



United Nations Development Programme

Constitutional Assistance in Post-Conflict Countries

The UN Experience: Cambodia, East Timor & Afghanistan

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EXECUTIVE SUMMARY

Some form of constitutional review or reform is often a key component of comprehensive settlements (as evidenced by Cambodia, East Timor, Afghanistan and most recently Iraq) to a conflict and the transition from war to peace. Increasingly, the UN is being called upon to support the process of constitution-making in these settings. Constitution-making provides a unique opportunity for the UN to encourage a process that promotes national reconciliation, consensus building and the creation of a national vision for the future of the country.

This report provides a brief overview of the role of UN constitutional assistance in three post-conflict constitution-making exercises: that of Cambodia, East Timor and Afghanistan. This report focuses on the *processes* of constitution-making and not the substance of the constitutions produced in each case. An underlying assumption of the report is that the process of creating a constitution is as important as the content in legitimizing a new constitutional order and creating a sustainable peace.¹

Although there are not yet agreed upon benchmarks for assessing a process or the constitution it produces, this report underscores the importance of a nationally led, transparent, participatory and inclusive process because they have the potential to:

- garner wider support for the peace process and reduce the influence of potential “spoilers;”
- enhance the legitimacy of the (often unelected) transitional administration;
- illustrate a break with the past where voices were suppressed at the point of a gun;
- provide a forum for national dialogue to promote reconciliation and forge a common vision for the nation that also recognizes minority aspirations;
- transform the understanding of constitution-makers who learn about the aspirations and concerns of the people and see and hear first hand the problems of their people;
- broaden the social and economic agenda of the constitution;

- create an educated public that understands the importance of constitutionalism to their daily lives and has greater public ownership of the resulting constitution;
- lay a foundation for more democratic practices, a culture of rule of law and ongoing participation in decision-making;
- enhance public willingness to defend the constitution, defend their rights and support the implementation of the constitution;
- influence the contents of the constitution by ensuring that factors contributing to conflict are addressed and that concerns and rights of minorities are reflected; and last but not least
- enhance the legitimacy of the final constitution.

The review of the UN role in the three cases illustrates that there has been no overall doctrine guiding the process and each approach has been *ad hoc* and to a significant degree, dependent on the choices of the UN leaders in the field. In each of the case studies, the UN missions could have planned support to the process more effectively if they had improved access to resources and information about options for design and implementation.

The mandates of complex peace operations, such as those covered in this report, involve an often staggering array of tasks which must be carried out, sometimes simultaneously. Security must be maintained, human rights protected, humanitarian crises averted, the economy kick-started, and political dialogue promoted. Everything is a priority; everything demands attention. Constitution-making is just one element in the midst of these Herculean endeavors, and in hindsight an analysis of this element alone cannot lose sight of the fact that decisions taken by UN and political leaders in the field were conditioned by a range of competing demands unfolding in real time. Improvisation is often a necessary virtue. Nevertheless, one of the central lessons of UN peace operations over the past decade and a half is that they have been mounted without a reliable base of doctrine and guidance from which mission leaders can draw even as they adapt and improvise on the ground.

A good example would be the base of doctrine, guidance, resources and expertise that has

been carefully developed and consolidated for elections. The Electoral Assistance Division (EAD) of the Department of Political Affairs (DPA) in the UN Secretariat provides assistance in the areas of needs-assessments; design and implementation of electoral assistance project activities; operational strategies for electoral components of peace-keeping operations; and a roster of electoral experts able to provide technical assistance on short notice and serving as the UN's institutional memory in the electoral field.

The EAD has also established networks with non-UN institutes, electoral commissions, etc., that create a much wider pool of resources and knowledge to draw on. In the constitutional field, many of the resources that currently exist are, and will likely remain, in academia, governments and non-governmental organizations external to the UN. What the UN can do, however, is ensure that it is capable of drawing on that expertise while maintaining the necessary doctrine and guidance and a core expertise in-house.

Therefore, to provide more effective UN constitutional assistance this report recommends, that the UN appoint a focal point for UN constitutional assistance that would: 1) develop doctrine and guidance on constitutional assistance; 2) provide technical expertise and resources; and, 3) document UN experiences to draw lessons learnt and reflect upon good practices. To minimize costs, the UN should draw upon existing external resources to support the above efforts.

The conclusions of this report are in line with the Secretary-General's recent report "In Larger Freedom: Towards Development, Security, and Human Rights for All" in which he underscores the vital role that the UN plays in mediating peace agreements and assisting in their implementation but notes that "there is a gaping hole in the UN Institutional Machinery: no part of the UN system effectively addresses the challenge of helping countries with the transition from war to peace."ⁱⁱ Supporting national actors to design and implement constitution-making processes that serve as a building block for longer-term peace and that produce constitutions that will be durable blueprints for political stability and broader development, should be seen as a key aspect of the challenge to addressing current peacebuilding gaps in the system.

The three case studies do not constitute a broad enough set of experiences from which to draw definitive lessons learnt and from which to build doctrine and guidance. For that, analysis of a larger number of both UN and non-UN constitutional exercises is necessary. Nevertheless, the cases do point towards some gaps in the UN's capacity of resources and some preliminary lessons that might inform future planning of constitution-making processes, including pitfalls to avoid.

Legal Framework

A prior legal instrument such as a peace agreement or Security Council resolution, which provides the legal framework, defining principles and parameters for the exercise, mandates most post-conflict constitutional exercises. The legal framework, however, has differed in scope and detail from case to case depending on the context and the objective of the constitutional review.

There is no "once size fits all" framework for a process. Sometimes, such as in Cambodia, it will be useful to have a more detailed framework that includes the principles to be enshrined in the constitution. At other times, the framework should be more skeletal, such as in Afghanistan, to allow for flexibility to respond to the inevitable changes in the political context. Nonetheless, while stressing that the unique circumstances of the context will determine the degree of specificity and the content of the legal framework, the following are some potential elements to be considered for inclusion in the legal framework:

- key constitutional principles or substantive provisions to guide the process and to be enshrined in the final constitution;
- the mandate and work plan for the constitutional organ/s;
- the timeframe for the process, with a schedule of when key tasks should be accomplished;
- a declaration that the constitutional organ/s drafting the constitution will be free of governmental control;
- transparent rules and mechanisms to establish constitutional organs and

appoint/elect delegates—perhaps to appoint an inclusive and technically competent constitutional organ to draft the constitution and a democratically elected body to adopt the constitution, with at times specific procedures for appointment or nomination of marginalized groups, members of civil society or those with specific professional skills.

- the mandate of a supportive administrative body, such as a Secretariat;
- provisions that describe the incorporation of a participatory process that prescribes sufficient time and resources to conduct separate phases of civic education and consultation;
- review and/or enforcement mechanisms to ensure that the final draft of the constitution incorporates any agreed upon principles;
- transitional arrangements if necessary and mechanisms for implementation of the constitution;
- provision for financial oversight of the process;
- the role, if any, of the United Nations or international community.

The legal framework should also be well publicized to promote transparency and gain public support for the constitutional roadmap; this can assist the public to be clear about the steps of the process, the objectives of the constitutional review or reform process, and their role.

Timetable for the Process

The legal framework in each of the case studies determined the timetable of the process. The political context both domestic and international will always have an impact on timetables. However, it is broadly accepted that while timetables can put a certain amount of useful pressure on the parties and the international communities alike to move the peace process forward, goals such as constitution-making and elections require legitimate processes and

sufficient planning and these processes should not be rushed to meet pre-set dates.

Deliberative processes that promote national reconciliation, conflict resolution and consensus building take time. In the cases discussed, opportunities to make the process more genuinely participatory were missed (in particular in East Timor and Cambodia), in part, because of tight timelines.

Structure and Representation

An independent commission or technical drafting body is often used to prepare the constitution because it tends to be more distanced from political agendas and may allow for greater diversity of views, improved opportunities for consensus building, input of experts and greater public participation.

An elected body typically adopts and debates the draft and because it is elected by the people may add legitimacy to the final constitution. An elected body that is representative and agrees upon the final constitution may also ensure that political elites feel ownership and implement the constitution.

In cases like East Timor, where there is a high risk that elections will lead to an adopting body that may reflect the views of a single party, special measures should be taken to promote a more inclusive adopting body. For example, provisions can be made for the representation of identity groups, women, civil society representatives or those with particular professional skills (as was done in Afghanistan). The mode of appointment for these delegates should be transparent.

While elected constituent assemblies do have claim to democratic legitimacy, in post-conflict situations under tight time pressures the electorate has in practice had insufficient information on the constitutional issues at stake. Furthermore the first post-conflict elections tend to be highly referential to the prior conflict, with voting concentrated on individual leaders, ethnic groups or others—vestiges, in this sense, of the war. Political parties are weak and rarely put forward fully articulated constitutional platforms. Therefore elections in and of themselves do not necessarily serve as a sufficient conduit through which to carry the expression of the people's

constitutional aspirations. These aspirations must inform not just choices about who should govern for one term but the blueprint for society itself. Hence, a strictly democratic electoral model dependent on representation through the ballot is usually not sufficient to capture public preferences in post-conflict constitution-making exercises.

Direct Participation

The degree to which a process can incorporate direct participation (typically through civic education and consultation) will depend on the context. Political elites will by necessity play a major role in decisions on how to structure the new state (this is important both for peacemaking and for future implementation of the constitution) but where possible, the role of the UN should be to broaden the political space so that the final constitution does not merely represent the views of warring factions holding power at the end of a conflict.

There is no single way to conduct a participatory process; each post-conflict situation has a unique set of challenges and specific objectives for the constitution-making exercise. Nonetheless, following from some of the lessons learnt from the case studies, the following elements may lead to more genuine participatory processes:

- a legal mandate and clear roadmap for the process which clearly indicates to the public at what stages they can participate and how;
- carefully crafted rules of procedure to minimize the risk that the process will spiral out of control or lead to more violence and ensures the process does not unduly raise the expectations of the public.
- awareness raising to increase the political will of the international community, constitutional drafters and political elites to take measures to establish a genuine participatory process;
- the establishment of an independent body (often a constitutional commission) which is mandated to conduct separate phases of public education and inclusive consultations

on key constitutional issues before preparing the constitution;

- the allocation of a minimum of one year (whenever possible) to conduct separate phases of civic education on constitutional issues and hold public consultations;
- holding public consultations prior to preparing a draft to encourage the public to express their views and then holding a possible second consultation process on the draft;
- using creative means to ensure that marginalized groups participate (such as illiterate citizens or the disabled);
- an adequate budget (with donors brought on board as soon as possible);
- the establishment of an administrative body (such as a secretariat) to assist with implementing the participatory mechanisms and the demanding logistical arrangements;
- sufficient time and resources to conduct capacity building programs to prepare national staff to effectively conduct civic education and public consultation programs;
- support to civil society and the media to participate and facilitate direct participation;
- fostering dialogue and the exchange of public views between identity groups or communities;
- an agreed upon methodology and mechanisms (including data base programs) to collate, summarize and analyze submissions to the Commission;
- the dissemination of a report explaining to the public the results of the consultation, how competing views were considered and accommodated, and how key decisions were made;
- transparent mechanisms for sharing drafts of the constitution and following deliberations on the draft by the constitutional organ adopting the constitution; and

- public education on the new constitution, in particular how the public can use it as a tool to access their rights.

Nationally Owned and Led

National ownership of the process is closely related to participation because the public will feel ownership over the constitution if they participate in its making. But, it also relates to the role of the constitution-makers and UN constitutional efforts should be guided by the principle of national leadership, to every possible extent. Following from the “light foot print” approach taken in Afghanistan, international actors should not assume roles that national actors can and should play. To ensure national ownership, the process should be conducted at an appropriate pace to allow for national actors to fully understand their role, learn from comparative experts about other experiences, weigh and deliberate upon options and enhance and build capacities where needed to effectively assume their responsibilities and implement the process.

Technical Assistance

Making a constitution is a complex operation which requires expertise on national politics, institutional reform, electoral procedures, budgets, procurement, logistics, civic education campaigns, consultative processes, IT, public relations (for the leaders of the constitution-making bodies), comparative constitution-making options, conflict resolution, technical drafting, rules of procedures for assemblies, security arrangements, diplomacy, donor relations, etc. It is the author’s experience that national actors are generally welcoming of technical expertise in these areas if it is offered in a fashion that respects their role in leading and managing the process. Also, often both international actors and national actors are not aware of the complexity of implementing the process and providing initial options papers describing types of assistance that may be needed is very helpful.

In Afghanistan the UN coordinated technical assistance and worked with the national actors to ensure that persons with the right types of expertise

met their assistance needs. The UN also coordinated substantive input by constitutional advisors to ensure harmonization and facilitated the provision of options papers that were translated into Dari and Pashtu. In East Timor, the Asia Foundation also translated options papers that the Constituent Assembly requested on key issues.

Although it may not always be appropriate for the UN to coordinate technical assistance, it may be useful to provide the constitution-makers with advice about how to best to make use of technical advisors and suggest what types of expertise may be needed. The constitution-makers can then make their own assessment of whether they have all those skills or external actors may be useful.

If technical expertise is requested, the UN should facilitate the provision of technical assistance. As in Afghanistan, this will require linking with external resources because few of these capacities are currently located within the UN.

Adoption

The methods of adopting the constitution should promote consensus building. In each of the case studies the constitutional organ tasked with adopting the constitution required that a two-thirds majority pass the constitution. This larger majority encourages consensus building depending on the make-up of the adopting body. In Afghanistan the rules of procedure also emphasized achieving consensus and short of this, a vote would be taken.

Implementation of Constitution

Many constitutions remain merely on paper and are never implemented. For example, many of Cambodia’s provisions, ten years on, have not been implemented. The UN should provide advice about constitutional provisions, mechanisms and transitional arrangements that may be useful to facilitate implementation post-adoption, including suggested deadlines for completion of important tasks and reforms. In addition, constitutional assistance should not end with the adoption of a constitution.

INTRODUCTION

Historically, the victors of a conflict imposed constitutions drawn up after conflict. Today, however, such constitutions are more often negotiated and the process of making a constitution presents a unique opportunity to forge a new vision for society.

Constitutional review or reform is often a central component of the comprehensive settlement of a conflict, as was the case in Cambodia, East Timor, Afghanistan and Iraq. Increasingly, the UN is being called upon to support this process of constitution-making.

This report will provide a brief overview of the role of UN constitutional assistance in three post-conflict constitution-making processes: that of Cambodia, East Timor and Afghanistan. The study focuses on the process of making the constitution and does not analyze the content of the constitutions. An underlying assumption of the report is that the process of creating a constitution is as important as the content in legitimizing a new constitutional order and creating a sustainable peace.ⁱⁱⁱ

While such processes are unique opportunities for national reconciliation, conflict resolution and consensus building it should be noted that there is no “one size fits all approach.” International and local politics, security concerns, and other competing priorities must be taken into account when designing the constitutional element of a transition from conflict to peace. And it remains difficult to assess the “success” of a constitutional process or at times the degree of “legitimacy” that an adopted constitution enjoys.

There are not yet agreed upon benchmarks for assessing a process or the constitution it produces. Nevertheless, this report underscores the importance of a nationally led, transparent, participatory and inclusive process. In societies divided by conflict, direct participation, transparency and inclusiveness are important characteristics of political transitions that build durable peace. They have the potential to:

- garner wider support for the peace process and reduce the influence of potential “spoilers;”
- enhance the legitimacy of the (often unelected) transitional administration;
- illustrate a break with the past where voices were suppressed at the point of a gun;
- provide a forum for national dialogue to promote reconciliation and forge a common vision for the nation that also recognizes minority aspirations;
- transform the understanding of constitution-makers who learn about the aspirations and concerns of the people and see and hear first hand the problems of their people;
- broaden the social and economic agenda of the constitution;
- create an educated public that understands the importance of constitutionalism to their daily lives and has greater public ownership of the resulting constitution;
- lay a foundation for more democratic practices, a culture of rule of law and on-going participation in decision-making;
- enhance public willingness to defend the constitution, defend their rights and support the implementation of the constitution;
- influence the contents of the constitution by ensuring that factors contributing to conflict are addressed and that concerns and rights of minorities are reflected; and last but not least
- enhance the legitimacy of the final constitution.

This report will therefore describe for each case study the nature of UN constitutional assistance and also broadly assess whether that assistance served to promote a nationally owned and led process that, where and when appropriate, was transparent, participatory and inclusive. Section 1 provides an overview of the legal framework that set the constitution-making process in motion; Section 2 describes the process, taking into account the degree of inclusiveness, transparency and participation; Section 3 focuses on the role and forms of UN constitutional assistance; Section 4 draws some lessons learnt and puts forward some recommendations for the way forward.

1. LEGAL FRAMEWORK FOR THE CONSTITUTIONAL PROCESS

A prior legal instrument such as a peace agreement or Security Council resolution, which provides the legal framework, defining principles and parameters for the exercise, mandates most post-conflict constitutional exercises. The legal framework, however, has differed in scope and detail from case to case depending on the context and the objective of the constitutional review. Objectives may or may not be explicitly stated. Stated objectives may include—to name only a few—national reconciliation, institutional reform or ethnic minority representation.

In internationalized contexts not only will national actors have differing objectives but, often, so will the international community:

“While the international community might see the constitution as a badge of state sovereignty and a passport into the international system, for the citizens of the state the primary functions of the constitution are manifold: depending on the situation, the constitution is seen as variously as an instrument to consolidate newly developing class and social relations, entrench revolutionary change, define nation or identity, heal conflicts and wounds of the past, develop norms and institutions for the coexistence of different religious or cultural communities, etc. The aims of international interveners and local communities may not coincide.”^{iv}

In addition, the focus of the international community in post-conflict interventions is often on rapid stabilization of the conflict and quick exit strategies. This tends to undermine national ownership of the process by setting a pace that does not allow national actors to fully explore and deliberate options for the constitution.

Inevitably, exercises supported by Security Council mandates and/or internationally negotiated legal frameworks have to accommodate, to some degree, the concerns of the international community, and donor assistance and heightened international attention further buttress that agenda. To various

degrees the legal frameworks analyzed below reflected such international agendas.

Therefore, if the constitution is to be nationally owned, participatory processes become all the more important, to draw national and local priorities into the exercise. They can help harmonize international and national agendas and, if anything, educate international actors on the particular concerns of, and potential innovations and solutions available from within the national polity.

This section discusses and compares the legal frameworks governing each of the case studies under review. In Cambodia and Afghanistan they took the form of a peace agreement while in East Timor it was a UN prepared regulation. In East Timor, where the UN had legislative authority and prepared the regulation it had more influence on the content. In Cambodia and Afghanistan the peace agreements were a product of negotiations with key parties to the conflict yet influenced by international agendas for the process.

Cambodia: A Tight Timeframe with Agreed Upon Constitutional Principles

The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (Paris Agreement)^v of 1991 provided the legal framework for Cambodia’s constitution-making process. All parties to the Cambodian conflict were present at the peace negotiations, which took place between 1989 and 1991.^{vi}

The Paris Agreement provided that an election would be held to form a Constituent Assembly of 120 members to draft and adopt a new constitution within a three-month time period and then transform itself into a legislative assembly.^{vii} On the one hand, this allowed for a quicker end to the transition, called for by some. However this, in principle, represented a conflict of interest, as Assembly members designed their own powers as future members of the legislature (In practice though, the resulting legislature in Cambodia has been weak).

A former UNTAC official explained that the international community preferred a tight timeframe to prevent potential spoilers from derailing the process and to establish the new government as soon

as possible to prevent confusion about who had authority during the transition.^{viii} There were concerns, too, that the longer the formation of the new government took, the longer UNTAC's departure would be delayed, increasing its financial costs.^{ix}

The Paris Agreement guaranteed that all Cambodians would have the same “rights, freedoms and opportunities to take part in the electoral process.”^x The Agreement did not refer to the participation of the public in the constitution-making process itself or create any mechanisms by which this would be accomplished. However, as a constitutional advisor noted, the trend toward more participatory and inclusive constitution-making processes had not yet taken root.^{xi}

The Paris Agreement also specified that the constitution be adopted by a two-thirds majority of the members of the Constituent Assembly.^{xii} Lastly, the parties agreed upon the following fundamental constitutional principles to be enshrined in the new constitution:

- the constitution will be the supreme law of the land;
- amendment to the constitution would only be by a designated process involving legislative approval, popular referendum, or both;
- the inclusion of a declaration of fundamental rights for the protection of specific human rights adhere to the Universal Declaration of Human Rights;
- that the rights must be enforceable in a court of law;
- that the constitution will be for a sovereign, independent and neutral State, and the national unity of the Cambodian people;
- the constitution will create a liberal democracy;
- mandated periodic elections;
- the right to vote; and
- an independent judiciary to uphold the constitution.^{xiii}

Although the parties agreed to this set of constitutional principles there was no mechanism for review to verify whether the final constitution fully incorporated the principles. Nonetheless, prior agreement on such fundamental future provisions of the constitution may have bolstered the international communities resolve to finance such an expensive undertaking.

East Timor: The Cambodian Process Revisited

Nearly ten years later, the legal framework for the East Timorese process was prepared under the auspices of the United Nations Transitional Authority in East Timor (UNTAET) Regulation 2001/2 “On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor” was promulgated on 16 March 2001. The framework was remarkably similar to that of Cambodia.

Regulation 2001/2 stipulated that an election would be held for 88 members to form a Constituent Assembly. The 75 national seats would be based on proportional representation and the 13 district candidates would be elected by simple plurality. It also specified that the Constituent Assembly should adopt the new constitution within a period of ninety days; that it would serve as an interim legislature; and could become East Timor's future legislature if the final constitution so provided. The Regulation also required a two-thirds majority of the Assembly's members to adopt the constitution.^{xiv}

Although the Constituent Assembly was to give “due consideration to the results of the consultations conducted by any duly constituted Constitutional Commission or Commissions,” Regulation 2001/2 did not require the Constituent Assembly to consult with the public.^{xv} Notwithstanding this suggestion that the structure might incorporate commissions, a constitutional commission with powers to prepare a constitution was not created—despite civil society strongly arguing (and lobbying the Security Council) for such a commission. The reference to “Commissions” in the regulation was later implemented through an UNTAET Directive, which led to a consultation process (which was seen an UNTAET product

despite being legally independent) that was later largely ignored by the Constituent Assembly.^{xvi}

A former UNTAET official responsible for assisting the drafting of Regulation 2001/2 noted that the Department of Political Affairs did review the Paris Agreement for inspiration on designing an exit strategy.^{xvii} It was natural for the mission to seek guidance from the only other example of a UN transitional administration ushering in a new constitution. However, the contexts were very different. Unlike the Cambodian process, by the time the East Timorese process commenced, there was internationally a clear trend toward direct participation in constitution-making and East Timor's civil society had met with national actors from South Africa and Thailand, among others, to share their experiences. This led, in part, to civil society actors, as well as some political actors, to strongly assert that the process should be given adequate time to allow for proper civic education campaigns, national dialogue, and an independent commission to hold consultations with the public.^{xviii} This would have been feasible because there were no dangerous spoilers within East Timor's borders to seriously threaten such an open process (unlike in Cambodia and later Afghanistan). Given these important differences, the 90 day timeframe to prepare, debate and adopt a constitution may not have been a useful precedent to replicate in the East Timorese context.

It is important to note that the legal framework for the constitutional process was drafted and adopted well into UNTAET's mandate and this may have led to the need to rush the process. The political elite wanted to assume authority from UNTAET and pressed for an early end to the transition. Certainly, some national leaders within the East Timor Transitional Administration preferred a more streamlined process centered around an elected Assembly. However, some observers have concluded that the tight timetable was "essentially an UNTAET creation" because the international community wanted a clear indicator of a successful political transition in the form of a constitution. After such failed UN missions as Somalia and Rwanda, the international community required a success story.^{xix} Although there was great potential to design a transparent, inclusive and participatory process, the legal framework allowed for an elite driven process to

the great disappointment of civil society, including the Catholic Church.

Another difference (related more specifically to the context) between the legal frameworks of Cambodia and East Timor is that Regulation 2001/2 did not prescribe the sort of binding constitutional or legal principles in effect in Cambodia. In East Timor, this was in deference to the sovereignty of the elected Constituent Assembly. The stance of senior UN officials was to have a "hands off" approach so that the substance of the constitution would be viewed as the exclusive purview of the Constituent Assembly and not foreign-imposed. Regulation 2001/2 did state that the constitution must be for an "independent and democratic East Timor" but these principles were largely a foregone conclusion and did not bind the hands of the drafters.

Afghanistan: A Flexible Framework

The Bonn Agreement^{xx} of 5 December 2001 established the legal basis for the constitution-making process. The fall of the Taliban presented the opportunity to forge a new consensus among Afghans to reconstruct the state. Under UN auspices, the Bonn conference brought four Afghan political groups together with the aim of securing agreement on a broad-based transitional government. Unlike the Paris peace negotiations, the gathering was not fully representative of all elements of the Afghan polity (nor was it possible to have the Taliban represented, a factor that would later impact the peace process). The Bonn Agreement reflected the power balance at the time, with the Northern Alliance parlaying its grip on Kabul into a dominant position in the initial Interim Administration established by Bonn. However, the agreement outlined an approximately three year transitional process allowing for steadily broader representation. The Interim Administration governed until the more representative Emergency *Loya Jirga* held in June 2002 selected a Transitional Administration ("TA"). The last two phases were the holding of the Constitutional *Loya Jirga* (CLJ) and finally national elections.

Within two months of its establishment, the TA was to establish a Constitutional Commission, with the assistance of the United Nations, to "prepare the proposed Constitution."^{xxi} The Constitutional

Loya Jirga would adopt the draft, which was to be convened within eighteen months of the establishment of the TA.^{xxiii}

The Bonn Agreement's legal framework diverged from that of East Timor and Cambodia in six fundamental ways. First, the Bonn Agreement created a two-pronged process: (1) a Constitutional Commission that would prepare the constitution and (2) a Constitutional *Loya Jirga* to debate and adopt the document. Second, the Agreement framed an eighteen-month time period for the preparation of the draft and the convening of the CLJ, but did not set a deadline for the CLJ to adopt the new constitution. Third, the Agreement did not specify the mechanism for the selection/election of the members of the Constitutional Commission or the Constitutional *Loya Jirga*. Fourth, the Agreement did not make the Commission an independent body. Fifth, the process drew on a culturally recognized Afghan institutional form (namely the *Loya Jirga*—the Grand Council).

Lastly, the Agreement differed from the Paris Agreement—and to a limited extent UNTAET Regulation 2001/2—in that it did not predetermine any constitutional principles. Nonetheless, the Agreement as a whole stressed several key goals and principles that the constitutional exercise could potentially draw upon. For example, it provided that the goal of the transition was to create a “political future in accordance with the principles of Islam, democracy, pluralism and social justice” as well as to “end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country” and the ‘establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative government.’^{xxiii}

The legal framework was skeletal. It did not provide for the mandate of the constitutional organs, the mode of appointments/elections to them, and the role of the public or basic rules of procedure. The lack of detail in the Bonn Agreement allowed the TA and the UN to be flexible and adjust to changes in the political and security climate. With UN assistance, the Afghans leading the process were free to devise as broadly representative a Commission and CLJ as possible, using a combination of methods for selection and appointment of CLJ delegates.

This was critical because areas of the country were too violent for the UN to have a presence, but

also because the overall transition process was constantly evolving and negotiated en route as power dynamics shifted. One of UNAMA's objectives was to continue reaching out to all factions and expanding the degree of representation in the peace process.

The governmental nature of the Constitutional Commission meant President Karzai and powerful members of his Cabinet were the ultimate decision-makers about the draft finally submitted to the CLJ. The executive control over the draft was tempered to some extent because the delegates to the CLJ were, taken as a whole, fairly representative and had the authority to revise the draft.

Besides the Special Representative of the Secretary-General's (SRSG) general authority to ‘monitor and assist in the implementation of all aspects’ of the Bonn Agreement,^{xxiv} the Bonn Agreement did not set up an enforcement mechanism to ensure that the TA upheld the underlying principles of the Bonn Agreement. Nonetheless, the UN was able to work closely with the TA to promote those principles. Similarly, while the constitutional provisions in the legal framework did not specifically reflect the principles of inclusion, transparency and participation, the UN, with external technical assistance, promoted their incorporation into the Presidential Decrees and rules of procedures, which shaped the constitutional process.

2. OVERVIEW OF THE PROCESS

This section broadly reviews the constitution-making process and takes particular account of the degree to which, where appropriate given security and other concerns, it was inclusive, transparent and participatory. It provides a brief overview of the sequencing of events, the work plan of the constitution-making organs, the mode of appointments/elections, the genuineness of any consultation processes, and the method of adoption of the constitution.

Cambodia: A Constitution in Ninety Days

The Cambodian constitutional process, as defined by the Paris Agreement, had three main phases: (1) the elections for the Constituent

Assembly; (2) the drafting of the constitution; and (3) the adoption of the Constitution. The process did not include a nationwide civic education campaign on constitutional issues or public consultation. Although participatory constitution-making is widely practiced today (see e.g., South Africa, Rwanda, Afghanistan), in 1993 the focus of the international community and political elite was more on the final content of the constitution as a way to create democratic governance and on how the process could contribute to that goal.

The broad timeline and structuring of the constitutional process was as follows:

April 1993:	Political campaign
May 1993:	Constituent Assembly elections
June 1993:	Inauguration of Constituent Assembly
Sept. 1993:	Promulgation of new Constitution

The sequencing of events was to include the demobilization of seventy per cent of all forces before the end of the voter registration period. All armed forces were to be placed in cantonments after the elections, demobilized or absorbed into a national army. These efforts were unsuccessful and proved one of the greatest weaknesses of the process, as the political campaigning and the elections in the end took place with neither of the largest of the armed factions—the Khmer Rouge forces or the Cambodian People’s Party Forces—demobilized and the two smaller parties only partly demobilized.

On 7 April 1993, the political campaigning period began, although the Khmer Rouge had already announced that it would not participate, ostensibly because the political environment was not neutral. Despite high levels of violence and intimidation, the electoral process continued. UNTAC organized its political officers, military observers and civilian police to attend the political rallies. Some areas of the country were off limits because of high security risks. Despite the risks, the Security Council on 20 May 1993 agreed that security measures were sufficient and that the elections should go ahead as planned, and to general relief the elections were largely peaceful. Moreover, close to 90 per cent of the registered voters turned out to vote.

Nonetheless, the central objective of the Paris Agreement—establishing a legitimate governmental authority and constitutional order through elections—began to unravel shortly thereafter. It was understood that the party that won the elections would form the government. Although the National United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) won, the Cambodian People’s Party (CPP) retained dominant military power, was firmly entrenched at every level of government in much of Cambodia and was not willing to accept the results of the elections. Under threats of civil war, Prince Sihanouk brokered a power sharing arrangement between CPP and FUNCINPEC, resulting in co-Prime Ministers.

The 120 seats of the constituent assembly were distributed as follows: FUNCINPEC (58), CPP (51), BLDP (10), MOLINAKA (1). A key faction in the conflict, the Khmer Rouge, was not involved in drafting the constitution. The Constituent Assembly did not have mechanisms for representation or input from a broader set of stakeholders in society, such as youth, women, and minorities, and hence was not inclusive in that sense. Women in particular were poorly represented in the political parties, with only five per cent of all candidates being women.

There was no requirement in the Paris Peace Accord that the public participate in the constitution-making process—other than to vote in the elections. Traditionally, this may have been considered adequate, not only by political elites in Cambodia, but also by the international community. This was not the position taken by civil society, the media and the public, who wished to have input into the process but were precluded because no mechanisms were in place.

A coalition of 14 civil society groups called *Ponleu Khmer* formed to encourage public participation in the drafting of the new constitution. However, because the process did not incorporate mechanisms for the public to participate and the drafting process was so short, the coalition struggled to understand basic issues of constitutionalism.^{xxv} The coalition rushed to translate other constitutions, share what they learned with other civil society members and meet with as many nearby communities as possible to discuss constitutional issues and consult with them about their aspirations for the future constitution.

The coalition shared the results of their consultations and suggested human rights provisions but they did not feel that their input was considered and were frustrated by the lack of transparency with the process.^{xxvi}

On 14 June 2003, on the first day of the Constituent Assembly, *Ponleu Khmer* members, numbering in the thousands (many of them monks and nuns), gathered in front of the Assembly and requested that *Ponleu Khmer* be granted observer status to make the process of drafting the constitution more democratic. The group read a statement, which underscored that the constitution should be a reflection of the will of the people.^{xxvii}

However they felt shut out from the process and just as in East Timor, the coalition wrote a letter to the SRSB stating the following:

We have the right to ask all the elected representatives about what they are going to include in the constitution. They should let us know openly what their intentions are. The drawing up of the constitution is not a secret thing. All citizens have the right to know about what will be written in the constitution. The people have the right to oppose what they think is inappropriate or should not be in the constitution.^{xxviii}

The SRSB replied that they had a “democratic right to lobby the members of the Constituent Assembly and the political parties to which they belong, on any matters of concern relating to the Constitution,” but emphasized that it was the responsibility of the Constituent Assembly to prepare and adopt the constitution.^{xxix}

However, from the outset, the process was highly secretive. Rules of procedure were introduced to the Constituent Assembly and they were voted on in secret, with no debate and no public tally of the vote on the rules.^{xxx} These rules provided for the appointment of a twelve-member Drafting Committee. The composition of the Drafting Committee closely followed the results of the elections: FUNCINPEC (6), CPP (5) and BLDP (1). The Drafting Committee largely conducted its work in secret. Not only were drafts of the constitution not

shared with the public but also they were also not shared with the full Constituent Assembly.

Although the Drafting Committee did attempt to prepare a draft, it was leaders of FUNCINPEC and CPP who each presented Prince Sihanouk with a draft for his approval. He chose the monarchist model prepared by a French constitutional expert. The press was reporting as early as 26 August 1993 that a consensus had been reached to restore the monarchy.^{xxxi} The Constituent Assembly reviewed the draft selected by Prince Sihanouk and adopted it with little debate on 21 September 1993 by a vote of 113 to 5, with 2 abstentions. Approximately five days later, with the Paris Agreement fulfilled, the SRSB departed the country.

On the ten-year anniversary of the signing of the constitution, the former UNTAC translator for the SRSB lamented that the government still lacked accountability and there is no public participation in government. Moreover, the people are ill informed about their rights and responsibilities under the Constitution.^{xxxii} Those that participated in the drafting of the constitution and others in society feel that although it initially brought a “sense of order and stability,” it did not live up to its potential, as much of it was never implemented.^{xxxiii} Those provisions that were to lead to greater participation of the people in government and transparency have been ignored. One of these is the establishment of the National Congress as an annual meeting that was to raise concerns and be informed on matters of national interest.

The political elite’s lack of will to consider the views of the public or even other members of the Constituent Assembly and the closed door debates on the constitution established an antidemocratic precedent; Cambodia’s National Assembly currently has little or no contact with its constituency, genuine deliberations on legislation do not occur and there is little transparency in government.

East Timor: A Missed Peacebuilding Opportunity

The broad structure of the East Timor process was similar to that of Cambodia. The tight

original timeline was only slightly improved by extensions, resulting in:

June–July 2001: Constitutional Commission Hearings

August 2001: Constituent Assembly Elections

September 2001: Constituent Assembly Sworn-In

March 2002: Constituent Assembly Adopts Constitution

Similar to UNTAC’s voter education program, UNTAET’s civic education campaign did not cover constitutional issues. These were discussed during the hearings conducted by the UNTAET appointed and organized Constitutional Commissions one month prior to the elections. An international observer group to the East Timor process summarized their concerns:

A primary concern is that the whole process is too rushed. The current timetable seems to mostly serve the concerns of United Nations member states and established political organizations, rather than grassroots East Timorese wishes as expressed by the NGO Forum's Working Group on Constitutional issues and the East Timorese Catholic Church.

Civic education started late because UNTAET initially failed to consult East Timorese on its design, leaving little time for this critical part of the democratic process. Even on election day many voters did not understand that the vote was to choose Constituent Assembly members and/or the function of the Constituent Assembly. While a directive from the SRSG established Constitutional Commissions in each district, these commissions had only 45 days to educate a mostly illiterate public on complex constitutional issues and gather input. The Independent Electoral Commission's work concentrated on the mechanics of the voting process, which naturally required much attention.

[We are] concerned that electoral regulations already adopted will potentially limit the

options of the Constituent Assembly. The decision to have voters choose among political parties (rather than individuals or sectoral representatives) could preclude diverse views and open debate. The structure of the Assembly, as well as the regulatory encouragement for it to evolve into East Timor’s first elected legislature, may preempt decisions on the structure of the legislature. The elected members are unlikely to relinquish their positions to stand for another election.

During the election campaign, the political parties provided little information about their views on constitutional issues. A truly democratic process would involve more informed debate prior to the election.^{xxxiv}

Civil society was the driving force behind encouraging broader participation in East Timor’s constitution-making process. Civil society organizations had met with leaders from the South Africa and Thai constitution-making processes, among others, and were enthusiastic to assist with conducting direct participatory activities so that their people could give voice to their aspirations for the future of their country.

During public hearings in the National Council (the thirty-six member, UNTAET appointed quasi-legislature) on the structure of the political transition, a wide range of East Timorese actors from civil society, the church and others stated that they preferred that an independent Constitutional Commission draft the constitution, that an elected body ratify the constitution and that that the process provide enough time to conduct a nationwide civic education campaign and consultations with the people.

However, the Director of UNTAET’s Political Affairs Department asserted in the public hearings that *only* an elected body should decide the future shape of the government.^{xxxv} This argument reflects what one constitution-making scholar notes is the position of “those who argue that democratic participation should not or cannot extend to the constitution-making process. Coming mainly from realists...these arguments recognize the claim for participation, but instead see it met largely by the

opportunity to vote for representatives or for ratification.”^{xxxvi}

This perspective was mirrored by the Frente Revolucionária do Timor-Leste Independente (FRETILIN), the dominant political party. FRETILIN did not initially welcome public participation in the Constituent Assembly. Senior FRETILIN officials felt that the people that voted for them gave them a mandate and did not expect to play any other role. Civil society representatives and some members of the public throughout the process contradicted this perspective.

In February 2002, the NC’s Standing Committee on Political Affairs (prepared primarily with civil society members of the NC) prepared and presented a draft regulation to establish an independent and inclusive constitutional commission composed of 26 East Timorese. The commissioners were to be professionals or representatives of youth, women, the church and civil society. The commission would have a nationwide presence and establish an office in each of the thirteen districts.

Section 3.2 of the draft regulation proposed the following twelve-month work plan.

(a) *Public Information Phase*, which will include mass dissemination of information on the Nature of a Constitution and the decisions need to be taken for its adoption.

(b) *Debating Phase*, during which members of the public will be assisted in discussing the key issues under the Constitution through debates, workshops or group discussions from the national to the community level;

(c) *Consultation Phase*, during which members of the public will be able to formally submit their views at public hearings held at the Sub-Districts level.

(d) *Reporting Phase*, during which members of the Commission compile the views expressed during the Consultation process and draws recommendations for submission to the Constituent Assembly;

(e) *Drafting Phase*, during which members of the Commission assist the

Constituent Assembly with the drafting of the Constitution.

The proposed regulation contained a range of elements to ensure broad participation. The National Council did not approve the regulation. FRETILIN largely blocked its passage; one member of FRETILIN claimed that the draft was intended to politically manipulate the process. Because FRETILIN had already prepared a draft of the constitution it did not necessarily want a process that may have led to a very different draft being tabled at the Constituent Assembly.

UNTAET prepared Directive 2001/3 “On the Establishment of Constitutional Commissions for East Timor” for the purpose of “soliciting the views of the people of East Timor on the future Constitution.” However, unlike the purpose of most constitutional commissions, this body did not have a role in drafting the constitution.

Just as civil society had opposed the structure of the constitution-making process, on 18 April 2001, a coalition of civil society members wrote to the Director of the Political Department to criticize the new Directive:

The NGO Forum believes that the establishment of Constitutional Commissions (UNTAET Directive no. 2001/2, 31 March 2001) for East Timor will appear as a legitimate process, while being seriously insufficient both in terms of substance and process. In particular, the NGO Forum has three main concerns:

1. The period of operation of the Constitutional Commissions is too short to allow for sufficient participation of a broad spectrum of East Timorese society. It will not be possible to have an effective information dissemination process and meaningful consultation within this short timeframe. The reports from the Commissioners to the Constituent Assembly will not be representative of the East Timorese people’s aspirations and should not be seen as such....

2. The process for nominations, training and guidance for the commissioners will be inadequate in such a short timeframe....

3. The objective of the Commission is unclear, in particular how it intends to influence the work of the Constituent Assembly.

The NGO Forum is very disappointed that our concerns, which have been expressed on several occasions, were not taken into account in Directive 2001/2.

...We have no illusions that the NGO consultation process on the Constitution will be sufficiently representative either, under such a short timeframe. Therefore, we will continue to make the point that the timetable for independence, and in particular, the constitution-making process, must be extended beyond the elections for a Constituent Assembly. Without significant change in the timetable, the new Constitution should be viewed as an interim Constitution, allowing more time for broad-based input and consultation.^{xxxvii}

The time frame of the process remained unchanged. The issue of representation was also of concern. The structure of the electoral process limited the degree of inclusion in the Constituent Assembly. The UN, the media and leaders of the FRETILIN) all predicted that FRETILIN would win a substantial number of seats because of its leadership role in the struggle for independence. Despite the likelihood of single party domination of the Constituent Assembly, the process was still structured to have the elected body draft, debate and adopt the constitution with no provision for marginalized groups to have representation.

Ninety-one per cent of eligible voters participated on August 30 in the elections. The electoral system led to an eighty-eight member Assembly consisting of one representative from each of East Timor's thirteen districts, with the rest of the seats divided on the basis of proportional representation. FRETILIN won fewer seats than many expected but still dominated with 57.3 per cent of the vote and 55 total seats (43 of the general seats

and 12 of the 13 district seats). A few of the parties with smaller electoral mandates that were very close ideologically to FRETILIN aligned with them and this gave it the two-thirds majority required to adopt the constitution. Thus, FRETILIN did not have to engage in consensus building to get a constitution adopted.

The Constituent Assembly was, arguably, not fully representative of the political power structure in the country. Among the public FRETILIN's political popularity was in fact challenged by that of Xanana Gusmão, the charismatic leader of the resistance who had left FRETILIN but did not form a political party. His power base was not clearly represented in the Constituent Assembly. Not all of the populace understood that FRETILIN and Gusmão had split and that voting for FRETILIN was in effect assisting the party to limit the power of Gusmão in his expected role as the future President. "The use of an elected Constituent Assembly did lead to the interests of the most powerful political party to be reflected in the Constitution, but the lack of a competing political organization meant that the constitution-making system did not lead to negotiations or compromise about the power-sharing arrangements with the other main power base in the country."^{xxxviii}

Clearly, FRETILIN was likely to have won any election at that time in East Timor and there is a democratic argument, albeit a narrow one, to support its subsequent domination of the process. Voters associated it with the long struggle for independence and that legacy represents deep political capital in East Timor. However, voters for a constitutional exercise are in effect asked not simply to select a government of one term but to make choices that will affect the 'blueprint' for their society. As with many post-conflict electoral exercises, the elections were influenced more by the legacy of the past than specific party platforms, and certainly the electoral process did not bring out the constitutional issues at stake.

The SRSB did stress the importance of women's participation in the elections and UNTAET's Gender Affairs Unit trained hundreds of women from political parties about how to participate in the process. In the National Council (East Timor's appointed transitional legislature), there was intensive debate about whether there should be a quota

guaranteeing that women make up at least twenty-five per cent of the Constituent Assembly. Although this was voted against in the National Council, parties voluntarily placed women in winnable positions. Women comprised twenty-seven per cent of the Constituent Assembly but because of strict party line voting, few attempted to advance provisions that women's groups had put forward in a charter submitted to the Constituent Assembly.^{xxxix}

UNTAET Regulation 2001/2 stipulated that the body should draft and adopt the new constitution within three months of its first sitting. The short timeframe was particularly challenging because few of the members of the CA had experience in governance or law. During the Indonesian occupation, the East Timorese were largely excluded from the civil service except for low-level positions.

Although inexperienced, the members were expected to draft the rules of procedure and decide the future structure of the state in only a few short months. Because UNTAET had taken a “hands off” approach, the UN had not prepared options for suggested rules of procedure for how a CA could operate. Many of the political parties expressed deep frustration that the time was so short and they had no guidance on how to proceed. The President of the CA also had little guidance on how to lead an assembly and discussions were unstructured; the CA spent twenty-one out of their allotted ninety days debating the internal rules of procedure. Because FRETILIN leaders were linked to Portugal, the proposed rules were nearly identical to the Portuguese parliament's rules of procedure. The rules focused on voting and majority rule rather than consensus building.

The CA established a forty-two member Systemization and Harmonization Committee (SHC) to set up in turn a system of thematic committees which focused on various constitutional topics, such as fundamental rights or the judiciary. The Committees were given ten days to discuss the issues and, hold public hearings and complete the draft articles related to their themes. The parties gave draft constitutions to the SHC and the SHC provided what each party's constitution contained for the relevant theme for each of the committees. A few parties submitted drafts, but the debates overwhelmingly focused on FRETILIN'S draft which was largely

based on Portugal's constitution. Comments made by civil society and others at the public hearings were generally not taken into consideration.

By 30 November 2001, the plenary had agreed on a draft constitution on which to debate article by article. By 15 December 2001, they had 1,000 articles left to agree upon. The CA voted to extend its deliberations until 25 January 2002. To counter any pressure the members were receiving from other members of the international community, including the UN, eight Congressmen from the United States of America co-signed a letter to the CA urging them to consider extending the process a further two months. The CA agreed to extend the drafting process.

On 31 January 2002, the CA voted to transform itself into East Timor's first legislature upon final approval of the Constitution. This had been hotly debated because many of the smaller parties in the CA argued that the people did not understand that they were voting for an assembly that would become the future parliament. FRETILIN clearly wished to maintain its dominance and voted to transform the CA into the new legislature. The UN was also in favor of this because it was less expensive than holding legislative elections concurrently with the presidential election scheduled for 14 April 2002. The Electoral Commission warned the CA that it would have been impossible to do so.^{xl} Nonetheless, the structure of the East Timorese process had the same potential conflict of interest issues as the Cambodian—a CA tasked with determining its own powers as the future legislature.

Civil Society's assessment of the potential efficacy of the UNTAET organized Constitutional Commissions was borne out. The Commissions met with East Timorese citizens for approximately one month. The Commission's meetings combined civic education on constitutionalism with consultations. These two elements of a participatory process are typically divided into two phases with adequate time for the public to learn about constitutional issues before they are consulted on key constitutional issues—often it is the civic education program that assists in shaping the constitutional issues placed before the public during the consultation phase.

The Commission's reports, produced with the assistance of the UN, were submitted to the

Constituent Assembly but were ignored by all members.^{xii} A few Assembly members stated in the plenary that they did not trust the reports because they were the product of UNTAET rather than a homegrown consultation process.

The FRETILIN leaders in the Constituent Assembly proved to have limited interest in a participatory process. Because of sustained pressure from civil society and the media, the CA agreed to hold a one-week public consultation process on its agreed-upon draft from 25 February – 1 March 2002. On 20 February 2002, Bishop Belo, speaking in a televised public discussion on the constitution, referred to the one-week consultation schedule as akin to “teasing” the public. Both Bishop Belo and Xanana Gusmão called for the Constituent Assembly to devote the month of March to a nationwide public review of the draft constitution. Gusmão argued that he did not think it was necessary to have the constitution adopted by Independence day because “A constitution is the pillar of a nation. It is the mother of law, and it should be properly legitimized by the people.”

FRETILIN leaders in the CA, however, considered the one-week consultation a compromise, in view of their electoral victory. Thirteen groups of CA members traveled to each of East Timor’s districts. The Asia Foundation and UNDP supported advanced distribution of drafts of the constitution in each of the languages and a magazine summarizing the drafting process and the main articles of the constitution.

Because a consultation process had not been planned prior to the establishment of the CA, it was a difficult task to get the funds and resources necessary, including the cars, helicopters, per diem, communication devices, etc. The UN secured transportation and The Asia Foundation assisted to secure emergency funds. Because of the rush and poor Secretariat planning, many citizens received the drafts the day the Assembly members arrived. In some areas, the public ripped up their copies of the constitution in protest and declared the process a sham because there was no time to read the draft, prepare comments and properly participate.

Each team of Assembly members had a different methodology for holding consultation meetings. Some spent the entire period explaining the

draft to the public. Others listened to hundreds of citizens come forward to give their views on the draft. This resulted in a skewed process with only some groups having commentary to report to the Assembly. Even after the one-week consultation period, the CA continued to debate whether the draft would be open to change based on the public’s comments.

The collation, analysis and recording of views require time and specific technical expertise. The East Timor Constituent Assembly did not decide how to consider the views until they returned to Dili. Some CA members, at least in private, still maintained that the process was an exercise in public relations only. Nonetheless, there was public pressure to consider the views that had been collected.

It was decided that some of the suggested revisions would be put to a vote in the Plenary but many that were too political or sensitive were not considered. Suggestions that were “soft” topics were agreed upon and incorporated into the draft. Suggestions by the High Commissioner for Human Rights, constitutional experts from the Asia Foundation and a few other commentators were also considered and incorporated into the final draft, particularly those that corrected inconsistencies within the draft or brought the draft into harmony with international human rights standards.

In many post-conflict contexts the threat of violence looms, space for political dialogue is limited, warlords hold power and the ability of the UN to support the creation of political space is limited. East Timor faced few of these challenges. There were no dangerous spoilers and even the diverse political factions had united and called for a more open process. Nonetheless, the UN waited too long to consider the structure of the process and to prepare the public to genuinely participate in the formation of the constitution that would give birth to their new nation.

Civil society repeatedly wrote to the Security Council and the SRSB to urge for sufficient time and resources to allow for an inclusive and participatory process but their pleas were ignored. If key UN officials involved in the process had viewed direct participation as an opportunity to lay the foundation for transparent, inclusive and participatory government, there would have been enough time during the transitional period to educate the public

about key constitutional issues. Instead, in a survey conducted five months before the elections for the Constituent Assembly, only five per cent of the population knew that the election was for the purpose of drafting a constitution. Most thought the elections were being held to elect their first president and over sixty per cent had no knowledge that East Timor would be drafting a constitution or if it already had a constitution.^{xliii}

Nonetheless, the East Timor process was an improvement on the Cambodian. The Constituent Assembly deliberations were open to the public and the media. Because of pressure from the media, the President of the Assembly held weekly press conferences and all drafts of the constitution were released to the public.

However, in the final analysis, while the East Timor participatory framework created mechanisms that seemed to replicate elements of other successful processes, such as civic education, constitutional commissions, and consultations on the prepared draft—these elements were not given sufficient time or resources to achieve the full benefits of successful participatory processes.

The entire constitution was provisionally approved on 9 February 2002. Slight revisions were made to the draft after the hastily conducted, one-week public consultation process and the constitution was formally approved on 22 March 2002 by a vote of 73 in favor, 14 against, 1 abstaining and 1 absent. Those voting against felt that FRETILIN had merely pushed through its constitutional agenda without seeking consensus on the draft. At that time, even some within the FRETILIN party recognized that the new constitution largely reflected their party's agenda rather than a consensus amongst the various stakeholders.

Afghanistan: Increasing the Degree of Representation and Participation

Although the Bonn Agreement established a two-pronged constitution-making process—the establishment of a Constitutional Commission to assist in preparing the draft and a CLJ to adopt the draft—the TA revised this framework into a three-stage process. The process was structured as follows:

October 2002: Formation of 9-member Drafting Committee and Secretariat

March 2003: Submission of Drafting Committee's constitutional draft to President Karzai

April 2003: Establishment of 35-member Constitutional Commission

June-July 2003: Civic Education Program on Constitutional Issues

July-August 2003: Public Consultation on Key Constitutional Issues

November 2003: Release of Draft of Constitution to the Public

December 2003: Convening of Constitutional *Loya Jirga*

January 2003: Adoption of Constitution

Karzai appointed the nine-member Drafting Committee in October 2002 to prepare a draft of the constitution. It did not have a legal mandate and the Committee largely conducted its work behind closed doors and held few consultations with experts or civil society. The Committee presented its draft of the constitution, which largely followed the 1964 Afghan Constitution, to the President in March of 2003. By this time, six months of the eighteen-month timeframe for the process had passed.

The President did not appoint the thirty-five member Constitutional Review Commission until 24 April 2003. The Review Commission was comprised of Afghan legal experts, tribal elders, religious scholars, and professionals specialized in such fields as economics and social sciences; seven of the members were women. The Constitutional Commission was fairly representative but there were complaints that the best and the brightest in key fields had been excluded because of powerful political factions wanted a specific person on the Commission who would be more likely to represent their interests.^{xliiii}

Karzai issued a Presidential Decree, which mandated the following work plan for the Commission:

- facilitating and promoting public information on the constitution-making process during the entire period of its work;
- conducting public consultations in each province of Afghanistan, and among Afghan refugees in Iran and Pakistan and, where possible, other countries, to solicit the views of Afghans regarding their national aspirations;
- receiving written submissions from individuals and groups of Afghans within and outside the country wishing to contribute to the constitutional process;
- conducting or commissioning studies concerning options for the Draft Constitution;
- preparing a report analyzing the views of Afghans gathered during public consultations and making the report available to the public; and
- disseminating and educating the public on the Draft Constitution.

The Afghan Secretariat rushed to support the Constitutional Commission's mandate; it established numerous departments including, administration, logistics, finance, IT, public education, public consultation, reporting, research, data processing, translation, elections, and protocol. The Secretariat established offices in eight regions of the country and in Iran and Pakistan. The Secretariat did a remarkable job in supporting the Commission and responding to the constantly evolving process, a lack of clarity about their role and the legal framework at each stage of the process, and at times a lack of funds.

One of the key aspects of the mandate was related to public participation. Initially both UNAMA and the TA feared that a consultative process would be hijacked by spoilers and could raise controversial issues with no easy way to resolve the problems. Constitutional advisors emphasized that the dangers of the process being hijacked or spinning out of control could be minimized by careful attention to the details of the process and the rules of procedures and that experience had shown that participation nearly always waters down fundamentalist tendencies and instead broadens the social agenda, such as enforcement of rights, including the right to development and a fair distribution of resources.

After Karzai agreed to undertake a participatory process in March 2003, there were already obstacles to holding a successful consultative process. First, the public was already highly suspicious of what was perceived as a secretive process because the nine-member Drafting Committee had conducted their task behind closed doors. Second, the Drafting Committee had prepared a draft that was not released to the public. The public felt the draft was being hidden from them and the consultation process was a sham. Third, the TA and UNAMA did not want to establish an independent commission; it was to be under the authority of the TA and led by the Chair of the former Drafting Committee (who also served as Vice-President in the TA). And lastly, donors had not committed funds to the process because it was lacking a clear work plan and budget.

The Commission, with the support of the Secretariat had only one month, from early May to early June, to educate the public about constitutional issues and the process and encourage the public to participate. The Secretariat partnered with a consortium of NGOs which linked with approximately 1600 persons to assist in getting out the messages and these efforts combined attempted to cover all of the provinces in the country. The challenges of conducting a civic education and public consultation process were immense, including poor infrastructure, a high illiteracy rate, the difficulty of reaching women and the disabled, and overcoming the domination of local commanders the elite or land owning citizens in community meetings. The process was too rushed to overcome all these obstacles yet the Secretariat distributed over 450,000 questionnaires about key constitutional issues before the Commissioners traveled throughout the country to consult with the people.

From 8 June to 20 July 2003, Constitutional Commissioners formed teams of three—two men and one woman—and traveled to each region of the country and to Iran and Pakistan. The Secretariat's teams in the regions were tasked with holding focus group meetings with target groups such as women, religious leaders, farmers, youth, and village elders. Given the level of insecurity, the Commission largely avoided open, public meetings where participants may feel intimidated by local commanders or warlords. Because of the rush, the Secretariat had little time to

train the staff and this led to inconsistent application of the consultation plan.

Participants were eager to meet with the Commissioners and traveled great distances to give their views, often at great risk. Women in particular knew they would be targeted for participating, but did so anyway. Over 15,000 citizens gave suggestions at consultation meetings.

Although the Commissioners were tasked with listening to the public, some spent the majority of the time lecturing or explaining the draft of the constitution that had been prepared by the Drafting Committee and slightly revised by the Commission. This draft was not shared with the public before the consultations because it was decided that it was preferable to encourage the public to share the issues they were most concerned about rather than focusing on the draft. After the views were analyzed and incorporated into the draft where appropriate, the Commission then planned to release this draft and explain how the views were considered and incorporated.^{xliv}

The Secretariat made a valiant effort to enter all of the questionnaires and views gathered from the meetings into a pre-designed data entry system. Approximately 100,000 questionnaires were analyzed and a report was prepared explaining the results of the views of the public. The views of the public did indicate the concerns of the average citizen about security, a fair distribution of resources, access to education, and underscored that in general the Afghan population was respectful of the right to freedom of religion.

However, it was ultimately left to President Karzai and influential members of his Cabinet to decide the content of the final draft of the constitution and the final considerations were largely based upon their political agenda. The views of the public were not given much weight in this final consideration. Hence, similar to the East Timor exercise, those gathering the views of the public did not determine the final content of the draft. After President Karzai approved a final draft, it was not released to the public until 3 November 2003—approximately one month before the Constitutional *Loya Jirga* was to convene.

The report explaining the results of the consultations and how the views of the public were considered was primarily distributed to delegates to the Constitutional *Loya Jirga*. The original work plan of the Commission included the Commissioners educating the public on the final draft. Because of the lack of time and, for some of the Commissioners, a feeling of lack of ownership of the draft, this task was never completed.

The Presidential Decree on the Convening of the CLJ, dated 15 July 2003, established the mode of election and appointment as well as the composition of the 500-member body:

- 50 experts appointed by the President, 25 of whom were to be women;
- 344 delegates elected by the approximately 18,000 former Emergency *Loya Jirga* representatives;
- 24 elected refugees from Pakistan and Iran;
- 64 women elected by women—two women per province;
- 9 elected Kochis (nomadic tribes);
- 6 elected Internally Displaced Persons (IDPs) from three provinces; and
- 3 elected Hindu and Sikhs.

The Decree ensured that women, minorities and marginalized groups, such as internally displaced persons, all had a seat at the table.

Due to deterioration in security, it was impossible to hold the same sort of nation-wide election of delegates for the 344 elected CLJ delegates as had been conducted for the Emergency *Loya Jirga*. For the latter, approximately 19,000 district representatives had been elected, who then elected provincial delegates to the *Loya Jirga*. For the CLJ, many districts were no longer accessible, so the same approximately 19,000 delegates formed an electoral college and were reconvened at provincial centers to elect CLJ delegates. While this narrowed somewhat the representative base, the process was largely seen as transparent.

Highly detailed rules of procedure were drawn up with the assistance of comparative constitutional consultants, and these were closely

adhered to, minimizing opportunities for fraud and intimidation. Nevertheless, despite these efforts many warlords and Jihadists were elected to the CLJ, reflecting political and security realities in Afghanistan.

The CLJ was governed by a set of rules of procedure that the UN and constitutional advisors had assisted the TA to prepare. Nearly all of the delegates attended a two-day orientation on the rules of procedure that was participatory and focused on encouraging consensus building and promoting dialogue.

Although the rules of procedure were agreed to, the President of the Assembly declared that he himself should be considered the rules of procedure and often deviated from them, at times to the detriment of the process and at times to break gridlock. This did compromise the transparency of the process to some degree. There was also a certain level of intimidation because of the warlords and Jihadists sitting in the CLJ. Some delegates did not feel free to speak their minds and when one young female delegate protested the inclusion of warlords, she was nearly thrown out of the CLJ and had to be protected by UN officials.

The CLJ plenary deliberations were open with observers present and the media broadcasting the sessions. The CLJ broke into ten working groups of fifty, which deliberated upon the 160 articles of the constitution and put forward recommendations for revisions to a harmonization committee. The process did lead to various factions, minority groups and women engaging in three weeks of debate, which at times became quite heated. At one point, the CLJ was at a stalemate when delegates were split among ethnic lines over language rights, dual nationality issues, and governmental structure and power sharing issues. Negotiations then took place behind closed doors and the SRSG and US Ambassador assisted delegates to compromise and agree upon a final draft on 3 January 2003. President Karzai signed the constitution on 26 January 2003.

The representative nature of the CLJ is in part, what allows most Afghans to view the final constitution as a positive step toward democratic governance despite flaws in the participatory process. While diverse voices and opinions, including those of minority groups, may not have been reflected in the

draft constitution, the representation of minorities and women in the Constitutional *Loya Jirga* led to revisions to the draft that reflected their concerns (such as quotas for women's representation in the legislature and recognition of minority languages). These groups, to a certain degree, were perhaps better able to advocate for the aspirations of their constituencies because the civic education and consultation process facilitated the delegates to be better informed about constitutional issues and how they related to their rights.

Unlike Cambodia and East Timor, the formal Afghan process built in an education program on the adopted constitution. The Secretariat of the Constitutional Commission remained operational for three months after the adoption of the constitution to distribute drafts of the constitution and educate the public about what the new constitution meant for them.

3. UNITED NATIONS SUPPORT TO THE CONSTITUTIONAL PROCESS

Although this study discusses the role of the UN throughout, this section discusses how UN actors in the field defined their mode of assistance vis-à-vis the constitution-making process. UN constitutional assistance in each of the three case studies was primarily guided by the decision of the SRSG on the ground and his key political advisors. There were no relevant UN guidelines.

Cambodia: the Election as End Point

The Paris Agreement established a Supreme National Council (SNC) composed of all the parties to the agreement to serve as the “unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined.”^{xlv} The Paris Agreement also invited the Security Council to create the United Nations Transitional Authority in Cambodia (UNTAC) to assist with implementation of the peace process.^{xlvi} It was the first time in peacekeeping history that the UN had been given such an extensive and complex mandate. The parties

agreed that the UN would supervise the governmental administrative structures, facilitate a ceasefire, disarm the factions maintain law and order, repatriate refugees, and promote human rights. The cornerstone of UNTAC's mission was to supervise, conduct and monitor elections for a 120 member Constituent Assembly.^{xlvi}

The end point for the United Nations would be the Constituent Assembly's approval of the new constitution and its transformation into the legislative assembly, which would entail the creation of the new government.^{xlvi} The production of a constitution was important to the international community—which was responsible for the 2.8 billion dollar price tag for the UNTAC exercise—because it was to be the exit point for the United Nations. Security Council Resolution 745 underscored that UNTAC's mandate was not to exceed eighteen months.

On 29 May 1993, SRSG Yasushi Akashi, declared the elections for the Constituent Assembly to be free and fair. UNTAC's mission at the time was broadly considered a success. With the benefit of hindsight, UNTAC is now regarded as only a partial success, given that many elements of the Paris Accords were not implemented and the government collapse in violence four years after the elections. However, as Simon Chesterman observes:

The important variable is how one views the political context within which UNTAC operated. If the purpose of the mission was to transform Cambodia into a multiparty liberal democracy in eighteen months, it clearly did not succeed. If, however, one takes the view that Hun Sen—who had led Cambodia from 1979 and later seized power from his coalition partners in a coup four years after the 1993 elections—was always going to be the dominant political force in Cambodia, and that the purpose of the mission was to mollify the exercise of that power through introducing the language of human rights to Cambodian civil society, fostering the establishment of a relatively free press, and taking steps in the direction of a democratic basis for legitimate government, the mission was indeed a partial success.^{xlvi}

Observers both within and outside the UN now criticize the fact the elections in Cambodia were

the endpoint of the UN's assistance to the country's political transition. As a former UNTAC official explained, the “planning and management of the process after the election was disastrous,” because it did not focus on how the new Constituent Assembly would go about completing the task of adopting the constitution. This official notes that at the time the mission failed to truly understand that the core purpose of the exercise was a political transition rather than an election.¹

UNTAC's Human Rights and Information Components did a laudable job reaching out to Cambodians to inform them about the importance of the elections and human rights. A former UNTAC official who had conducted training sessions on elections explained that the primary message of the voter education campaign was about the importance of each individual's vote in choosing their new government and the secrecy of that vote. However, the campaign did not emphasize that those elected would be drafting a new constitution or attempt to educate the public on constitutional issues.

One very important aspect of UNTAC's legacy was the Human Rights Component's efforts to fund NGOs to assist with the civic and human rights education efforts. At the conclusion of UNTAC's mandate, civil society had blossomed from one NGO to over eighty registered NGOs or associations. Many of these were funded through the efforts of the Human Rights Component. To their great frustration, these NGOs and associations were shut out of the formal constitution-making process because there was no role for the public and no established mechanism to engage civil society.^{li} Nevertheless, post-adoption of the constitution, many of these NGOs have taken the lead in educating others about the contents of the constitution and monitoring the implementation of the constitution.^{lii}

After the elections, the SRSG took the position that the Constituent Assembly was a sovereign body and that therefore UNTAC would not interfere in its deliberations. Although UNTAC did offer to provide assistance, UN technical advisors were not formally accredited to the Constituent Assembly and had limited access. However, the Constituent Assembly had little constitutional or legal expertise within in its ranks. Because of the over twenty years of conflict, in particular the Khmer

Rouge’s targeting of intellectuals, there were scarce human resources in the country. UNTAC staff did not have offices in or near the Constituent Assembly to help the Cambodians to move forward with the process. UNTAC officials prepared alternative drafts of the new constitution but did not know how, or if, the drafts would be used.^{liii}

UNTAC did not plan for the resource needs of the Constituent Assembly—the Assembly members did not have access to research facilities, a library or technical experts. UNTAC had focused on securing resources for the election but not for the drafting process.^{liv} This lack of planning resulted in missed opportunities to lay a foundation for democratic institutions and practices—when the Constituent Assembly transformed into the new legislature, it continued to lack basic resources that would have improved the capacity of members to draft and debate legislation.^{lv}

UNTAC was mandated to exercise its authority to ensure the implementation of the Paris Agreement.^{lvi} However, because it did not have a post-election strategy, Prince Norodom Sihanouk and other key political elites in Cambodia set the agenda at that point. Sihanouk arranged a meeting with the parties to form a coalition government outside the structure of the Paris Agreement. Sihanouk also played a role in limiting UNTAC’s influence in the Assembly’s work, hiring a French legal expert to prepare a draft constitution for a Constitutional Monarchy.^{lvii}

UNTAC and the international community were extremely concerned about the closed-door nature of the drafting process, because they found that they “suddenly had little direct influence on what was the most important outcome of the entire UNTAC-led effort.”^{lviii} UNTAC officials assumed that because the Constituent Assembly lacked legal expertise, UNTAC would provide them with either a draft of the new constitution or with draft provisions. Although UNTAC had little influence on the process, Sihanouk allowed UNTAC to draft the human rights provisions of the constitution because he perceived these to be the primary areas of concern to the UN and the international community.^{lix}

The promulgation of the constitution on 21 September 1993 and the formal establishment of the Royal Government of Cambodia brought an end to

UNTAC’s mandate as stipulated in the Paris Agreement. However, the weak implementation of the constitution, including the Hun Sen led coup in 1997 and the subsequent flawed elections in 1998 indicate that the declaration of success was premature.

East Timor: A “Hands Off” Approach?

After the 1999 referendum, the Indonesian military launched a “scorched earth policy”^{lx} which caused widespread violence and left nearly ninety per cent of the country’s infrastructure burned to the ground or severely damaged and valuable property looted. The Indonesian technocrats departed en masse. An international peacekeeping force was deployed to secure the peace and the Security Council adopted SC Resolution 1272 establishing the United Nations Transitional Authority in East Timor (UNTAET) and vesting it with all executive, legislative and judicial authority. The scope of UNTAET’s mandate was unprecedented.

The Security Council did not specify how authority was to be transferred to an independent East Timorese government. In April 2000, UNTAET informed the Security Council that it was developing a detailed plan of how it would devolve governing power to the East Timorese and that it was establishing benchmarks for UNTAET’s exit strategy.^{lxi} Similar to Cambodia, one of the key benchmarks for the successful transfer of power was the election of a Constituent Assembly that would draft East Timor’s first independence constitution.

Public hearings were scheduled in the National Council (NC), East Timor’s appointed quasi-legislature, from 18–23 January 2001 about the form of the process. However, more than three months prior to the public hearings in the NC about the design of the constitution-making process, the SRSB briefed the Security Council about how the process would proceed:

“The major elements of the political transition are clear. As things currently stand, our plan is to hold national elections in the second half of next year with a view to establishing a Constituent Assembly. This Assembly will be tasked with drafting the Constitution, choosing the members of the new transitional government and serving as

an interim legislature. Upon completion of the Constitution, the Assembly would become the new National Assembly for an independent East Timor.”^{lxiii}

Some members of civil society who were invited to attend the public hearings about the constitution-making exercise publicly stated they felt the hearings were a façade. *Yayasan Hak*, the leading human rights organization in East Timor argued that:

“So far there has been a rush, linked to the timetable that relates more to UN priorities, and the priorities of some political leaders than the priorities for the people to make up their mind. We need to be realistic. While we welcome these hearings, most people will have no opportunity to participate properly because they simply have not been given the information on which to make choices ... We can not make mistakes, again and again, by calling consultation what is in effect a ready made monologue between those that are already making decisions on behalf of the East Timorese people. And we certainly can not make this mistake when it relates to the constitution, which has to be a living document reflecting how the East Timorese as a people see themselves, relate to themselves, and finally, after many centuries, govern themselves.”^{lxiiii}

The NC’s Standing Committee on Political Affairs requested the Political Department to advise on options for structuring the constitution-making process. In response, the Political Department drafted a “Working Paper” on the pros and cons of East Timor using an unelected or elected constitution-making body to draft the constitution. The Working Paper expressed a strong disposition toward an elected body that would make all decisions related to the constitution. The Working Paper did not present comparative options of what types of bodies had been used in other constitution-making processes. For example, the Working Paper did not note that other countries had used a two-tiered structure: a Constitutional Commission to prepare the draft and a Constituent Assembly to adopt (similar to the structures used in Eritrea, Ethiopia, Nicaragua, Brazil, and Fiji). The Working Paper presented the options as between either an unelected body or an elected body

performing all tasks, with no combination of the two as an option.^{lxiv}

However, a two-tiered process was a common structuring of constitution-making exercises because it had several advantages. An independent commission or technical drafting body is often used because it tends to be more distanced from political agendas and may allow for greater diversity of views, improved opportunities for consensus building, input of experts and greater public participation.

An elected body typically adopts and debates the draft and because it is elected by the people may add legitimacy to the final constitution. An elected body that is representative and agrees upon the final constitution may also ensure that political elites feel ownership over the constitution and may be more likely to implement the constitution.

However, the Working Papers did not discuss the pros and cons of such comparative options and were in effect advocating for the position that UNTAET had already taken in the Security Council about how the constitution-making process would proceed.

The NC followed the advice of the Working Papers and the framework for the process was identical to framework political leaders had put forward and the SRSG had announced to the Security Council over four months prior. A coalition of nearly all civil society groups in East Timor wrote to the Security Council to complain that UNTAET was rushing the decision, that the East Timorese needed at least nine months to discuss the constitutional issues at stake rather than the few months being offered by UNTAET and a few political leaders and that the ninety day timeframe for drafting the constitution would preclude any public participation or consultation.^{lxv}

Although UNTAET, in consultation with a few East Timorese leaders, designed the framework for the political transition, including the elections and framework for the constitution-making exercise, it chose to take a “hands off” approach during the drafting and debating stages of the constitution-making process. Because constitution-making is a sovereign act by an elected body, the UN determined that it should not be seen as imposing a result.

However, it did support the process in critical ways, such as assisting with securing funds to reconstruct a room appropriate for the convening of the CA (and the future legislature). The room allowed for simultaneous translation, an area for the public, a library and Internet services as well as a sophisticated speaker system. The UN also ensured technical international staff to assist with running the CA, including the Director and Deputy-Director of the Secretariat of the CA. These resources were critical for the establishment of the future parliament, which was up and running quickly because of the resources that had been provided to the CA. This was an improvement from Cambodia where the parliamentarians had few resources and little opportunity to develop their skills or research legislation.

Neither the international Director nor Deputy-Director of the Secretariat, who were appointed by the UN, had experience in constitution-making. However, Portuguese advisors, who had experience in parliament supported the functioning of the CA and worked closely with the CA members. The Asia Foundation also provided constitutional consultants to be a resource. The consultants had comparative constitution-making experience and met several times weekly with the Director of the Secretariat and the President of the CA to provide options for how the CA could function and address problems. They also provided option papers as requested to both the UN international staff and the Constituent Assembly members on how to structure the constitution-making process. Advice was also given about how to ensure the process was transparent, such as holding weekly press conferences, issuing daily press briefings and releasing drafts of the constitution. The CA adopted these options.

The SRSG did not attend CA sessions because he did not want to be perceived as influencing the process. UNTAET staff monitored the process and reported to him. When provisions in the draft constitution violated human rights norms, UNTAET political staff were directed to quietly meet with CA members to explain where the draft did not uphold international norms. The UN High Commissioner for Human Rights, UNTAET's Human Rights Department, the Asia Foundation and *Yayasan Hak* also submitted comments on the draft.

The Asia Foundation constitutional experts also met on a daily basis with CA members as well as UN and Secretariat staff to answer constitutional questions and provide options for constitutional provisions. The CA did revise the provisions that violated international standards and generally welcomed comments on the text.

The UN's support to the constitutional process did not fully support civil society calls for a more inclusive, transparent and participatory process. However, UNTAET improved upon the constitutional assistance provided in Cambodia by: planning for the human and material resources needed to run the CA; supporting the development of transparent mechanisms in the CA; monitoring the process and effectively intervening to uphold international standards; establishing a foundation for the future parliament, and; through UNDP providing post-adoption education materials on the constitution.

Afghanistan: The Light Footprint

The TA determined the details of the constitution-making process in consultation with SRSG Lakhdar Brahimi, who had the general authority to "monitor and assist in the implementation of all aspects" of the Agreement. The SRSG's approach to supporting the TA was to ensure that Afghan priorities led the mission's assistance efforts and that UNAMA bolstered Afghan capacity (both official and non-governmental) by "relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate 'footprint.'"^{lxvi}

UNAMA defined its role in part as the lead for all technical assistance, including coordinating all international support offered to the process. All consultants to the process were vetted through UNAMA. This was to ensure that technical assistance met the demands of the process and that the international community did not provide competing advice to the constitution-makers. UNAMA also formed a Constitutional Support Unit ("Support Unit") initially comprised of a junior UN official and an Afghan administrative assistant with knowledge of the Afghan political context but no constitution-

making experience. Although the SRSG and Deputy Special Representative of the Secretary-General (DSRSG) provided overall guidance on the process, the Unit itself could not directly advise the Afghan Director of the Constitutional Drafting Commission's Secretariat about options to bring the skeletal constitutional framework to life. The Asia Foundation (funded by the United States Agency for International Development) secured two constitutional consultants to support both UNAMA and the Commission to explore constitutional options for the process.^{lxvii}

With the agreement of the UN, the consultants conducted an initial assessment of the process and prepared memoranda on how the process could be improved and structured. Shortly thereafter, the UN and the Secretariat provided the consultants with an office both within UNAMA and the Secretariat. These consultants provided options paper on how to structure a constitutional process to both UNAMA and the Secretariat. They also advised on options for the work plan, a nationwide civic education and public consultation process, the budget, staffing and material resources required to implement the process and drafting of suggested decrees, rules of procedure and codes of conduct. The Afghans were in the lead and making final decisions about the process but were being supported to create a road map and learn about how other comparative processes were implemented so they could make choices about how to proceed.

After the TA agreed to a detailed constitutional roadmap, donors who were previously not forthcoming with funds and thereby delaying the process agreed to commit resources. UNDP was responsible for administering the funds. The Asia Foundation also provided a financial consultant to the Secretariat to support it to administer the disbursements and establish accountability mechanisms. The DSRSG created a constitutional task force comprised of senior staff from the Afghan Secretariat, the Constitutional Support Unit and the two constitutional consultants to coordinate and ensure the process was progressing satisfactorily. The DSRSG also held meetings with donors to provide them with updates on the process and urge them to fund the process.

The SRSG did not have the degree of formal power that the SRSG in either Cambodia or East

Timor had held, but he had a strong political advisory role and met regularly with the President of the TA, Hamid Karzai, to assist with guiding the peace process. The SRSG had a unique position in Afghanistan. He had a close relationship with President Karzai and was held in great esteem by Afghans in general. Although the approach was labeled a "light footprint" the SRSG wielded strong political influence. He used his good offices to ensure the constitution-making process stayed on track.

The SRSG (with the support of the DSRSG, constitutional support unit and external constitutional consultants) hosted consultative discussions with five senior Afghan officials selected by President Karzai who represented key political factions in the TA. This Ad Hoc Panel advised the President on a myriad of decisions, such as the election/selection of delegates for the Constitutional *Loya Jirga*, security and oversight to the process, the role of the United Nations at the CLJ, the role of the media and observers, etc. The result of these consultative discussions were put in the form of draft decrees or rules of procedure and revised as necessary or approved and promulgated by President Karzai.

As the process progressed, the Afghan Secretariat grew considerably, as did the numbers of international actors supporting the process. UNAMA added three additional staff to the Constitutional support Unit and identified staff in each of the UN regional offices to support the process. As requested by both the Secretariat and the TA, the Asia Foundation also increased its support to the Secretariat and provided it with a data base consultant, media/graphic artist specialists, logisticians as well as security contractors to assist with preparing the elections of the delegates and preparations for the Constitutional *Loya Jirga*.

UNAMA also ensured that the constitutional consultants^{lxviii} advising on substantive content were coordinated and providing harmonized advice. The group was well conceived, because one of the experts had in-depth political knowledge of Afghanistan and the others had comparative constitutional expertise. Despite the depth of knowledge, the consultants had limited success in influencing the drafts of the constitution. The Afghans were much more receptive to receiving guidance about how to structure the process.

Unlike the Cambodian and East Timor process, where the SRSG had stayed away from the formal proceedings in the Constituent Assembly, the presence of the SRSG in Afghanistan was welcomed and he had an office at the CLJ. He was frequently present at the CLJ and used his good offices to reconcile opposing views or advise on the position of the international community on suggested provisions.

A team of UNAMA staff also maintained a continuous presence at the CLJ to monitor discussions in the committees, assist with complaints of intimidation or violations of human rights, observe and support the voting process and advise on rules of procedure. The Asia Foundation staff were also present around-the-clock to assist with logistical arrangements and security.

The “Light Footprint” approach did not necessarily translate into less influence or fewer international technical advisors than in other cases, per se, since Afghans placed a great degree of trust in the SRSG and the UN’s advice. The UN supported the creation of transparent, inclusive and participatory mechanisms. Though tight timeframes meant that their impact may have been somewhat limited, considering the serious security constraints and charged international and domestic political environment, the degree of public participation and representation was noteworthy.

4. CONCLUSION AND RECOMMENDATIONS

Some form of constitutional review or reform is often a key component of comprehensive settlements to a conflict and the transition from war to peace. Constitution-making provides a unique opportunity for the UN to encourage a process that promotes national reconciliation, consensus building and the creation of a national vision for the future of the country. In order for such a process to underpin a durable peace, the UN’s constitutional assistance should seek to support a nationally owned and led process that is inclusive, transparent and participatory.

The mandates of complex peace operations, such as those covered in this report, involve an often staggering array of tasks which must be carried out simultaneously. Security must be maintained, the

economy kick started, human rights protected, humanitarian crises averted, and political dialogue promoted. Everything is a priority; everything demands attention. Constitution-making is just one element in the midst of these Herculean endeavors, and in hindsight an analysis of this element alone cannot lose sight of the fact that decisions taken by UN and political leaders in the field are conditioned by a range of competing demands.

Nevertheless, one of the central lessons of UN peace operations over the past decade and a half is that they have been mounted without a reliable base of doctrine and guidance from which mission leaders can draw even as they adapt and improvise on the ground. The review of the UN’s role in the Cambodia, East Timor and Afghanistan cases illustrates that this, as each approach has been *ad hoc* and, to a significant degree, dependent on the choices of the UN leaders in the field. In each case, the UN missions could have planned support to the process more effectively if they had access to resources and information about options for design and implementation of constitution-making processes.

A good example would be the doctrine, guidance, resources and expertise that have been carefully developed and consolidated for elections. The Electoral Assistance Division (EAD) of the Department of Political Affairs (DPA) in the UN Secretariat provides UN leaders in the field with assistance in the areas of needs-assessments; the design and implementation of electoral assistance project activities; operational strategies for electoral components of peace-keeping operations; maintaining a roster of electoral experts able to provide technical assistance on short notice and serving as the UN’s institutional memory in the electoral field.

The EAD has also established networks with non-UN institutes, electoral commissions, etc., that creates a much wider pool of expertise, resources and knowledge upon which to draw. In the constitutional field, many of the resources that currently exist are and will likely remain, external to the UN in academia, governments, non-governmental organizations, etc. What the UN can do, however, is ensure that it is prepared to and capable of drawing on that expertise while maintaining the necessary doctrine and guidance and a core expertise in-house.

Therefore, to provide more effective UN constitutional assistance this report recommends that the UN appoint a focal point for UN constitutional assistance that would: (1) develop doctrine and guidelines on constitutional assistance; (2) provide technical expertise and resources; (3) document UN experiences in the area of constitutional assistance to draw lessons learnt and reflect upon good practices. To minimize costs, the UN should also draw upon existing external resources to support the above efforts.

The conclusion is in line with the Secretary-General's recent report "In Larger Freedom: Towards Development, Security, and Human rights for all" in which he underscores the vital role that the UN plays in mediating peace agreements and assisting in their implementation but notes that "there is a gaping hole in the UN Institutional Machinery: no part of the UN system effectively addresses the challenge of helping countries with the transition from war to peace." A key aspect of addressing current peacebuilding gaps in the system should be supporting national actors to design and implement constitution-making processes that promote longer-term peace and produce durable blueprints for political stability and broader development

The three case studies do not constitute a broad enough set of experiences from which to draw definitive lessons learnt, or from which to build doctrine and guidance. For that, analysis of a larger number of both UN and non-UN constitutional exercises is necessary. Nevertheless, the cases do point towards some gaps in the UN's capacity of resources and some preliminary lessons that might inform future planning of constitution-making processes, including pitfalls to avoid. These are detailed below.

Legal Framework

A prior legal instrument such as a peace agreement or Security Council resolution, which provides the legal framework, defining principles and parameters for the exercise, mandates most post-conflict constitutional exercises. The legal framework, however, has differed in scope and detail from case to case depending on the context and the objective of the constitutional review.

There is no "once size fits all" framework for a process. Sometimes, such as in Cambodia, it will be useful to have a more detailed framework that includes the principles to be enshrined in the constitution. At other times, the framework should be more skeletal, such as in Afghanistan, to allow for flexibility to respond to the inevitable changes in the political context. Nonetheless, while stressing that the unique circumstances of the context will determine the degree of specificity and the content of the legal framework, the following are some potential elements to be considered for inclusion in the legal framework:

- key constitutional principles or substantive provisions to guide the process and to be enshrined in the final constitution;
- the mandate and work plan for the constitutional organ/s;
- the timeframe for the process, with a schedule of when key tasks should be accomplished;
- a declaration that the constitutional organ/s drafting the constitution will be free of governmental control;
- transparent rules and mechanisms to establish constitutional organs and appoint/elect delegates -- perhaps to appoint an inclusive and technically competent constitutional organ to draft the constitution and a democratically elected body to adopt the constitution, with at times specific procedures for appointment or nomination of marginalized groups, members of civil society or those with specific professional skills.
- the mandate of a supportive administrative body, such as a Secretariat;
- provisions that describe the incorporation of a participatory process that prescribes sufficient time and resources to conduct separate phases of civic education and consultation;
- review and/or enforcement mechanisms to ensure that the final draft of the constitution incorporates any agreed upon principles;

- transitional arrangements if necessary and mechanisms for implementation of the constitution;
- provision for financial oversight of the process;
- the role, if any, of the United Nations or international community.

The legal framework should also be well publicized to promote transparency and gain public support for the constitutional roadmap; this can assist the public to be clear about the steps of the process, the objectives of the constitutional review or reform exercise, and their role. It may also provide the media and civil society with benchmarks to monitor whether the constitutional organs adhere to the framework, its principles and work plan. This enhances the accountability of elites to the people and in some cases, the international community, which may be financing the exercise.

In some contexts, the creation of the legal framework may need to be elite driven and the process a closed one because of the delicacy of the negotiations and the high risk of return to conflict or violence. However, even the decision on how the process is conducted can benefit from consultations with civil society and the public where appropriate. The tendency should be for as open a process as possible where this does not pose a significant risk – such as the case of East Timor. The process of promoting public ownership should begin as soon as feasible because in deeply divided societies suspicion is high and transparency will lead to wider buy-in of the peace process and ownership of the constitution.

Timetable for the Process

The legal framework in each of the case studies determined the timetable of the process. The political context both domestic and international will always have an impact on timetables. However, it is broadly accepted that while timetables can put a certain amount of pressure on the parties and the international communities alike to move the peace process forward, goals such as constitution-making and elections require legitimate processes and sufficient planning and these processes should not be rushed simply to meet pre-set dates. Deliberative

processes that promote national reconciliation and conflict resolution support a durable peace and take time. In the cases discussed, opportunities to make the process more genuinely participatory were missed (in particular in East Timor and Cambodia) because of tight timelines.

Had the UN had at its disposal models and options for supporting a participatory process, the time that was available could have been used more effectively (e.g., Afghanistan). While the timeframe will depend on the context and the objectives of the constitution-making or review process, a better understanding of the complex planning and logistics needed would have the potential to lead to more appropriate timetables. Although, some countries emerging from conflict may require shorter political transitions because of security issues or other imperatives, the ninety day time frames to draft, debate and adopt the constitution in East Timor and Cambodia perhaps reflected less the peacebuilding needs of the country than the desire to have an identified end point.

Structure and Representation

Constitutional commissions or technical drafting committees should primarily be technical bodies, yet with a membership that is as inclusive as possible. The decisions of the body should not be held hostage to the political aspirations of a few political elites but reflect transparent choices based on broad consultations, consensus positions and where necessary compromises balanced with a respect for international standards. A democratically elected assembly, parliament or constitutional conference should adopt the draft prepared by the constitutional commission or a similar body to legitimize the constitutional order. In cases like East Timor, where there is a high risk that elections will lead to an adopting body that may reflect the views of a single party, special measures should be taken to promote a more inclusive adopting body. For example, provisions can be made for the representation of identity groups, civil society or those with particular professional skills. The mode of appointment for these delegates should be transparent and where possible, can even be participatory.

The Cambodia and East Timor processes highlight the potential pitfalls of prescribing the tasks of drafting, debating and adopting the constitution all within a constituent assembly. In East Timor, members of civil society had requested a two-staged process (which is a common feature of constitution-making) with the formation of an appointed constitutional commission or committee to prepare the draft and a constituent assembly to adopt. They argued that this would allow the people to share their views and free the draft from political influence. Given the political context (the likelihood of a single party dominating the Constituent Assembly), such a process had greater potential to be representative and encourage a broader set of stakeholders to seek consensus on key constitutional issues. However, the dominant party presented its draft constitution before the Constituent Assembly and there were few discussions that diverted from what was in the draft. East Timor is a fairly homogenous society and this may or may not lead to conflict in the future, but in more divided societies with larger minority populations (e.g., Iraq) this result has the potential to lead to more immediate conflict.

While elected constituent assemblies do have claim to democratic legitimacy, in post-conflict situations under tight time pressures the electorate has in practice had insufficient information on the constitutional issues at stake. Furthermore the first post-conflict elections tend to be highly referential to the prior conflict, with voting concentrated on individual leaders, ethnic groups or others—vestiges, in this sense, of the war. Political parties are weak and rarely put forward fully articulated constitutional platforms. Therefore elections in and of themselves do not necessarily serve as a sufficient conduit through which to carry the expression of the people's constitutional aspirations. These aspirations must inform not just choices about who should govern for one term but the blueprint for society itself. Hence, a strictly democratic electoral model dependent on representation through the ballot is usually not sufficient to capture public preferences in post-conflict constitution-making exercises.

Afghanistan created a three-staged process that had benefits and drawbacks. Both the Constitutional Committee and the Constitutional Commission were governmental and the members were appointed by President Karzai, which led to

suspensions that they were more accountable to a governmental agenda than that of the people. However, the Constitutional Commission was comprised of experts and was fairly representative of the diversity of the country (including women). Despite the Commissioner's lack of independence, the consultations they held throughout the country and in Pakistan and Iran were well received.

The Constitutional *Loya Jirga* (the adopting body) was drawn from a traditional Afghan institution, the *Loya Jirga* or Grand Council, which had been used to adopt constitutions in the past; this conferred greater legitimacy on the body from the outset. There is no one model for adopting a constitution and establishing adopting bodies that are drawn from local models has potential to enhance the legitimacy. In the Afghan context, the model was modified to include not only appointed delegates but also elected. The security situation was volatile and the electoral rules of procedure for the CLJ had to be tailored to the circumstances. However, the rules (despite issues of security) led to a representative CLJ that was able to negotiate an instrument that assisted in stabilizing the country.

None of the case studies used a referendum. This is not a requirement for legitimacy. If the process has led to a consensual constitutional framework through a participatory, transparent and inclusive process, the end result will likely be a constitution that enjoys legitimacy.

Security

An argument could be made that constitution-making exercises should be sequenced to occur after the demobilization, disarmament and reintegration process has been successfully completed. While this would be ideal, at times, the early peace dividend of creating a negotiated constitution may outweigh other considerations, such as in Afghanistan. Yet, in Cambodia, the failure to allow the peace process to move forward without sufficient demobilization contributed to the coup only a few years after the adoption of the constitution.

Direct Participation

The degree to which a process can incorporate direct participation (typically through civic education and consultation) will depend on the context. Political elites will by necessity play a major role in decisions on how to structure the new state (this is important both for peacemaking and for future implementation of the constitution) but where possible, the role of the UN should be to broaden the political space so that the final constitution does not merely represent the views of the warring factions holding power at the end of a conflict. There is also an emerging legal argument that there is a political right to participate in a constitution-making process.^{lxix}

In each of the case studies civil society and the public expressed a strong will to directly participate. In Cambodia and East Timor coalitions of civil society members wrote letters to UN leaders to complain that the level of public participation was not sufficient. The degree to which the UN and political elites supported those demands was mixed.

In Cambodia, the role of the public was largely confined to casting a vote and the voter education process primarily focused on how to vote rather than educating the public on constitutional issues. However, the UN's support to the establishment and development of non-governmental organizations did lead to greater public awareness of the constitution and continued monitoring of adherence to the constitution post-adoption.

The UN supported more direct participation in East Timor but missed opportunities to establish an effective participatory process. The civic education and consultation process were conducted at the same time and over only a one-month period. This did not allow the public to be sufficiently informed of the issues, to carefully consider the options or to adequately provide submissions or views. Nor did it promote dialogue between communities. The members of the Constituent Assembly largely ignored the results of the consultations because the process was UNTAET-led and the members did not participate in the consultation process (which is often a transformative experience for political leaders). Largely because of pressure from civil society and some of the smaller parties, the members held a rushed one-week consultation process on the draft.

The methodology to analyze the views was *ad hoc* and few of the views expressed by the public were incorporated into the draft. UNDP supported the East Timorese to disseminate materials explaining to the public their new constitution.

In Afghanistan, UN constitutional assistance led to greater direct participation than the other cases. Improvements included a civic education process that was conducted separately from the consultation process, led by the national actors tasked with preparing the constitution. The Commission had regional offices, the Secretariat was nationally led and owned and had adequate resources, the consultations were primarily based on a questionnaire comprised of key constitutional issues for the constitution, the inputs were carefully documented and the Commission met with and partnered with civil society. One unique aspect to the Afghan process that should also be replicated was that the Secretariat continued to operate three months after the constitution was adopted to educate the public about their new constitution. In addition, the staff that had gained experience in participatory methodologies went on to support the final stage in the Bonn process, the elections for the legislature.

However, because of an initial lag in planning for a participatory process, only one month was dedicated to each phase. Although approximately 100,000 citizens submitted questionnaires or views to the Constitutional Commission, there was little feedback to the public about how those views were considered. Because a draft of the constitution had been prepared prior to the consultations, the public was suspicious that their views would be sufficiently considered.

Lastly, the commissioners who consulted with the public did not have a final say about the content of the draft because the Constitutional Commission was a governmental body under the control of President Karzai. In the Afghan context, President Karzai was the main political force for reform and his control over the Constitutional Commission's output may ultimately have been a guarantee against more fundamentalist forces at play in Afghan politics. Hence, while in principle one would desire an independent commission, the Afghan case highlights that basic principles will inevitably

have to take into account political realities on the ground.

There is no single way to conduct a participatory process; each post-conflict peace process situation has a unique set of challenges and specific objectives for the constitution-making exercise. Whenever possible, constitution-makers should exploit the opportunity a constitution-making process presents to examine the difficult issues, consult all sectors of society, and build consensus and search for common ground to reach compromise positions. However, there are risks to participation because of the threat of spoilers hijacking or manipulating the process and because, in the short-term, issues may arise that could lead to conflict. Also, it should be noted that even if the participatory process is done well it is not solely determinative of the success of the outcome (e.g., Ethiopia) and other components such as democratic legitimization of the constitution must also be carefully planned. Nonetheless, following from some of the lessons learnt from the case studies, the following elements may lead to more genuine participatory processes:

- promulgating a legal mandate and clear roadmap for the process which clearly indicates to the public at what stages they can participate and how;
- crafting rules of procedure to minimize the risk that the process will spiral out of control or lead to more violence and ensures the process does not unduly raise the expectations of the public;
- raising awareness to increase the political will of the international community, constitutional drafters and political elites to take measures to establish a genuine participatory process;
- establishing an independent body (often a constitutional commission) which is mandated to conduct separate phases of public education and inclusive consultations on key constitutional issues before preparing the constitution;
- allocating a minimum of one year (whenever possible) to conduct separate phases of civic education on constitutional issues and hold public consultations;
- holding public consultations prior to preparing a draft to encourage the public to express their views and then holding a possible second consultation process on the draft;
- using creative means to ensure that marginalized groups participate (such as illiterate citizens or the disabled);
- ensuring an adequate budget (with donors brought on board as soon as possible);
- establishing an administrative body (such as a secretariat) to assist with implementing the participatory mechanisms and the demanding logistical arrangements;
- allowing sufficient time and resources to conduct capacity building programs to prepare national staff to effectively conduct civic education and public consultation programs;
- supporting civil society and the media to participate and facilitate direct participation;
- fostering dialogue and the exchange of public views between identity groups or communities;
- designating an agreed upon methodology and mechanisms (including data base programs) to collate, summarize and analyze submissions to the Commission;
- disseminating a report explaining to the public the results of the consultation, how competing views were considered and accommodated, and how key decisions were made;
- implementing transparent mechanisms for sharing drafts of the constitution and following deliberations on the draft by the constitutional organ adopting the constitution; and
- conducting public education on the new constitution, in particular how the public can use it as a tool to access their rights.

Lastly, and perhaps more importantly, UN field actors and national leaders should be sensitive to the desire of the average citizen to participate. It is the author's experience that those who have had their voices and their dignity suppressed at the point of a gun will often walk for miles, travel by donkey for days, and even risk their lives to share their views and aspirations for the future of their country. Although the average citizen (who may be illiterate) does not express his or her views in constitutional language, their concerns are relevant to the future structure of the state. For example, complaints of no clean water or schools in one particular community may lead to considerations of structures for decentralization that would allow communities to have more control over services.

Nationally Owned and Led

National ownership of the process is closely related to participation because the public will feel ownership over the constitution if they participate in its making. But, it also relates to the role of the constitution-makers and UN constitutional efforts should be guided by the principle of national leadership, to every possible extent. In Afghanistan, UN constitutional assistance was based on the assumption that the process should be nationally owned and led. Following from the "light foot print" approach taken in Afghanistan, international actors did not assume roles that national actors could and should assume. For example, in East Timor, a UN staff member directed the Secretariat of the Constituent Assembly while in Afghanistan it was an Afghan, supported by technical assistance. This disparity was similar for other aspects of the process. In East Timor, UNTAET established the public consultation process (although East Timorese held the consultations) while in Afghanistan it was an Afghan body supported by technical advisors.

To ensure national ownership, the process should be conducted at an appropriate pace to allow for national actors to fully understand their role, learn from comparative experts about other experiences, weigh and deliberate upon options and enhance and build capacities where needed to effectively assume their responsibilities and implement the process.

In both Cambodia and East Timor the UN transitional administrators viewed the constitutional deliberations as something they should formally distance from to ensure that the constitution did not appear to be imposed by the international community. It was necessary to clearly signal a shift from international "tutelage" to sovereignty. In Afghanistan, on the other hand, sovereignty was vested in Afghan institutions from the outset and the SRSG was welcomed to play a more direct mediation role in the Constitutional *Loya Jirga*. Through his good offices he mediated during stalemates between different sub-national groups and positively influenced the final content of the constitution regarding international standards and the rights of minorities and women. The role the SRSG played did not jeopardize the public's perception of the Constitutional *Loya Jirga* as a sovereign body or the final constitution as an Afghan drafted and negotiated instrument.

Perhaps in contexts where the UN is supporting locally led processes, local actors may be more welcoming of the role of the UN as a mediator during constitutional gridlock and more open to receiving advice. Of course, the degree of trust the local actors have in the SRSG or his or her political advisors will also affect this decision.

Technical Assistance

Making a constitution is a complex operation which requires expertise on national politics, institutional reform, electoral procedures, budgets, procurement, logistics, civic education campaigns, consultative processes, IT, public relations (for the leaders of the constitution-making bodies), comparative constitution-making options, conflict resolution, technical drafting, rules of procedures for assemblies, security arrangements, diplomacy, donor relations, etc. It is the author's experience that national actors are generally welcoming of technical expertise in these areas if it is offered in a fashion that respects their role in leading and managing the process. Also, often both international actors and national actors are not aware of the complexity of implementing the process and providing initial options papers describing types of assistance that may be needed is very helpful.

In Afghanistan the UN coordinated technical assistance and worked with the national actors to ensure that persons with the right types of expertise met their assistance needs. The UN also coordinated substantive input by constitutional advisors to ensure harmonization and facilitated the provision of options papers that were translated into Dari and Pashtu. In East Timor, the Asia Foundation also translated options papers that the Constituent Assembly requested on key issues.

Although it may not always be appropriate for the UN to coordinate technical assistance, it may be useful to provide the constitution-makers with advice about how to best to make use of technical advisors and suggest what types of expertise may be needed. The constitution-makers can then make their own assessment of whether they have all those skills or external actors may be useful.

If technical expertise is requested, the UN should facilitate the provision of technical assistance. As in Afghanistan, this will require linking with external resources because few of these capacities are currently located within the UN.

Adoption

Ideally, the methods of adopting the constitution will promote consensus building. In each of the case studies the constitutional organ tasked with adopting the constitution required that a two-thirds majority pass the constitution. This larger majority encourages consensus building depending on the make-up of the adopting body. In East Timor, because a single party dominated the Constituent Assembly it did not have that affect. In Afghanistan the emphasis in the rules of procedure was on achieving consensus and short of this, a vote would be taken. There, the President of the *Loya Jirga* asked all the delegates to stand up and adopt the constitution by unanimous acclamation.

The Afghan delegates attended a one-day orientation on the rules of procedure (led by the Secretariat and facilitated by civil society leaders) primarily to promote national unity and facilitate consensus building in the Constitutional *Loya Jirga*. The sessions were held with smaller groups that were intentionally diverse (geographically, ethnically and by gender). The orientation session was participatory and

provided the delegates with practice in using consensus-building methodologies and to help them reflect on their duties and responsibilities as representatives of the nation.

Implementation of Constitution

Many constitutions remain merely on paper and are never implemented. For example, many of Cambodia's constitutional provisions, ten years on, have not been implemented. The UN should provide advice about constitutional provisions, mechanisms and transitional arrangements that may be useful to facilitate implementation post-adoption, including suggested deadlines for completion of important tasks and reforms. In addition, constitutional assistance should not end with the adoption of a constitution.

In Afghanistan, the Secretariat remained operative for three months to educate the public on the draft. This was a positive development in constitution-making. It would also be useful for some form of institution or commission to assist with institutional reforms and supporting government officials to implement the constitution

Endnotes

- ⁱ The United States Institute for Peace and the United Nations Development Programme recently examined 18 case studies of constitution-making processes in primarily post-conflict contexts and concluded that the process by which constitutions are made is as important as the final content. See also, Jamal Benomar “Constitution-Making after Conflict: Lessons for Iraq” (2004) 15 (2) *Journal of Democracy*.
- ⁱⁱ UN Secretary-General Report “In Larger Freedom: Towards Security, Development and Human Rights for All” (A/59/2005).
- ⁱⁱⁱ See note 2.
- ^{iv} Ghai, Yash, Lattimer, M. & Said Yahia. “Building Democracy in Iraq,” *Minority Rights Group International Report*, United Kingdom, 2003 at 27.
- ^v There are in fact four Settlement Agreements which comprise “The Agreements on a Comprehensive Political Settlement of the Cambodian Conflict,” October 23, 1991, UN doc. A/46/608-S/23177; 31 ILM 183 (1992).
- ^{vi} For an overview of the peace negotiations see Steven Ratner, “The Cambodian Settlement Agreements,” *American Journal of international Law*, vol. 87, 1993.
- ^{vii} Paris Peace Agreement, annex 3. 1.
- ^{viii} Interview with former UNTAC official.
- ^{ix} Paris Peace Agreement.
- ^x *Ibid.* Annex 3, para 3.
- ^{xi} Interview with former constitutional consultant to the process.
- ^{xii} *Ibid.*
- ^{xiii} *Ibid.* Annex 5.
- ^{xiv} Reg 2001/2, Section 2, para 2.6.
- ^{xv} *Ibid.* para 2.4.
- ^{xvi} See generally, Section 2.2 on the public consultations in East Timor.
- ^{xvii} Interview with former UNTAET official.
- ^{xviii} See generally, Louis Aucoin and Michele Brandt, “East Timor’s Constitutional Passage to Independence,” paper prepared for United States Institute for Peace, Project on Constitution-Making, Peacebuilding and National Reconciliation (2003)
- ^{xix} The Conflict, Security and Development Group, *A Review of Peace Operations: A Case for Change*, London: Kings College, 2003, para 302.
- ^{xx} Agreement on Provisional Arrangements in Afghanistan, Pending the Re-establishment of Permanent Government Institutions.
- ^{xxi} *Ibid.* Section 1, Art 4.
- ^{xxii} Section 1, Art. 6, Bonn Agreement.
- ^{xxiii} See generally, the Bonn Agreement.
- ^{xxiv} Annex II, Bonn Agreement.
- ^{xxv} Interview with former *Ponleu Khmer* member.
- ^{xxvi} *Ibid.*
- ^{xxvii} *Ibid.*
- ^{xxviii} John C. Brown, “Khmer Democracy: Where’s the Participation?” *Phnom Penh Post*, August 27-September 9, 1993, at 7.
- ^{xxix} *Ibid.*
- ^{xxx} Stephen Marks, “The Process of Creating a Constitution for Cambodia,” paper prepared for United States Institute for Peace, Project on Constitution-Making, Peacebuilding and National Reconciliation (2003), p. 9.
- ^{xxxi} William Branigin, “Cambodia Moves to Return Sihanouk to His Throne; Elected Leaders Said to Form Consensus on Monarchy,” *The Washington Post*, Washington, D.C. Aug 26 1993, pg. A 18.
- ^{xxxii} Lor Chandra and Wency Leung, “Law and Order? 10 years later, corruption mars a constitutional attempt at democracy,” *The Cambodian Daily*, September 26, 2003.
- ^{xxxiii} *Ibid.*
- ^{xxxiv} International Federation for East Timor, “Elections in the Context of Nation-Building Preliminary Report,” Press Release distributed at a press conference at Yayasan Hak, Dili, Timor Lorosae, 3 September 2001.
- ^{xxxv} See the Report on the Political Transitional Calendar compiled by the Standing Committee of Political Affairs of the National Council (on file with the Author), (hereinafter PAC Report).
- ^{xxxvi} Owing the constitution: An Oath to Peace? Vivien Hart, lecture, Wed, April 30 2003.
- ^{xxxvii} See NGO Forum open letter to the Security Council, dated 17 March 2001.
- ^{xxxviii} Aucoin and Brandt, “East Timor’s Constitutional Passage to Independence,” p. 21.
- ^{xxxix} In contrast, a percentage of seats in the Afghan Constitutional *Loya Jirga* were for women who were elected by women and women delegates to the Constitutional *Loya Jirga* and were not beholden to patriarchal party structures. The women delegates had more success advancing issues of concern to women.
- ^{xl} Interview with former member of Constituent Assembly.
- ^{xli} Aucoin and Brandt, “East Timor’s Constitutional Passage to Independence,” p. 35.
- ^{xlii} The Asia Foundation, East Timor National Survey of Voter Knowledge, p. 4 (May 2001).
- ^{xliii} An alternative would have been to establish an independent selection committee that would have allowed for recommendations and nominations from civil society and educational institutions. This may have alleviated the pressure on the President to choose Commissioners that may have been favored by powerful political factions.

^{xliv} Although there is no one method of encouraging public participation, in the Afghan process, it would have been preferable if the full Commission had been formed first and if its mandate required the body to conduct civic education and a public consultation process before a draft had been prepared. This would have led to fewer suspicions that the constitution was being kept from the public. By the time the full Constitutional Commission held consultations, the public assumed it was hiding the draft and that the content was a foregone conclusion.

^{xlv} Paris Peace Agreement, art. 6.

^{xlvi} *Ibid.*, art. 2.

^{xlvii} See Michael W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder, CO, 1995). See also Steven R. Ratner

^{xlviii} Paris Peace Agreement, Section I. art.12.

^{xlix} Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State Building* (Oxford University Press, Oxford, 2004) p.224.

^l Interview with former UNTAC official.

^{li} See Section 3.1 for a discussion of the role of the NGOs, in particular that of Ponleu Khmer, in the constitution-making process.

^{lii} For example, organizations such as the Khmer Institute for Democracy, Vigilance Human Rights of Cambodia, LICADHO and ADHOC.

^{liii} Interview with legal consultant to the process.

^{liv} Interview with former UN official.

^{lv} See Lao Mong Hay, *Cambodia's Agonizing Quest: Political Progress amidst institutional backwardness*, in *Safeguarding Peace: Cambodia's Constitutional Challenge* (Accord, November 1998); William Shawcross, *Cambodia's New Deal*, Contemporary Issues Paper 1 (Washington: Carnegie Endowment for International Peace, 1994), p. 56, for a discussion about the role of the National Assembly as a rubber stamp in the legislative process.

^{lvi} Paris Peace Agreement, Annex 1, Section A, para. 1.

^{lvii} Interview with legal consultant to the process.

^{lviii} Grant Curtis, *Cambodia Reborn?: The Transition to Democracy and Development* (1998) The Brookings Institute, p.13.

^{lix} Interview with former legal advisor to the process.

^{lx} UN Doc S/1999/976, Annex, para.1.

^{lxi} Open Briefing to the Security Council on East Timor, Sergio Vieira de Mello, Special Representative of the Secretary-General to East Timor (SRSG) and Transitional Administrator, 29 September 2000

^{lxii} *Ibid.*

^{lxiii} PAC Report.

^{lxiv} *Ibid.*

^{lxv} See NGO Forum open letter to the Security Council, dated 17 March 2001

^{lxvi} See *The Situation in Afghanistan and Its Implications for International Peace and Security* (Report of the Secretary-General), UN Doc A/56/875-S/2002/278 (18 March 2002), para. 98.

^{lxvii} Michele Brandt served as full-time constitutional consultant and Professor Yash Pal Ghai served as part-time constitutional consultant (Ghai was also serving as Chair of the Kenyan constitutional reform process).

^{lxviii} Barnett Rubin and Guy Carcassone coordinated and harmonized their substantive advice to the National Security Council and the Constitutional Commission.

^{lxix} See generally, Vivian Hart, "Democratic Constitution Making", *United States Institute of Peace Special Report*, SR 107, Washington D.C., 2003.