Think of it as a peace treaty in the making.” It seems to me that in today’s lecture I have simply elaborated on those mantras.