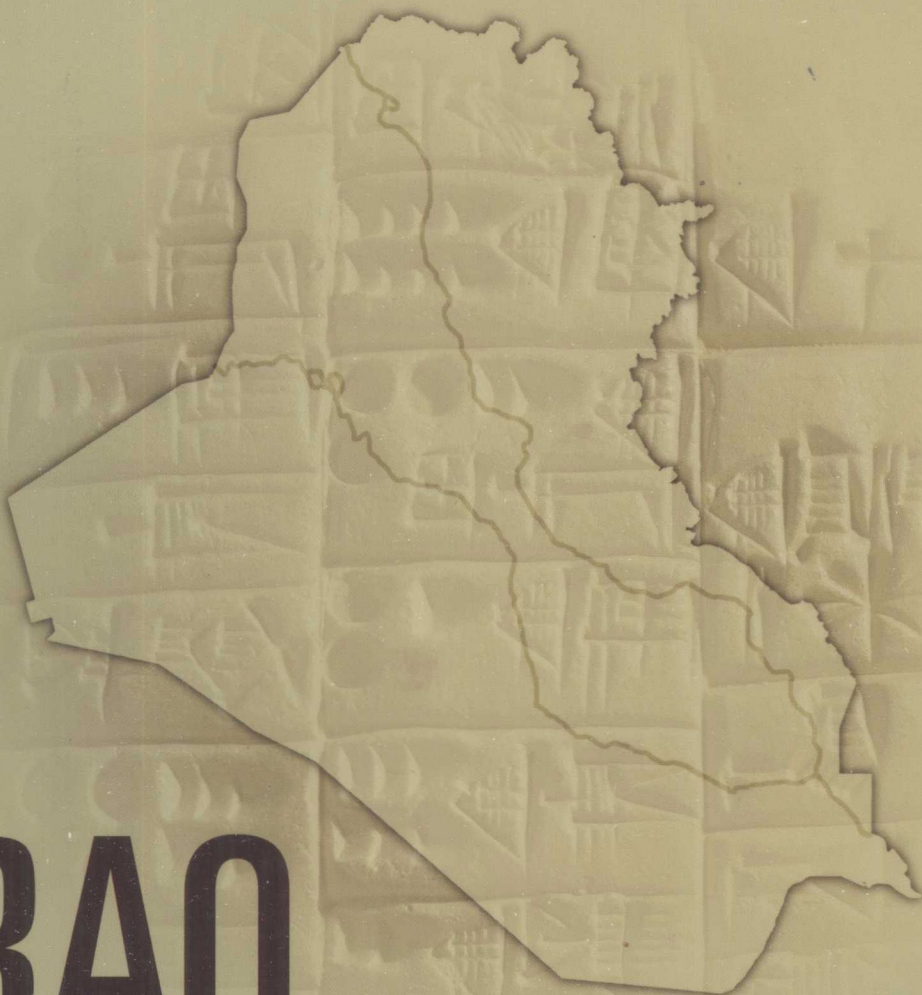


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IRAQ

GUIDE TO LAW AND POLICY

CHIBLI MALLAT



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IRAQ: GUIDE TO LAW AND POLICY

Chibli Mallat

*Presidential Professor of Law and
Professor of Middle Eastern Law and Politics
S.J. Quinney College of Law
University of Utah*

*EU Jean Monnet Professor of European Law
Saint Joseph's University, Lebanon*



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***IRAQ:
GUIDE TO LAW
AND POLICY***

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***For the peoples of Iraq and their friends,
May they choose well.***

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the book in record time, and I cannot thank them enough for their friendship and scholarly dedication. Although their comments have been invaluable, I am exclusively responsible for the choice of material and its treatment in the book, and for its many imperfections.

At Aspen Publishers, I am grateful to Carol McGeehan's leadership, and to the support of Lynn Churchill, John Devins, Troy Froebe, and their colleagues. I should also acknowledge the genuine inspiration for the course from the highest levels of government in Iraq, starting with the Iraqi ambassador to the UN, Dr. Hamid al-Bayyati, who visited Salt Lake City in Fall 2007.

Reengaging with Iraq. I had learned to appreciate Hamid's dedication when we worked together on Indict, a group we founded together in London in 1996 to bring Saddam Hussein and his close aides to trial for crimes against humanity. When I decided to re-engage with Iraq, Hamid arranged for an invitation from Prime Minister Maliki to discuss some of the issues now presented in this book, and that encouragement made the effort suddenly real to all. This reengagement with Iraq, also helped by another old friendship, that of Iraq's ambassador to the U.S., Samir al-Sumaidaie, unexpectedly intensified when the College of Law at the University of Utah received two significant grants from the U.S. State Department to assist the Government of Iraq in constitutional, legislative, and judicial matters. This led to three working visits to Baghdad in four months to help establish the Global Justice Project: Iraq (www.gjpi.org).

The book had been mostly completed by the time the visits took place, and I have avoided the inclusion of any sensitive or internal documents since the Global Justice Project started. But the visits were exceptional, and the welcome of old friends overwhelming. The list is too long to cite, but I must mention the warm embrace of the Iraqi President Jalal Talibani and his close aides, Dr. Fuad Ma'sum, who sits on the leadership of the Constitutional Review Committee, Deputy Prime Minister Barham Saleh, and Dr. Lateef Rashid, Minister of Water; all dear friends from the days of lead, as well as the president of the Kurdish region Mas'ud al-Barzani and his chief of staff Fuad Hussein; Hiram Chodosh and I were warmly greeted by Prime Minister Nuri al-Maliki, his chief advisor Ambassador Sadiq al-Rikabi, and his chief of staff Dr. Tarek Najm 'Abdallah. Old friendships contacted again in Baghdad include Sayyed Muhammad Bahr al-'Uloom, the distinguished Shi'i scholar and first president of the Iraq Governing Council, who introduced me to the world of Najaf scholarship over two decades ago; Dr. Ahmad Chalabi, a man as extraordinary and courageous as he is controversial, though not controversial to me who shared with Ahmad exalted and difficult moments in opposition to dictatorship, including a few hours spent in jail on the Iranian border in May 1992; the National Security Council advisor Dr. Muwaffaq al-Rubaie; Speaker Dr. Ayad al-Samarra'i and Sheikh Khaled 'Atiyyeh, the Deputy Speaker and author of one of the most remarkable modern compendia of Shi'i law; MPs Dr. Salem al-Jiburi and Dr. Baha' al-A'raji, from the legal committee of the Iraqi Council of Representatives; and several other remarkable MPs of the new Iraq, including the Secretary General of the Fadila party, Sayyed Hashim al-Hashimi, Assyrian leader Yonadam Kanna, Karim al-Ya'qubi, Malhan al-Moguter,

former judge Wael al-Fadel, leading female MPs Zahra al-Hashimi and Shatha al-Obosi, Dr. Saleh Mutlak and his distinguished colleagues in the Hiwar bloc and many others met in committees and working groups. I must acknowledge the extraordinary trust and friendship of MP Sheikh Humam Hamoudi, head of the Constitutional Review Committee (CRC), his assistant 'Ali Fadel', and the members of the CRC, MPs Fuad Ma'sum, Dr. Salem al-Jiburi again, MP Abbas Bayyati, MP Dr. Fariad Rawanduz, MP Sayyed 'Ali Allaq, MP 'Alia Nassif, Dr. Mayada Al-Ihtishami, and Dr. Hassan Al-Yasiri, the diligent secretary of the CRC.

I was also warmly welcomed by the country's senior judges: the courageous president of the High Criminal Court, 'Aref al-Chahine, ably assisted by the court director Haithem al-Musawi, the distinguished Shura Council president Ghazi al-Janabi, and the energetic Chief Justice Midhat al-Mahmud, president of the Higher Judicial Council, of the Federal Supreme Court, and of the Court of Cassation. While this book was in the main completed before I went to Baghdad again in October 2008, many passages were reinforced, enlightened, or corrected in view of subsequent work with my Iraqi and Global Justice Project colleagues. Again, I have avoided the inclusion of any material I have been privy to thanks to the extraordinary GJPI work.

Albeit a different type of warmth, I should acknowledge the welcome of Ambassadors Ryan Crocker and Robert Ford, anti-corruption Ambassadors Lawrence Benedict and Joseph Stafford, whose democratic vision and hopes for Iraq have been chiefly translated for me by the U.S. Embassy's Constitutional and Legislative advisor April Powell-Willingham, her deputies Marc Chrétien and Jim Beeby, along with Alan Zangana and an impressive staff devoted to Iraqi democracy and human rights; as well as the Embassy's INL-Rule of Law dedicated colleagues of whom Alex Wong will remain a lasting impression. I cannot emphasize enough the exceptional engagement of April Powell-Willingham with Iraqis. Her humanistic, almost driven view of American commitment, should be a model for a foreign policy still looking for its world bearings beyond *Realpolitik*.

A happy coincidence joined me in Iraq with the two leaders of the UN mission, the Chief of Mission Staffan de Mistura and his deputy Andrew Gilmore. On reflection, this was not a total coincidence, for they represent the best that the United Nations Secretariat has offered to Middle Eastern democrats in the past two decades. Not surprisingly, their staff was also remarkable, and I have closely worked with Sven Spengemann and his colleagues for a better Iraq. It is unusual for a jurist such as myself to get involved in as challenging a milieu as the one prevailing in 2008-2009 Iraq, especially when one is blessed with old and new friendships of this caliber, and a growing unsurpassed expert team around the GJPI that includes Andrew Allen, my former student who has long surpassed his teachers, Joanne Dickow, Jim Holbrook, Ambassador Vincent Battle, Haider Hamoudi, Wayne McCormack, Melissa Waters, Jaye Sitton, Jeff Fischer and Sean Grafton, Muayyad al-Chalabi and Janan Dakak, distinguished Iraqi staff holding the fort in Baghdad in always difficult circumstances, and outstanding colleagues and students at the University of Utah. I do not know of any legal occasion like this one for exploring avenues between Iraqi and like-minded American and other opinion leaders in this

way. I must also say how privileged I have been in Utah with the leadership and wide horizons of the University's president, Michael Young, and Governor Jon Huntsman.

Also in the manner of disclosing my interest, I should state that my involvement with Iraq is neither new, nor usual in the traditional scholarly sense. I have worked on Iraq with Iraqis for over 20 years. Ever since brutal turf wars between the Iraqi, Iranian, and Syrian governments in my native Lebanon in the late 1970s, and the intimate link between the Iran-Iraq war and the Israeli invasion in 1982, when the Iraqi ruler engineered the attempted assassination of the Israeli ambassador to London to encourage that ill-conceived invasion, through to my work on the late Muhammad Baqer as-Sadr and the forging of many friendships of Iraqi opposition leaders in London, including Sayyed Mahdi al-Hakim (who was assassinated in the Sudan in April 1988), Iraq has been a constant personal concern as the key to a better, more humane, Middle East. I opposed the war in 2003, but I had long supported efforts to bring Saddam Hussein and his close aides to account: politically by siding with many Iraqi oppositional figures since the brutal death of Mahdi al-Hakim, and helping them within the limited means at my disposal to bring an end to the dictatorship; and judicially by developing human rights tools to bring an end to impunity in Iraq. My personal Iraqi tribulations are uninteresting, and I brook no illusion that they deflected the course of Iraqi history in any meaningful way, but such a long personal commitment to human rights and democracy in Iraq, and to non-violence in the whole region, inevitably colors my views. This *Guide* is very much informed by this commitment, and the reader will find many texts drawn from this close interaction with the country over two decades.

I would also like to thank the following authors and publishers for kindly granting permission to reproduce excerpts of, or illustrations from, the following materials.

- Batatu, Hanna, *The Old Social Classes and the Revolutionary Movements of Iraq* 545-557 (1978). Reprinted with permission of Saqi books, with special thanks to André Gaspard.
- Brown, Nathan, *The Final Draft of the Iraqi Constitution: Analysis and Commentary* (Sept. 15, 2005), <http://www.carnegieendowment.org>. Reprinted with permission of the Carnegie Endowment for International Peace, with special thanks to Nathan Brown.
- Caron, David D., *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. Davis J. Intl. L. & Poly. 123 (2004). Reprinted with permission.
- Crane, David, A., *Gallows in Baghdad: International Justice in 2006* (Jan. 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/01/gallows-in-baghdad-international.php>. Reprinted with permission of Jurist Legal News and Research Services, Inc., with special thanks to Bernard Hibbits.
- Danner, Mark, *"The Moment Has Come to Get Rid of Saddam,"* El País Minutes Transcript Between President Bush and Spanish Prime Minister Jose Maria Aznar at Crawford, Texas (Nov. 8, 2007), <http://www.nybooks.com/>

- articles/20770. Reprinted with permission of The New York Review of Books.
- Dickinson, Laura A., *Abu Ghraib: The Battle over Institutional Culture and Respect for International Law*, in *International Law Stories* 414-416 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). Reprinted with permission of Thomson West, with special thanks to Laura Dickinson.
- Dobbins, James, *The UN's Role in Nation-Building: From Congo to Iraq* (2005). Reprinted with permission of the National Book Network, with special thanks to Lauren Skrabala at the Rand Corporation.
- Hamoudi, Humam, *My Perceptions on the Iraqi Constitutional Process*, 59 *Stan. L. Rev.* 1315 (2007). Reprinted with permission from Stanford Law Review.
- Kirgis, Frederic L., *International Agreements and the U.S. Law*, ASIL Insights (May 1997), <http://www.asil.org/insigh10.cfm#author>. Reprinted with permission of the American Society of International Law.
- Latif, Ali, *Iraq: Status of National Reconciliation* (Mar. 2008). Reprinted by permission of the publisher from *Iraq: Status of National Reconciliation*, Ali Latif (Washington, DC; Carnegie Endowment for International Peace, 2008). <http://www.carnegieendowment.org/arb/>.
- Low, Lucinda A., *Enforcement of the Foreign Corrupt Practices Act in the United States: Trends and the Effects of International Standards* 771-776 (PLI Corporate Law and Practice Handbook Series, Apr.-May 2008). This material has been published as a part of *Foreign Corrupt Practice Act 2008: Coping with Heightened Enforcement Risks*, by Lucinda A. Low et al., available at 1-800-260-4754; www.pli.edu © The Practising Law Institute. Reproduced with permission. All rights reserved.
- Muir, Richard, *The Iraq-Kuwait Border Dispute: Still a Factor for Instability?*, 35 *Asian Aff.* 147 (2004), copyright © The Royal Society for Asian Affairs, reprinted by permission of (Taylor & Francis Ltd, <http://www.tandf.co.uk/journals>) on behalf of The Royal Society for Asian Affairs.
- Stigall, Dan, *A Closer Look at Iraqi Property and Tort Law*, 68 *La. L. Rev.* 776 (2008). Reprinted with permission of the Louisiana Law Review.
- World Bank, *Rebuilding Iraq: Economic Reform and Transition*, <http://sitereources.worldbank.org/IRFFI/Resources/CEMEXsum.pdf>. With thanks to the International Bank for Reconstruction and Development, The World Bank, which is the source and the copyright holder of the data used.
- World Bank, *United Nations/World Bank Joint Iraq Needs Assessment* (Oct. 2003), <http://siteresources.worldbank.org/INTIRAQ/Overview/20147568/Joint%20Needs%20Assessment.pdf>. With thanks to the International Bank for Reconstruction and Development, The World Bank, which is the source and the copyright holder of the data used.

NOTE ON SOURCES, SPELLING, AND CITATIONS

The amount of material on Iraq is overwhelming and hard choices had to be made. A search in American and British law journals yielded over 250 entries for articles and notes on Iraq since 2003. There was hardly a tenth that number over the previous 50 years. Over 100 books have been published in the United States only since 2003, from descriptions of military operations to heart-rending accounts of the death of loved ones in often gruesome circumstances. In contrast, perhaps no more than a dozen important books appeared on Iraq in the full course of the 20th century. "Iraq in Books," a remarkable review by Michael Rubin in the *Middle East Quarterly* (Spring 2007) briefly discusses 33 titles since the invasion. The present book has tried to keep up-to-date on that immense production, but preference has been given to reports and discussions focusing on policy-making, with a legal slant. The "Iraq cottage book industry" is expected to grow and surpass the Vietnam literature in years to come. It is not humanly possible to cover it all, let alone to give their due to some remarkable works that range from personal accounts by soldiers and journalists to the book-length recollections of the American presidential envoy and the former Iraqi minister of finance. Access to and dissemination of Iraqi books and studies in Arabic and Kurdish is difficult within Iraq, let alone abroad, although some good books, especially on the Iraqi Constitution, are already available. To the extent I could reach some of these sources, they are mentioned in this book.

Because of the variety of sources, consistency was not practical. Originally exotic Arabic words have become well known, but orthography did not follow. The Ba'th party is found in the book as Baath or Ba'th; Hussein could also be spelled Husayn, Husein, or Husain; Shi'is is the same as Shi'ites, Shiites, Shia, Shi'a; Ayat Allah is the same as Ayatollah, etc. Footnotes are generally omitted, and when they are profuse in the cited text, an additional

reference is included to remind the reader of their availability in the original. References to website URLs were current by the end of 2008, but rapid shifts mean sudden lack of availability. With the change of administration in 2009, all White House original sources and texts have for instance suddenly disappeared, so I tried to rely on texts whose lifespan is not as fragile. Ellipses indicate an omission in the documents selected.

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