# Proceedings
# Workshop on Constitution Building Processes

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**Workshop Sponsors**

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# Proceedings
# Workshop on Constitution Building Processes

During the past two decades, new constitutions have appeared in many parts of the world, often in the aftermath of civil wars, but also in response to demands for more democratic political systems or for resolution of institutional crises. These new documents have varied in their capacity to help channel conflict into non-violent settlement of differences, preserve the ability of individuals and groups to participate in a continuing dialogue about policy and politics, generate accountable governments, and focus attention on the common weal or on shared aspirations. Some remain pieces of paper that command little attention from political elites or ordinary citizens, while others have become focal points for political debate and the source of norms that shape everyday behavior. Some are suspended within a few months or years of their creation, while others endure.

In May 2007, Princeton University's Bobst Center for Peace & Justice joined with Interpeace and International IDEA to consider what we have learned about how to build constitutions that perform well with respect to these important outcomes. Under Bobst auspices, twenty practitioners and scholars convened to exchange ideas and to pave the way for further investigation. This document summarizes the conversations that took place. It offers tentative generalizations and points for debate, investigation, and further discussion.

## Background

In recent times, constitution making has taken place in five distinctive political contexts and periods. Yash Ghai opened the meeting with a general overview of these waves of constitution building.

1. One important wave of constitution building took place as part of the process of decolonization, after WWII. The emphasis was on the creation of new sovereign states. A dominant concern was to aggregate power in a centralized authority. The choice of procedure was partly influenced by domestic factors, such as the complexity and diversity of the society, and partly shaped by what one might call the "metropolitan model." The French and British had different ways of going about constitution building in terms of both procedure and substance.

2. Another wave of constitution making was associated with democratization: first in Latin America and parts of Asia, later in Africa. The new constitutions in Latin America are really part of a process of re-democratization. These new constitutions are vehicles for deepening democracy.

3. The collapse of communism has presented a third political context. The end of the Soviet empire brought regime change to relatively strong states in Eastern Europe and the Baltics. In some instances, countries temporarily reverted to constitutions put in place in the early 1900s, while in others, new constitutions had to be created de novo.

4. Elsewhere, states failed, sometimes in the context of the collapse of communism and sometimes, as in parts of Africa, as part of the wave of democratization that followed the fall of the Berlin Wall. Constitution making had to address fundamental institutional crises in addition to regime change.

5. Post-conflict constitution making has attracted the most attention lately. In this context, constitution making is partly about re-building political community as well as about state structures. Because constitution making follows the conclusion of a peace agreement, or may even be among the settlement terms, it is intimately linked to the dynamics of negotiations designed to convince parties to lay down their arms. Often the very process of resolving conflict is tied to basic understandings of how the state will be restructured, and prior agreement on features of the new constitution is very much part of the peace process.

One might also speak of a sixth political context, in which a constitution is reviewed to ensure that it up to date, as in Finland.

## What do we mean by success or failure in constitution building?

High hopes often attend efforts to write new constitutions. Conference participants stressed the complexity of measuring success and failure. "Success" has many dimensions, and some of these may be more important than others in any given context. Some of the anticipated results may materialize only after a considerable delay, while others may appear quickly. A *process* may be successful in inducing political elites to work together even though the document produced fails to win ratification. Here are some of the measures of success meeting participants proposed, with some of their attendant ambiguities.

Durability. Whether a constitution remains in force and wins the respect of political elites and the populace is one measure of success. "Does the constitution last, and does it really work, or is it just a piece of paper?" Constitutions that are suspended within a few years and constitutions whose terms fail to attract allegiance might reasonably be considered failures. The first transition in power is seen as a key moment in the consolidation of democracy and these moments often test new constitutions.

Yet durability is not as straight-forward a metric as it may first appear. First, the severity of the challenge may make a difference in whether we say a constitution is

strong or weak. In the life of every constitution there comes a point in time where the majority in parliament is not supportive of the constitution… are they still willing to live under the constitution? Can the constitution survive this unfriendly majority? A constitution that lasts in the face of a tough challenge might be regarded as stronger than one of which few care about. But would this constitution be stronger than one that had so shaped the values of political elites and citizens that few contested its terms?

Second, if we think of the relationship between ending a conflict and building a constitution for the future, there may be another fundamental problem in taking "durability" as a measure of success. To end a conflict, negotiators may accept terms they might not have included under other circumstances. They may anticipate that they will be able to replace the new document in a few years. Thus, a constitution that is amended or replaced is not necessarily a failed effort. It may have achieved an important aim and it may be an essential precursor to an arrangement that is more enduring.

The emerging consensus implored us all to take care in using "durability" as a measure of success. One participant posed the issue this way: "The significance of 'durability' is different in a society where what we need to get beyond this conflict is the central issue, compared to 'durability' in a society where the arrangement is intended to provide a stable basis for the long term." Another commented:

> The factors that ensure longevity are very diverse. There are many constitutions that were highly publicized at their inception and were in the dustbin in two weeks. It is no great virtue to have the same constitution for 200 years. We live in times of rapid change and we should be able to adjust and change. Constitutions should be able to respond. The notion that a good constitution is the one that has lasted for 100 years is not among my criteria for a successful constitution.

Some considered incorporation of specific terms a better way to assess success than longevity. "In discussing the metrics of success, it is worth remembering that durability is not really an objective at the moment when one makes the new constitution. For example, in transition from authoritarian rule, the new constitutions were successful to the degree they created new regimes. In cases of democratization, success was a function of whether the new constitutions provided for alternation of power. In the conflict case, we may think an important criterion is the degree to which the constitution displaces conflict into regular and appropriate channels. It is more appropriate to think of success in terms of those immediate problems."

Reduction in violence/increase in civility. To the extent that new constitutions are compacts between communities or factions, an ambition is to reduce violence and channel conflict through established institutions in peaceful form. The degree to which a constitution or a constitution writing process displaces conflict from the streets and into institutions is an important measure of success. Said one conference member, "if you

are in a situation of intense conflict, then success is in large part a matter of whether that decisions can be made political instead of by the barrel of the gun. As Gandhi said, civility is a good idea!"

For negotiators, reduction in violence and an increase in civility are both central ambitions. As measures, they are not without their share of difficulties. Because many factors shape willingness to lay down arms, from war weariness to international pressure or a change of generation, it can be very difficult to impute a reduction of violence to procedures or to constitutional terms. Further, it is possible for a constitution building process to bring many communities together but for conflict between the government and one group to persist, making an otherwise successful constitutional dialogue appear unsuccessful. In Mali, for example, the constitution building process won kudos for resolving an institutional crisis and creating new pathways for securing governmental accountability, but a low-intensity war continued to rage between the government and the Tuareg community. Few would say that constitution-building had failed in this instance, but there was little noticeable reduction in violence levels.

These reservations, aside, the measure has some practical utility. We can all cite examples of countries where constitution writing has inflamed passions and sparked violence, as it has in the Solomon Islands, Chad, Iraq, and the Republic of the Congo. In Chile, the enactment of the 1980 constitution without participation, under dictatorship, and after a fraudulent plebiscite, initially polarized politics because the way in which the document was crafted seemed to promise continued authoritarian rule. This process coincided with and gave credence to the emergence of armed activity among groups linked with the Left. The constitution's provisions fueled conflict, because the text excluded traditional Left parties and gave the armed forces a continued role in politics.

Awareness, public information levels. Especially where a constitution marks the creation of a new state, awareness of the institutions and principles embedded in a document may be an especially important outcome. Awareness may take the form of knowledge or acceptance--or both. It may vary in scope as well. In some places it may be restricted to political elites, while in others increase knowledge or acceptance may be shared by large numbers of citizens. Further, it may pertain to the specific principles or terms negotiated or to a way of interacting.

In its strongest form, awareness may consist of acceptance of or general agreement upon a shared set of values, including willingness to process disputes through the mechanisms set up as part of a constitutional agreement. Said one participant, "a successful process is transformational; it converts the spoilers." The people most able to cause violence accept the basic terms and are willing to process disagreements in constitutionally acceptable ways. Their orientation toward political institutions and toward law changes in the course of negotiations. Transformation is hard to measure, of course, but it sometimes manifests itself when people tell their personal stories about their roles or place issues into constitutional context. Under what conditions does such a change of view take place? Where do alliances that did not seem possible, now seem possible?

At the other end of the spectrum, there may be several states. People may know the terms that won agreement, and even accept them, but show little inclination to resolve disputes through established channels ("constitutions without constitutionalism"). Or deep agreement on shared values may prove elusive, but key actors may nonetheless accept constitutionally-enshrined procedures for resolving differences and establishing laws. A quick way to gauge this kind of awareness is to ask the question, "In a political conflict, do all sides do their best to argue that *their* positions are constitutional and the others' positions are not?"

Not all measures of success necessarily march together. Public awareness can increase without conclusion of a durable agreement. How? Think of the case of Kenya, where, after long deliberations, a draft failed at referendum. How does one judge the three years of very intense activity even though the constitution failed? Initially, most people in urban and rural areas did not understand what was going on because the national level structures of power were so different from the community structures in which they lived their lives. Most tests of awareness were very negative when the process started. To build understanding of principles and institutions, and ultimately of how the state works, is a very important objective and it takes time. If the constitution is to be rooted properly and implemented, it is very important that people understand (1) what is in the document, (2) how they can hold governments accountable. On these criteria, the Kenya process was very successful. The organizers went from town to town, listening and explaining. People felt they had some authority.

Inclusiveness. Inclusiveness might be a measure of success for a constitution building process, although it is often a feature of the design we consider useful in promoting outcomes people often consider important (and thus something that shapes performance, not a measure of performance). If we expect with great certainty that durable, rights-respecting documents are more likely to emerge when all potential spoilers are involved and when members of the broader public are engaged, inclusiveness may be a way to assess a constitution building process. Inclusiveness also may have a place among our "measures of success" because we generally imagine constitutions to have a more fundamental status than ordinary legislation and to represent the outcomes of conversations within the larger political community. Often the reason a constitutional dialogue is taking place is that groups within a country have lost means of talking to each other, and constitution is a way of opening up space to discuss underlying issues.

Terms that respect political & civil rights. Order is not all that matters in today's world. For instance, many people would hesitate to call a highly restrictive or exclusionary constitution, such as South Africa's earlier apartheid constitutions, "successful." The future ability of citizens to participate in the affairs of their own countries, to act as members of a political community, usually matters too. By this logic, the terms in the document itself are indicators of success or failure. If they protect

individual and civil liberties, a constitution might be deemed "successful" and if they don't, it might be seen as a failure.

There is a second, prudential rationale for including "rights" as a measure of performance: Where people feel excluded or where they can be thrown in jail for no good reason, grievance may fester and breed violence.

Accountability. Historically, constitutions often developed as deals to ensure that the sovereign could not abuse those who had to pay for his adventures. Concern about executive abuse of power and misuse of security forces is a common theme in most constitutional conversations today, developed better in some than in others. A process that produces a document that aggregates all power in the executive would be hard to countenance. Because elections and independent courts are among the institutional vehicles for ensuring accountability, most "successful" constitutions contain both, along with a variety of other devices.

"Outside the conflict areas, constitutions are about accountability," observed one participant….We shouldn't lose track of the objectives in non-conflict areas. Half the constitution making processes in Africa are about that kind of thing."

Whether the terms are implemented. A constitution that is successful is one that is not just a piece of parchment. Steps are taken to implement its provisions. Institutions set up under the terms of the agreement are created according to a reasonable timetable.

Adaptability. A successful constitution is one that is able to accommodate political, social, and economic change. It continues to provide a framework for resolving disputes and framing policy in ways that minimize violence even when the country's demographic profile changes, or prosperity or depression visit.

One conference participant also suggested that "success" and "failure" depend partly on the point of view. From the perspective of the politicians who bargain over terms, the goal may be to preserve personal or party power. Advisers seek medium- or long-term stability, which rights provisions and accountable government will promote, at least in theory, but politicians generally focus on short-term personal advantage. The perspective that underlies most of the comments at the conference is closer to the second view.

## Context & procedural choice

Which procedures and institutions are most likely to result in successful constitutions? Under what circumstances do the local parties on all sides decide that a constitution is a way to invest in a future?

"It depends" is a good answer. Features of the setting or context may powerfully shape the ability of people from different backgrounds to talk with one another, the

coherence of the parties to the conversation, the willingness of ordinary people to trust negotiators, the kinds of decision rules considered fair, etc. Talented practitioners inevitably say, "Tell me more about the situation," before they offer recommendations. Their social science counterparts think in terms of decision trees, devices that help the person on the ground identify options that are most likely to produce positive results in each of several different contexts.

Which features of context most strongly shape the appropriateness of different procedural recommendations? As constitution experts and advisors, can we say what kind of situation calls for a particular kind of approach? Conference participants suggested that a wide variety of circumstances shape the constraints and opportunities that pertain in any given setting.

Nature of the root conflict/political context Important issues are defined by the political context or period in which constitution building takes place. For example, decolonization, the severing of sovereign links, leads to a focus on nation building and national institutions. The collapse of communism, transitions to democracy, and the end of ethnic conflict often lead to an emphasis, instead, on establishing harmonious relations. For example, what is happening in Nepal today is a re-definition of what Nepal is, what it stands for. The 1990 model of the state--one language, one religion, one dress, uniform, etc.--has come apart. Now there is a deep concern for identity, respect for communities. An important element in the Nepalese context is this redefinition of identity. In this setting, what kind of process is good for negotiating difference, finding/inventing identities, undermining others? It is important to think about what role process plays in enhancing the achievement of the objectives that mark the point of departure.

Similarly, where the problem is secession by a small part of a country, the agenda might be much narrower than would be the case in a generalized civil war or an effort to respond to an institutional crisis. The process for arriving at agreement would also be different.

Severity and duration of violence/character of conflict termination. Another factor that shapes choice of procedure is the nature of violence during the conflict and the way in which a conflict concluded. One participant suggested that it was difficult for people to have much pride in a constitution where violent conflict has shattered lives. Constitution writing dynamics in civil war contexts may be quite different from those where the problem is institutional collapse, democratization, or the establishment of a newly independent state.

Wasting stalemates and war weariness are often considered helpful in concluding negotiations. They may make it easier to build new constitutions that are attentive to the common weal, provided some groups have not developed a vested interest in conflict, as is sometimes the case. Sometimes civil war becomes so routine that people learn to live with it, and politicians can't contemplate their lives in a peaceful system. If the spoilers

have disappeared, the task is easier. If they are excluded, producing a durable constitution may prove difficult.

It may be very difficult to develop a successful constitution when a country's neighbors help fuel conflict or where combatants are proxies for countries or factions that are based somewhere else.

Costs of failure A related element of context is the cost of failure to conclude constitutional negotiations. How important is it to get the job done? In South Africa, it was clear what the cost of failure would be. In Canada, where negotiations have failed many times, no one believes there will be a civil war if no agreement is reached.

Governmental capacity. If state institutions have collapsed, there may be no way to bring key actors together in a legislature or constituent assembly, and the ability to carry out delegate selection processes may be very limited unless the international community or other third parties play a large role. Managing a constitution writing process and implementing new constitutional provisions requires that at least some parts of the civil service operate well. The institutions and procedures that might work in circumstances where governments are relatively effective may not help at all in Somalia.

Character of cultural pluralism. The degree of ethnic, religious, or cultural fragmentation may shape the tasks the constitution must assume and the kinds of procedures that are helpful. First, an antecedent sense of nationhood or the extent to which polity has previously shared some sense of "nation-ness" may make it easier to build a dialogue in the aftermath of a conflict or crisis. It may be possible to re-capture the sense of shared community in such contexts. By contrast, where there is no cultural group big enough to capture power, the constitution often is used in a way to manage contestation and conflict. Second, the existence of a significant diaspora may alter constitution building dynamics.

Civil Society/Media. Constitution making in countries with lively print and broadcast media, as well as many voluntary associations, may have different requirements for public participation and engagement than constitution making in places without a lively civil society. In the former, people may feel that they are adequately informed and they have many ways to voice their opinions. Therefore, whether they are invited to officially sponsored hearings or asked to offer their opinions on a survey may not matter for their knowledge of the process or their sense of inclusion. By contrast, where civil society and the media have limited reach or appear to be dominated by a particular faction, explicit efforts to inform and to seek opinions may have greater importance for the acceptance and durability of the document that is ratified.

Economic development. Economics may matter for constitution building processes in several ways. 1) There is a general adage that people are more willing to accept a reduced share of a benefit if the pie is growing and the absolute amount of their entitlements do not diminish. Thus we might think that a growing economy would facilitate compromise. Most recent constitutions have not been negotiated in periods of

prosperity, but the promise of growth, pending acceptance of terms required for accession to regional organizations, has sometimes proven a motivating factor, a way to surmount objections. 2) The distribution of a country's resources among its regions inevitably motivates discussions of revenue-sharing and other devices for dividing proceeds. In this sense, economic geography and constitution building are closely intertwined. 3) A country's income level, its GDP per capita, also shapes how much it can spend on constitution writing exercises.

Tradition of pluralistic politics. Most participants agreed that a tradition of pluralistic politics is helpful. In Eastern Europe, the pre-Soviet tradition of political pluralism probably advanced negotiations more than any other single factor, observed one conference member. Other concurred. It is almost impossible to have a constitution unless political parties take the lead or one group is dominant.

"Coherence" of the main parties. Where the key actors are known, have organizations, and control their members or support bases, the negotiating process is likely to work more smoothly than it will where the main parties are fragmented or lack a strong rapport with their followers. Usually it is easier to win support for compromises in the first context, compared to the second. In cases where there aren't very clear parties or where parties are discredited, then it becomes necessary to convene civil society groups, who may or may not have strong roots in the community and who are often opposed by governments.

Distribution of "reformers" among main parties. In some settings, all parties include people who seek reform or see the need for reform, although they differ on what changes are required. In others, as in Zimbabwe in 1999, calls for constitutional reform emanate almost exclusively from one group. In this second circumstance, the risk is that the whole process will be identified with the opposition and with the removal of the incumbent government from power—thus as *more* than a demand for new constitution.

Leadership & Facilitators. How well a constitution building process works may also depend on idiosyncratic, "subjective" characteristics of the people involved. Success is not a straight-forward function of auspicious conditions and of clever choice of procedures suited to the context. Personalities and the quality of leadership influence outcomes too. Some procedural options may work well in the hands of people with particular talents, but far less well when such people are absent.

Politicians generally pursue short-term self interest, whether self interest is defined in individual terms or as partisan political advantage. Constitution writing, especially amid conflict or just after a war, demands some special personalities. In many successful constitution building processes, there is someone who sets an appropriate tone, who takes the long view and rises above the fray, and who serves as model for others or as a deadlock breaker. There are also people who have experience in negotiating and making deals. A third type of talent is ability to bring delegates together informally and to build trust between them. Some countries are better supplied with such leaders than

others. Where these types of people are absent, different kinds of forums, procedures, and assistance may be necessary, compared to when they are present.

One of the striking things about South Africa was the presence of talented negotiators behind the scenes. For example, Cyril Ramaphosa had served as a labor negotiator and he had the trust of other principals. (Indeed, the depth of the talent in South Africa was impressive.)

The presence or absence of mediators, as well the characteristics of the mediators may also shape the kinds of processes that may be effective. In Chile, Poland, and Benin, the Catholic Church played an important role in brokering discussions. In some other countries, its personnel also helped chair proceedings but the results were not always as successful.

Orientation toward Law Whether a constitution shapes behavior may be a function of a community's prior orientation toward law. If law and the constitutional system were tools of repression, those excluded may set a high priority on reform, though it is also possible that they will view the legal sector with such disfavor that they may be unwilling to engage with it. Whether there is a memory of a period when a country's laws or constitution were successful may also influence popular enthusiasm and orientation toward a new constitution.

Related, though perhaps separable features of context are the pre-existing norms that shape what the constitution means to people and how it is perceived. Do people regard it as "nice" or "enforceable"? Is it aspirational only, a power map that shapes the actual distribution of power, or some combination of the two?

International involvement. Where the international community has intervened, key decisions important in developing a new constitution may have been taken outside a country's boundaries (at the Bonn Conference with respect to Afghanistan,, for example). These may affect the content, timing, schedule, choice of forum, and a variety of other aspects. Similarly, continued aid may depend on adhering to a pre-determined schedule, respecting terms during the negotiation process, or incorporating particular terms, as in Kosovo and, in some measure, in Iraq.

International influence may shape the choice of process and terms in other ways too. Because the current international system emphasizes "juridical sovereignty," a state that wants to signal its independence can do so by creating a new constitution, but to gain respect today it also needs to be attentive to international conventions. Moreover, ability to accede to important regional bodies often depends on incorporation of specific terms in a constitution.

Current events may also shape pressures to negotiate, the kinds of terms considered, or the pretexts used for avoiding certain kinds of issues. Participants noted that the global "war on terror" had influenced many of the most recent processes of which they had been a part.

After reviewing this list, some conference participants asked whether it was really possible to offer general guidance: **"**If particularities such as these shape what kinds of procedures are helpful, then is it really possible to offer general guidelines? To what extent does our realization that we should focus on particularities in fact preclude our ability to derive broadly applicable prescriptions?"

## Designing forums for text development & deliberation

How do countries devise and debate constitutional texts? Six main alternatives are in use today, defined by the character of the main deliberative body. Within each "reform model," countries vary in choice of decision rules, involvement of advisory bodies, publicity and opportunities for public involvement, and the use of referenda and other devices as part of the ratification process.

- Commission or Committee/Elected Constituent Assembly Model
- Commission or Committee/Legislature Model
- National Conference/Commission/Transitional Legislature Model
- Roundtables, including many processes linked to peace settlements
- Executive-directed processes
- Hybrid approaches

Together, the constituent assembly model and the legislature model were employed in about 60 percent of the cases that came to a conclusion between 1995 and 2003. Executive-directed processes account for a small minority of contemporary reform cases.

What are the pros and cons associated with each of these models, in different contexts? Conference participants offered a number of helpful observations.

### Setting ground rules and frameworks

Where an existing constitution is not a source of guidance about how constitutional reform should unfold, the first task is to win agreement on a way to move forward. Usually these bargains re-legalize opposition, set forth a framework for subsequent negotiation, specify the rules that will govern elections for constituent assemblies or some other method for delegate selection, and identify the laws that will govern in the interim. Sometimes these agreements extend to essential features or immutable principles that a final draft constitution must respect.

The usual venue for these conversations is a roundtable that includes key actors, whether these are political parties, major social actors, or key combatants. Much has been written about roundtables in Eastern Europe, but roundtables were also important in South Africa, Benin, Spain, and, informally, in many or most other settings. In most

post-conflict constitutions building programs, a roundtable negotiates at least the interim framework, if not a whole new constitution.

In the most recent wave of constitution writing, the Poland roundtable occurred earlier than other East European examples and offered a model. It developed a relationship between the communist establishment and the opposition. The idea was not to replace the existing system, but rather to open participation to Solidarity. It took several months to organize, as each side grew to understand what was involved. Eventually it convened with government and Solidarity representatives, as well as Catholic Church observers, although it really only met twice. Between the opening and closing meetings, committees and sub-committees dealt with the real issues. When disputes arose, the sub-committees sent the problems to the committees, and the committees sent the problems they could not resolve for mediation at high levels, usually informally. The sides cut deals about which group would hold each of several key positions and how the reform process would unfold.

The roundtable accomplished three tasks in Poland. It addressed what would happen to Solidarity by re-legalizing the union as an opposition party. It prepared an election in which Solidarity could contest seats and win representation. Finally, it offered some guarantees to the Communists. Afterwards the parliament pursued the actual job of writing a new constitution.

Similarly, in Colombia (1990), there was a pact between the political parties, including agreement on the design of the electoral system and the design of the mandate for a constituent assembly. The court struck down some of the limitations on the mandate, opening up the space even further.

In South Africa, a Negotiating Council produced draft laws and sent them to the old parliament for passage. The Transitional Executive Council created sub-committees that paralleled the branches of the government, although these lacked the power to do anything more than issue orders to the government to desist from certain actions. It also set up an electoral court, which was never used, and it intervened to broker agreements when conflicts broke out. Meanwhile it also developed the interim constitution.

The operation of these interim mechanisms or interim authorities has received little attention. We know relatively little about the sources of legal authority, the parts of the constitution typically suspended, and the rules put in place in most instances. In Latin America, presidents have made use of their decree powers either to empower a roundtable to design interim arrangements, or to authorize a framework developed informally by members of a political pact. The source of authority in other settings merits more attention. Practically, it is helpful to enable a neutral third-party to handle initial contacts and encounters.

Depending on public willingness to accept past constitutions, interim provisions may either resurrect an older document for a defined period or provide new essential language and leave the rest for delineation in the official constitution writing process.

Latvia resurrected its pre-war 1923 constitution, just as Poland revived its earlier constitution, with amendments. After the coup in 1991, the Republic of Georgia also felt it was not possible to retain the old Soviet constitution. Georgians lived for three years under a combination of the restored 1921 constitution and interim laws put in place by a national consultative conference. At the other end of the spectrum, in South Africa the pre-existing constitution was not accepted by all sides, and an interim document was put in place, a step that was feasible in part because the interim constitution would only last on paper for two years, and the government of national unity (GNU), for five years. (Another example of an interim constitution is German "Basic Law" of 1949. A clause maintained that the Basic Law was the interim constitution until Germany was unified, and the clause was not deleted until 1991.)

Bills of rights are essential for free and fair elections to take place and for this reason they are important parts of interim laws or constitutions unless alternatives are available. In Eastern Europe, countries essentially adopted a bill of rights by ratifying the European Convention on Human Rights. This ratification was a very important part of the process.

Where the appropriate authority for developing a new constitutional text does not appear in the existing constitution or where there is no accepted constitution, the roundtable typically also determines the forums in which an initial text will be drafted and in which deliberation and development of the final draft will take place. Sometimes they vest these responsibilities in a transitional legislature, while at other times they may designate a specially elected constituent assembly or a national conference. In a few cases, the roundtable itself may develop the language of the new constitution as was essentially the case in the Dayton Accords.

Ideally, the roundtable should also specify that before deliberations on the final draft begin, there will be an opportunity for the parties to step back and discuss the kind of society they want to build. This step helps distance the subsequent process from fighting or polarized political conflict.

**Development of an initial text**

The conference participants emphasized the need for a commission to develop an initial draft text. Who prepares this initial text is important, in part because the content tends to shape the final document. If a country doesn't sponsor a commission, political parties will tend to push their drafts, leading to a focus on short-term partisan advantage. Alternatively, if a large assembly or national conference assumes responsibility, incoherence is a likely result. For example, in Brazil, an array of committees prepared the initial draft and the consequence was a mélange of inconsistent pieces. By contrast, a commission, if representative, can carry out an investigation and prepare a detailed report for submission to the main deliberative body, which will debate and modify the text.

In a country that has free and fair elections, many conference participants thought the commission should be appointed by the legislature, although every effort should be made to select people who attract the respect of all parties and social groups. Separate selection of a commission by the executive branch or by a roundtable, under these circumstances, might question the legislature's legitimacy. In many developing countries, the pool of lawyers, politicians, and elder statesmen may also be limited; therefore, it makes sense to tap people in the legislature as part of this body. Experts could be placed on the drafting commission, but they would still have to consult with the politicians to know how much power to vest in different parts of the government. The best approach is probably to create a commission within the parliament but with enhanced autonomy.

Practice is often at odds with this recommendation. For example, in Latin America, the president often issues an emergency decree to establish the rules for election of the assembly and sometimes provides a draft text to this body. In parts of Africa, proposals for constitutional reform have generally been presented to regular legislatures in the form of a bill drafted by the executive branch. In East Timor, a draft text was prepared even before the referendum to call for the constitution making process.

In countries without a record of free and fair elections, the legislature lacks the legitimacy that voting may confer. In these cases, alternative methods of appointment merit attention. In Benin, the drafting commission was appointed by a transitional legislature, itself indirectly elected from the ranks of a large national conference. The legislature named technical experts to the commission along with some of its own members, and the conference designated some other representatives. In other cases, the executive has appointed a commission but has taken care to make the body representative. Two examples of this approach are the French constitution of 1958 (formally submitted by the government but written by a group of experts and then submitted to a referendum because De Gaulle had no majority in parliament) and the Russian constitution (Yeltsin got a group of experts together and submitted to the draft to a referendum).

There was some division of opinion at the conference about whether the commission members should be relatively independent of political parties or whether the commission should include political party representatives. Ensuring that politicians have a role in the constitution making process is vital, but it is possible, some thought, to focus their engagement at the stage of deliberation and development of the final draft, rather than the preparation of the initial text. It is more important to choose people who are eminent, well-established, and attract the trust of a wide variety of social groups. To grant a large role to politicians is "to confuse law making with constitution making." Other conference members felt that political party involvement was essential in the investigation and preparation of the initial draft as well, although the composition of the commission ought to be broadly representative. "If politicians do not feel that they have contributed to the production of the constitution, then even if the document is adopted, the politicians are the ones who must implement it and they are unlikely to do so. There is a tension here."

What are the other hallmarks of an effective commission? A commission ought to engage extensively with the citizenry through hearings, solicitation of written submissions from civil society groups, and district meetings. The conversations should begin before the text is developed. This consultation is important for broadening the minds of the commissioners, allowing information and ideas to come forward from the grassroots, and building popular knowledge and acceptance of the constitution. One participant suggested that public participation at this stage can have significance long after a new constitution goes into effect. "In South Africa now, the politicians involved in the process of constitution drafting are largely gone and the new politicians have little interest in implementing the constitution. We have to look at the other factors that influence its implementation—participation seems key." It should also be the commission's responsibility to publicize the draft and collect comments prior to submission to the assembly.

In Uganda, public participation at the commission stage proved very important too. The commission had received about 43,000 written submissions. At the end of the negotiations within the commission, there were about ten issues outstanding, among them whether the military should be included in legislature and whether the Buganda King should be re-established. The members of the constitutional commission couldn't agree, so they decided to do a statistical analysis of the opinions voiced in the submissions. They decided to go with the majority view in the written submissions, and accepted this procedure as a valid way of resolving differences.

Several conference members voiced concern about the need to manage expectations that might develop in these participatory processes, however. Even in the very best scenario, a constitution cannot deliver what many people say they want. A constitution can create an institutional framework to promote better policy making, but the quality of leadership, international conditions, and other exogenous factors shape policy and performance too. There must be a way to explain that constitutions are about principles, not quick results.[1]

Some conference members thought it was important to monitor the translation of comments into a commission draft. They were concerned that a draft that overlooked something citizens felt to be especially important would simply produce popular disillusionment. Conference participants also suggested that it is important that the commission transmit to the main deliberative body both the initial draft text and the comments received.

[1] Participation has to be carefully organized. Broad-brush questions about "what issues do you think are most important for our country?" aren't likely to yield answers that are highly relevant for the constitution making process. "In my own country," commented one participant, "80% of comments would be complaining about economic issues, rather than how president is selected." Participation can build strong expectations that a change in the constitution will bring about rapid economic improvement, and people may feel demoralized later. At the same time, remarks that are "off-topic" may yield clues about what people want. In Bougainville, for example, one of the single biggest problems cited was men objecting to women wearing six-pocket trousers. The frequency of the remark helped constitutional committee come up with some provisions about gender equality.

Technical expertise is important at this stage in the preparation of a new constitution. Lawyers, economists, and public administration specialists should all be involved if not as commission members, then on the staff.

The status of the initial text also attracted discussion. Should features of the commission's initial draft have special status? In the South African case, a new constitutional court was tasked to review the final draft to ensure that it respected 34 immutable principles or "essential features" set forth in the interim constitution. This arrangement is uncommon but may be appropriate in post-conflict settings where there are potential spoilers whose continued assent depends on the preservation of elements of a peace settlement. As a general matter, making elements of the initial text difficult to change invades the prerogatives of an elected assembly and should be regarded as an exceptional measure, but there are settings in which the practice helps produce success.

Finally, conference participants noted some common mistakes in the design of commissions. Some suggested that the commission not have ex officio status or voting rights in the main deliberative body (the constituent assembly). They argued that it is difficult to foster open deliberation if the commission members are directly involved in the deliberation. (However, if a legislature appoints some of its own members to a commission, this recommendation would be difficult to follow.) Others emphasized that the executive should not involve itself in the commission or modify the draft the commission sends forward. One person noted that a very small commission with representation of groups in conflict can only work where, as in Fiji, the number of groups is very small also. With multi-faceted conflict a different model might be required.

## F**orums for deliberation**

Development of a final draft usually results from debate and amendment in some sort of deliberative body. Representative bodies, such as elected constituent assemblies, legislatures, and some types of national conferences, are, today, the main forums in most parts of the world. There may not be an optimal design for these institutions, because they must respond to historically-specific and culturally-specific popular views about what "representativeness" means. In some situations it may be clear how a constitution should be made or modified, given a country's traditions, and in other situations political turbulence means that everything is up for grabs. Nonetheless, through careful examination of experience, it may be possible to make a convincing case to people in many different communities that some approaches work better than others.

Elected constituent assemblies and legislatures. For a variety of reasons, elected assemblies are becoming the norm. The standards imposed by the Council of Europe on new democracies create pressure for elections. Where the United Nations and other donors become involved, the emphasis is also on elections as the preferred method of assembly. (In both Nepal and Cambodia, the amount donors spent organizing elections was over ten times the amount spent to develop a new constitution.) Grand Ayatollah Ali al-Sistani's insistence on an elected constituent

assembly in Iraq is one example of the acceptance of elections as a legitimating mechanism.

Elected assemblies have strengths and weaknesses. One strength is that they enhance the likelihood of buy-in from politicians. A second is the general perception that elections provide individuals a way to signal preferences and communicate interests to candidates who visit, seeking votes. Third, an election allows for the creation of a representative body, which has the authority to speak on behalf of constituents. "Participation" and "representativeness" are both central to the preference for elected deliberative bodies. Fourth, the election process sets up a model for making public choices in more ordinary matters.

Yet there are reasons to think that elections often fail to achieve these objectives and often may be misused or inappropriately integrated in constitution making processes.

- Depending on electoral rules, the numbers of issues voters juggle in their heads, the strength of patronage ties, the security situation, and even the weather, the results may not be truly representative. Potential spoilers may fail to win seats. Women, lower castes, and other historically under-privileged groups may capture no seats at all. Further, if the playing field isn't level, accusations of unfairness can undermine acceptance of a draft constitution. Some of the new hybrid systems that reserve seats for under-represented groups are attempts to help correct these imbalances, but because the seats are sometimes filled through executive appointment, mixed elective-appointive assemblies may privilege the incumbent political party or ruler. Nonetheless, in Uganda, where this approach was tried, the women and the army members were not really regarded as unelected by most people, at the time. They were elected by special constituencies, and people thought that was acceptable. Similarly, in Afghanistan, creation of special constituencies to elect women and others likely to be left out played an important role in legitimizing the process. Constituent assemblies that are broader, in this sense, attract more legitimacy, argued some conference participants.

- The participatory advantages elections confer, in theory, are also weaker than they may first appear. In the early stages of South Africa's constitution making process, prior to elections, popular participation within parties and broader social movements was quite high. People came to branch meetings, to conferences with unions, and to local activist meetings. This kind of participation, which involved interaction and deliberation, was more meaningful than simply casting an up or down vote, observed one conference member.

- When well-managed, elections may create models for making public choices, but they can easily do just the opposite. Elections carry many risks in post-conflict settings and in many divided fragile states. Elections are contests. They heighten partisanship and focus attention on short-run advantage, neither of which is helpful amid the delicate process of constitution making. Unless carefully

sequenced and managed, elections can undo a lot of the work of peace negotiations.

Crafting constitutions in elected assemblies may also undermine coherence of the document, although conference participants thought this objection overstated the insight of lawyers or commissions and understated the skills of politicians. It also allows day-to-day political disputes to be reflected (or perpetuated) in the constitution

These difficulties noted, it remains the case that there are few other ways to select delegates. In Venezuela, many people sought corporate representation, the appointment of delegates from different social groups or occupations. Then they realized that the non-governmental organizations would be in a position to hijack the discussion and they worried that leaders would be self-anointed. Elections began to look like a better alternative.

Where the main deliberative body is created in a national election, then, care must be taken with regard to design and sequence.

- The more proportional the electoral system, the more representative the constitution making body will be. Inclusiveness helps ensure that all significant actors feel they have a stake in the assembly.

- Hybrid forms may help address lack of representativeness. For a constituent assembly, non-political party representation may be appropriate for some groups, including women, professionals, trade unionists, the business community, civic organizations, etc., to represent the broader national interests and interests parties do not normally espouse, and to act as bridge builders.

- It is important to build prior consensus on many of the most difficult issues so as to avoid later disruption by potential spoilers who are left out and to lessen the risk that the electoral process will polarize factions on central issues.

- In cases where there are two of more equally strong forces vying for control of the assembly, a power-sharing device is useful to stave off conflict. In the case of Colombia, three groups shared in the "three-party" presidency of the assembly. The assembly presidents often met informally for breakfast to talk and come to agreement on issues that had proven divisive. South Africa also created a five-year government of national unity.

There are some trends in the use of constituent assemblies that conference participants found worrisome. In Latin America, parties and legislatures are often deeply discredited and are not popularly perceived as legitimate options, so the preferred venue for constitution writing is a constituent assembly, not the standing legislature. Yet these often serve as heavy-handed tools of executives to displace opposition. "This is part of what happened in Columbia and Venezuela," commented one conference participant.

"The president's office writes the draft, issues an emergency decree that creates a constituent assembly, and then that draft is discussed." The final draft goes to a referendum for ratification. The authority to convene the assembly is usually part of the president's constitutional emergency decree powers. "The courts rarely object because the citizenry usually sense that there is a national crisis and they hope that changing the constitution will solve the country's problems."

**Elections without Parties?**

Is it possible to design an elected institution immune from the dangers of highly partisan politics? British Columbia sent letters to a random sample of citizens, asking them to participate in choosing a new electoral system. The names of those who wrote back were put in a hat. Officials then drew the names of one man and one woman from each district. These representatives listened to experts and debated. They then submitted their decision to a referendum. No politicians were involved.

National conferences. Sometimes out of tradition, or out of lack of capacity to organize an election with little preparation, countries have convened unelected but nonetheless representative national conferences. Generally these serve as devices for building consensus or identifying important principles, prior to the creation of a transitional legislature and the development of a draft constitution or prior to legislature-based constitutional reform. The transitional legislature may be indirectly elected from the ranks of the conference. In a few instances, conferences have also produced initial texts and final drafts themselves.

Conferences are usually large—much larger than the typical "roundtable" discussion among political parties that has preceded legislative action in countries such as Poland. The largest have exceeded 2000 delegates. Usually the potential spoilers, the main parties, sit down to agree on a set of rules first. They may set limits on the numbers of seats allocated to different types of delegates—for example, for farmers, traditional authorities, political parties, etc. They may set eligibility rules as well. The associations that organize these groups—unions, for example—then have responsibility for selecting the people who will represent them.

The Benin national conference is often cited as an example of a process that worked effectively. Benin led a wave of political liberalization in Africa. It drafted a new constitution in response to an institutional crisis. An initial roundtable meeting developed the format the constitution making process would follow and established some initial principles the final draft would reflect. A national conference was empowered to reflect upon seven volumes of citizen input, deliberate about main items for inclusion in a draft, promulgate a transitional constitution, and select a transitional legislature. Responsibility

for preparing and debating the actual text lay with the indirectly chosen transitional legislature. The conference convened 495 delegates for a period of ten days. The delegates included representatives of newly formed political parties, farmers, unions, the branches of government, the central and regional administration, the army, religious groups, and NGOs. The incumbent regime reserved 10 percent of the positions for its supporters and "invited personalities." The conference was televised and broadcast on the radio. The conference formed sub-committees, of which the Commission of Constitutional Affairs was the most notable. This commission translated the deputies' ideas into text. It referred this text to the transitional legislature and to the legislature's own constitution drafting committee. By pre-arrangement, this committee included five members of the conference's constitutional commission as well as ten others chosen by the legislature for their representativeness or their legal knowledge. The transitional legislature debated and approved the final draft and sent the document to a national referendum.

National conferences are vulnerable to their own distinct set of maladies. The risk of dominance by the incumbent is high unless the roundtable that establishes eligibility rules and numbers of delegates is very balanced and very careful. Phantom political parties tend to proliferate prior to registration of delegates, empowering very small groups. The credentialing and registration processes are often points of conflict. More seriously, conferences are large bodies, and developing a text in this setting usually is very difficult (Benin simply referred principles to a smaller committee, but others have tried to draft the document in the conference). Sheer size means that most delegates will have very little time to speak and feel they really have not been consulted. Slow translation or publication of proceedings may breed distrust. The tone set by the chair often influences the ability of delegates to work together. Where the tone is retrospective and punitive, members of the incumbent regime may withdraw participation.

Despite the difficulties, a conference may be able to surmount obstacles to reform and become the impetus behind constitutional change. In Kenya, a conference brought lots of groups together. It succeeded in pushing the president to develop a framework for reform. The conference also defined fundamental constitutional principles.

Executive-directed processes. Executive-directed constitutional processes are increasingly less common, although closed-door development of constitutions in association with peace agreements share some of the hallmarks of this approach. In the 1980 process in Chile, three out of four members of the junta, which played a major role in preparing the draft, headed a branch of the armed forces and therefore could credibly threaten the use of force if proposed terms diverged from those they wished to see. The draft was published in the newspapers, however, so that although the commission had no constitutional power, there was some small measure of transparency and accountability. Similar approaches have characterized constitution writing in Algeria (1976 and 1989).

**Constitution writing in the context of peace negotiations or high levels of violence**

Usually it is easier to convince politicians to take a long view and consider broader community interests when conditions are peaceful. High levels of insecurity usually cause people to draw inward and to restrict their contacts to kin or to people they know well. Sectarianism inevitably increases in the context of violence, as a result. It becomes very difficult to convince people to adopt long time horizons and think of broader interests, or push for compromise. To hold election contests or draft constitutions amid insecurity increases political passions further, and makes both exercises extremely difficult to carry off successfully.

There are several additional risks associated with the linkage of constitution writing and conflict resolution, including the possibilities that the combatants will seek to enshrine their power, that new fighters will appear in order to claim a seat at the table, that some potential spoilers will be left out, that non-combatants will be excluded from the process, that the negotiators will lack legitimacy in the eyes of the larger public, and that the timetables and concerns of third-party mediators and international actors will come to dominate. It is also likely that there will be inadequate attention to issues other than who gets power and excessive faith in a constitution as a solution to underlying problems. Finally, peace agreements are concluded by people who usually understand the immediate political context well but may not understand the longer-term legal ramifications of constitutional provisions they advocate.

Sometimes it proves impossible to move peace agreements forward without agreement on a constitutional contract or some key principles, however. Said one conference member, "Very often conflict is about exclusion, and it is vital to address this issue through a constitution in order to convince combatants to lay down arms." Thus in some cases, the constitutional process is actually a prerequisite to ending the violence. As a result, peace negotiations and constitution writing are sometimes inextricably linked. Moreover, in some instances it may also be possible to tame polarized political elites by bringing party leaders together with other people in the context of constitution writing. The public may be able to help moderate passions. Finally, in the context of violence, creating space for political discussion is important. Constitution drafting can create that space. Whether this space is inclusive at the outset or engages a broader part of the community only at the end may not matter very much.

The right approach may depend on specific features of the setting. Not all conflict or post-conflict situations are the same. There are at least four types. (1) The "Columbia type" conflict, where the institutions remain substantially the same and the aim is to incorporate an opposition group. (2) The "Kosovo type" conflicts, where a new entity is being created. (3) The "failed state model," where the focus is on building new institutions. (4) The "internationalized conflict," in which there are new stakeholders. The "post-communist" situations are a fifth type. Although violence wasn't as evident in these cases as in the other settings, the fear of Russian invasion or interference shaped the constitution writing process. Negotiators were influenced by the unspoken realization

that they must not go too far. They focused on reshaping the economy and left other matters to be addressed later.

Popular expectations, or what some might call "political culture," also shape what is possible. In Chile, for example, everyone understood from the beginning that the negotiation was about the constitution and about politics and the chance to influence policy. As a result, the country could hold a discussion about opening the door for democracy even though key figures received a grant of amnesty.

**Interim Arrangements**

Conference participants were generally of the view that the use of interim arrangements is preferable to a full-scale effort to draft a new constitution in the context of peace negotiations or on-going violence. Although constitution writing appears to be a specific element of the peace negotiations in these cases, most of the conference participants suggested that it makes more sense to think about the negotiations as a source of interim arrangements. Usually the problems that spark conflict have a constitutional dimension, but the goals of reform in the context of peace negotiations and the goals of a thorough-going effort to draft a new constitution or re-draft an old one are different. For the latter, freely acting parties and free elections, are important, and these may not be possible during the settlement of a civil war. The interim constitution is likely to be a hybrid that borrows on previous constitutions and adjusts the terms to produce a settlement. Later, it is possible to approach the process more logically and to frame a document that serves the broader purposes set out earlier in the meeting--creating a framework for accountable government, in particular. "Talk first, write later."

This notion of separation between initial and final deal is an apt description of the constitution writing process in a variety of countries, including not only South Africa but also Poland and Namibia. For Poland, the initial deal was the agreement concluded in 1980 between workers and government. It was a formal agreement with a number of key points, which were never fully implemented, and it had a constitutional dimension, but it was nevertheless a kind of peace settlement. Nine years later, when it was possible to hold a civil discussion, a constitution began to emerge.

The rationale for emphasizing construction of interim agreements or constitutions extends beyond the greater likelihood of real deliberation in peace time. Achieving high levels of participation is very difficult and often morally troubling when polarized and militarized factions control the streets or the countryside. In Afghanistan and in other places where negotiators have tried to create some participation and opened assembly meetings to the public, many people were killed as a result of their involvement. Nothing is really foreclosed if warring parties adopt an interim constitution without full participation.

Depending on the context, there may be risks associated with a prolonged interim arrangement. Delays can be dangerous when there are high expectations of the constitution making process as a national consensus building exercise, and a new constitution is seen as a way out of a confused and unstable situation. In post-conflict

settings where the state has failed and there is no clear victor, delaying constitution making and elections may create a vacuum and a period of deep uncertainty unless there is international capacity to provide governmental services, most likely through a U.N. mandate. Further, some interim constitutions contain terms or ambiguities that inflame passions further and cause the prospects for peace and for a better constitution to deteriorate.

In Nepal an eight-party coalition has to manage the transitional period at a time when people expect immediate solutions and party agreements are coming under strain. In the absence of a clear majority, even the day-to-day functions of government have become difficult to manage. If there is a majority that enjoys some measure of legitimacy, a lengthy process may not do too much harm (as in Uganda under Museveni), but delays can also upset the political equation and may make consensus building more problematic in other settings, like Nepal.

It may be wise to ensure that constitution making does not take place in lieu of government programs focused on reconstruction and nation building. The trick may be to govern in such a way that the settlement acquires credibility *and* the constitution writing process receives the attention that it needs.

"Constitution building" may start early in a settlement process – as people start contemplating the ways in which a constitutional settlement can help them resolve differences. But constitution "writing" should surely not happen until the big issues are resolved.

**Sequencing**

Many conference participants stressed the desirability of sequencing acceptance of some provisional or interim arrangements along with a ceasefire, followed by a series of steps that culminate in a more inclusive constitution writing process later. Some of the linkage points might include disarmament, demobilization, and programs to reintegrate combatants.

Bougainville provides an example of the use of sequences and linkages to resolve conflict and win passage of constitutional changes. In Bougainville, when the peace agreement was signed, former combatant groups still had not given up their weapons. Papua New Guinea had to pass constitutional amendments to implement the peace agreement, first, then the Bougainville militia had to give up their weapons, the Papua New Guinea forces left, a new Bougainville constitution was developed, and finally troops were to be withdrawn. The Bougainville peace process entailed a complex mix of constitution writing, development, DDR (disarmament, demobilization, reintegration), elections, formation of an autonomous government, and referenda.

There were people on either side who did not really want to take any of these steps. The question was how to get the factions to go along. Each side compromised at various points and agreed to do things it was not happy to do. Obstacles became opportunities. When one side implemented part of an agreement it didn't like, the other

was more willing to reciprocate. Papua New Guinea wanted to embark on weapons disposal, but before it could do that, it had to pass some constitutional amendments, which many did not like. The U.N. certified whether each benchmark had been met satisfactorily. It was not just the sequence that mattered; the links are what made the real difference.

There are similar issues in Nepal today, although the cases are very different. In Nepal, the conflict is not between the central government and a regionally based opposition. Instead, it takes the form of a major conflict between different parts of the country. Sequencing and linkages have worked less well, to date, possibly because of the different context or because of the character of the initial agreement put in place.

The country arrived at a comprehensive peace agreement through a series of inter-party conversations. As in the Bougainville case, the process had to address disarmament and demobilization, the status of the Nepali Army, and the balance between the Maoist armed forces and the state's armed forces. The U.N. agreed to monitor the completion of the steps agreed to. The main arguments were about the structure of state representation, so early in the negotiations it was clear that agreement on a constitution would be important for building peace.

The parties arrived at an eight-point agreement that outlined the key features of the process and indicated there would be a constituent assembly, but they left out many details. For example, the peace agreement says elections can only be held in appropriate environment, but it doesn't specify whose responsibility it is to ensure that the playing field will be free and fair. The negotiators omitted any very specific ideas about what the constituent assembly would look like or what it would do. Discussion of how best to move toward a constituent assembly kept the inter-party conversations going for a time, but the lack of specificity has created its own set of difficulties.

The problem, now, is what will happen if the constituent assembly does not materialize. The agreements set out no fixed dates, and the Maoists are now concerned that there is no reason to continue to engage with the other parties. It is difficult to manage a process built on an agreement with few dates, specifics, or benchmarks. The certification of weapons disposal has raised questions and concerns—particularly the suspicion that some of the Maoists may have gone to India and purchased cheap weapons to surrender, while keeping their main arsenal intact. All agree that it is impossible to de-link constitution making and the peace settlement in this case, but sequencing and linking has not worked well in this instance. Effectively Nepal has an interim government, and people maybe happy to be with that position for a while. The question is how to move forward when necessary. At what point is it a crisis if the interim arrangements continue?

In South Africa, there was talk about sequencing and none of the deals were completely consummated. Both sides complained throughout the process. There was great pressure to keep the process moving forward, however.

The Colombian peace process may also present some useful lessons. The process unfolded in stages, and it partly failed, partly succeeded. The first phase took place in the mid-1980's, and it was a relative failure. Peace negotiations took place with three different guerilla groups, but a complete ceasefire was never achieved. The guerillas' main demand was to open up the political system to allow for broader participation. The guerillas thought that the constitutional reforms made at the time were insufficient, and the process broke down, although the reforms went forward and the country ended up with new electoral rules, a proportional representation system. As a result of the changes, one of the guerilla groups won 26 percent of the seats in the assembly, and when the constituent assembly convened, the other groups wanted to participate but could not, technically, because elections had already occurred. The president responded. He appointed two representatives from each group. As a result, there were four groups inside system and two outside. The conflict persists, but the modifications of the process allowed some groups to play a role. Retrospectively, the arrangements failed, but the situation is such today that the guerillas don't have legitimacy that they used to have. Colombia is a case of partial success.

There was some disagreement or difference among conference participants in nuance about the need to be specific in spelling out timetables and benchmarks. Some emphasized the desirability of clear, specific timelines and clear sanctions if a party fails to live up to its responsibilities under the interim agreement. Others said highly specific roadmaps are difficult to manage and flexibility is important. What happens, they asked, if something all parties say they want can't be realized? For example, the Sudan has an interim constitution dictated by the peace agreement. The agreement has a large number of timetables and provisions that say what must happen. Few if any of these requirements have been met. All expressed concern about the short time horizons of the United Nations and international actors and the effect of rapid withdrawal on phased constitution writing processes. If there is massive international intervention, as in Cambodia, it may be easier to sequence and link effectively, but even in the Cambodian case, difficulties arose and Cambodia is continuing to confront the challenges today.

Should the conversations about the constitution take place even if no ceasefires are in effect? Again, flexibility seems to be part of the answer. In most cases of sequencing, the linkages are designed to induce a reduction in violence. But it is possible for violence to escalate, as in Iraq, where constitution writing took place while violence grew worse. In the initial years of the South African process (1991-1993), violence escalated too. However, the interim constitution only came into effect after the peace deal was done, and that timing is important. The interim constitution reflected the deal. The biggest agreements took place before the interim constitution and the 34 principles were crafted. The South African process was slow and it gradually forced people to start making agreements. Roelf Meyer says passionately that it took the National Party a while to learn that it couldn't break deals.

**Inclusiveness**

Inclusiveness is important to the success of constitution writing, more generally, and constitution writing in the context of peace negotiations, in particular. It is not always easy to secure in settings with high levels of conflict.

- On-going violence may limit the willingness or ability of potential spoilers to participate.

- The relative benefits of continuing the fight may impel some political elites to decline the invitation to participate. In Colombia, FARC was left out because it did not want to be incorporated; nor did the drug dealers, another source of violence, want to join in (and it is not clear that they should have had a role).

- Those who help craft post-conflict arrangements or cease fires may not seek inclusiveness. For example, in Somalia, those charged with helping to prepare a new constitution inherited a process that left out the Islamic Courts Union representatives.

- Often a barrier to real progress is exclusion of key groups that may not have taken up arms but are nonetheless important. This exclusion can impede progress.

- Transitional justice problems also arise in these contexts. In the case of Nepal, there are people among the Maoists and on the government side who killed thousands of people, between them. To involve them in the negotiation process and the constituent assembly gives them complete immunity or amnesty. Part of the deal is that detainees and prisoners will be released. In the view of the ICTJ, no process is complete without justice. Louise Arbour, U.N. High Commissioner for Human Rights, considers amnesty unacceptable. The justice concerns create additional difficulties, and it is not clear what the answer is.

It may be better to try to engage potential spoilers through a series of small events that aim to build the basic level of trust required for discussions to move forward. Small, quiet events that bring together a few key people and help them get to know one another can be very helpful, as it was in the South African case. So many conflicts are mutually destructive that usually we are not talking about winners and losers, but losers and losers. The aim of the small meetings must be to help people reframe their interests to win-win.

**Attenuating the Influence of Militarized Factions**

There is a strong likelihood that militarized factions will dominate the construction of any agreements, whether interim or a final in nature, when negotiations are held in the context of peace negotiations or amid violence. By definition, stopping violence gives primacy to groups that can organize military force. For example, the 1979-80 Zimbabwe peace agreement and subsequent constitutional arrangement gave many advantages to military people. Other more recent constitutions crafted in wartime have enshrined ethnic or cultural divisions and given these a new lease on life.

A challenge is to ensure that the linkage of a constitution to a peace settlement does not simply reward those who participated in a conflict.

- Postponing the development of the final draft until after violence has ebbed and after an election has taken place may reduce this tendency, although some principles may be locked in to ensure that conflict does not resume.

- Whenever possible, peace agreements should focus mainly on procedural elements, not on choosing terms for a new constitution.

- It is important to take deliberate steps to broaden participation in the subsequent constitution building exercise in order to counter the effects of letting warring factions dominate the process at the first stage.

**Sunset provisions.**

Sunset clauses have proven useful in a number of contexts. Sunset clauses can be used to offer warring parties some time to adjust, some kind of immunity, some kind of particular treatment—and ensure that warring parties can't live "in the interim" indefinitely." In South Africa, the sunset clauses were part of a deal. The provisions included an agreement that civil servants would be able to retain their positions for five years. Probably many of the incumbents thought they could continue to control ministries if they retained their jobs. Another sunset clause allowed racially constituted local governments to stay in place till 1999. This ambiguity was important; it allowed some to think world would stay the same and others to think things would change.

From a moral or ethical point of view, it may be hard to construct arguments for these kinds of provisions, but from a pragmatic perspective, the clauses are helpful. South Africa is not the only country that has used them. They appear in the post-communist constitutions and also in Spain and Portugal. In Uganda, the issue was a role for the military in the legislature; a sunset clause governed how long military representatives would stay on. In Bougainville, a sub-national sunset clause allowed militants to participate for a certain period of time.

The success of sunset provisions may depend in part on laying out clear time frames. The clauses should not be constructed in such a way that they allow a "victor" to bide time and then claw back concessions. Possibly creating a structured opportunity for reconsidering provisions would alleviate this danger, but this approach may have drawbacks in societies in which constitutional stability may already have little meaning.

**Ambiguity**

Where differences appear intractable, some constitution making bodies have deferred discussion either by leaving language ambiguous, effectively punting the issue to the courts at a later date, by sketching broad principles with much the same effect, or

by creating sunset clauses. Perfection is not the aim; it may be better to postpone efforts to address some problems.

In South Africa, the articulation of the 34 immutable principles in the 1993 constitution was vague and undetailed. As a result, people did not feel threatened. A little ambiguity can be helpful. It allows different actors to read advantages to themselves and keep the process moving forward. However, uncertainty is also problematical. Down the road, if views or perceptions of interest have not changed, key parties may feel they have been duped. Conflict may break out again.

**Venue**

In persuading extremists to take a long view, does changing the venue help? In the case of Afghanistan, it was impossible to hold conversations in Kabul, initially, and we held them in Bonn instead. As a general rule, venue changes should be based mainly on issues of security. But the issue prompts a further question about the nature of the conflict: Are the negotiations moved because the factions will kill the participants, or does the change in venue make it possible for all factions to come together?

Holding constitution making proceedings outside national boundaries may make the process appear less participatory and less democratic. (One participant noted, wryly, that colonial constitutions were nearly always devised in London.) Although the reality may be otherwise in many cases, the perception is important. Similar tensions arise in the handling of trials. Amid high levels of violence it is simply not possible to have a modicum of justice, but holding trials outside the borders does affect the way people perceive issues. This problem is especially evident in the Arusha-based Rwanda tribunal.

At the same time, in some circumstances a change of venue can be helpful even when not made entirely necessary by the security situation. One conference participant recounted the difficulties of trying to negotiate knowing cameras were outside the door. After five days in a foreign locale, out of the way of the television cameras, more was accomplished than during the two previous months at home. The real rationale for holding the meeting outside the country was that it was impossible for the donor to pay for the meetings in the country in question, but the unintended consequence was that it proved easier to agree on a text and a memorandum of understanding.

Holding negotiations outside the capital can also sometimes prove helpful, depending on the selection of the location. Both in Ecuador and in Bolivia, assemblies are taking place outside capital city, in minor cities. They are not located in places that are noted for being “home bases” for any ethnic group/opposition. They appear to be on neutral ground, and that neutrality helps foster deliberation.

**Other Challenges**

There are several other challenges that attend constitution writing, or the preparation of interim constitutions, conducted in the context of peace negotiations or civil war.

Amnesty & Transitional Justice. There is a persistent tension between the need to include potential spoilers and provide stability, which is important after the trauma of dictatorship, and pursuing justice. Initially amnesty can provide some degree of stability. To build a democracy and a sense of equality before the law, justice is important, however. After twenty years, Chile is still dealing with these issues.

Conference participants struggled with this issue. The remarks of one colleague captured the sense of the majority:

> As much as possible, I would try to provide assurances to potential players that, at least in the short term, they will not suffer retribution for their role in the former conflict. I am aware that this may be in tension with the openness of democracy and, often, normatively unattractive, but I view any such mechanism or agreement as a way to buy time and let institutions begin to work (as well as permit generational renewal). Such measures often stimulate new points of tension but I suspect they may contribute to displacing conflict onto new issues and away from the use of force. Thus, I would accept agreements to remove certain substantive issues off the table, at least temporarily.

Independence of drafting commissions. Interim constitutions are generally developed prior to any national election process or other effort to secure representativeness. As a result, drafters are appointed, either by the executive, or, more likely, by third-party mediators or the combatants themselves. Questions of independence may arise. From the perspective of mediators, there are some advantages if the commission is not wholly independent and can be prevailed upon to propose language that might bring parties together. An independent commission could offer an initial text at odds with the terms created in on-going peace negotiations and re-kindle conflict. At the same time, if one party is viewed as particularly influential, the draft text may have little legitimacy. Again, the best response may be to follow the example of South Africa, in which the interim document reflected the terms the potential spoilers would agree to and a later process, which proceeded more independently, generated a final draft.

Intimidation in deliberations. Reducing the possibility of intimidation is also important in the context of conflict. In Afghanistan, the ministers sought to have committee discussion and a secret ballot vote out of fear that full discussion in a plenary and roll-call voting would elicit reprisals. Similarly, in East Timor, issue of closed and open voting was very important for security reasons. In Colombia's 1991 constitution, the extradition of Colombian nationals on drug charges was a big issue, and holding an open roll-call vote meant intimidation was easy. An open vote may also encourage bribery because it allows the bribers to monitor whether a representative has reciprocated or defected.

Protection of delegates is important. Provision for protection must be made in advance, either by the government or by international actors.

## Building concern for the general welfare

Grandstanding is usually an impediment to the creation of a constitution that will endure. As compacts, constitutions generally entail considerable compromise. The conference pushed participants to offer recommendations about ways to foster compromise and to consider which of their proposals would be best suited to some of the very distinctive contexts described in the previous section. Similarly, it challenged participants to recommend devices for generating long time horizons among those involved in constitution building, luring people away from sole focus on immediate self-interest. Given that politicians are self-interested, how can procedure be used to reduce the attention to short term interests?

Two difficulties arise immediately in trying to answer these questions. Paradoxically, the practices often most likely to reduce compromise often are precisely those that are key elements of democratic life: elections, press coverage, etc. The challenge is to balance these values. The timing of elections and publicity, for example, can sharply affect the ability to focus attention on the longer-term welfare of the larger community. Further, local traditions of consensus building may matter greatly, making broad generalizations difficult to devise.

### Timing of elections and constitution writing

In order to encourage delegates to focus on longer-term, broader interests, some countries have tried to separate deliberation from concern for advantage in subsequent electoral competition. Some have excluded sitting politicians from constitution making or have prohibited those who participate in the constitution making process from running for office in the next election. Thailand and Colombia both experimented with these approaches. In general, these strategies are problematical. In Colombia, for example, the choice of rules meant that critical political actors could not influence the development of the constitution, and some of those responsible for the new constitution could not participate in its implementation.

An alternative that may prove more workable is to proceed in phases. The constituent assembly that develops the final draft may as a sitting legislature for several years before elections are called. Allowing more time to elapse before the drafting process and elections may make it more difficult for the parties to calculate where their self-interest will lie in the next contest and may encourage them to focus on provisions that would promote the common weal. This approach might not work in settings where restoration of a multi-party system is the motivation for the new constitution, however, and where leaders on all sides may not have the trust of their followers.

The composition of the assembly may influence the degree to which election timing is important. If assembly delegates are not chosen through elections in which parties play a central role, the quest for electoral advantage may not dominate.

**Other timing considerations**

Timing may influence willingness to compromise, but the optimal timing is often difficult to identify. There are trade offs associated with the choice between gradualism versus a clear constitutional moment.

Conference participants offered a number of axioms. Some emphasized the dangers of moving too quickly. "Clear moments can aggravate conflict," said one. Repeat encounters may prove essential for gradually reducing tensions. Zimbabwe, East Timor, and Iraq are all examples of the dangers of imposing short deadlines where there is no trust.

Others emphasized the need for gradualism. "In societies where there is a deep lack of trust, as in Chile in the 1980s, it may take time and repeated encounters to build the kind of rapport necessary to create a constitution that will attract the support of political elites and the population. Time may allow tempers to cool and it may allow people to develop capacities that are useful in a constituent assembly."

A very gradual process carries dangers too. In South Africa, an extended process would not only have led to a loss of energy but the idealism reflected in the agreement is likely to have faltered even more than it did. The "settlement" reflected in the pre-first election negotiations was initially considered a prize by the parties involved. As time passed, politicians came to devalue it and thus respect it less. Under these circumstances a delay in the process or a much extended process would undermine the settlement. (The Kenyan process occurred under very different circumstances but may provide a related example of a process that became so extended that sight was lost of the promise it was initially seen to hold.)

Others concurred about the potential disadvantages of gradualism.

- "A gradual process makes it hard to deal with the past, while clear moments help form national identities."

- "Stretching out negotiations does not always foster consensus. New interests get defined, people regroup, and new oppositions form. There has to be some kind of closure; in most instances longer process goes on less likely consensus is. The longer the process, the more items that land on the agenda and the greater the risk that a constituent assembly will behave like a legislature."

- "Often there is a very limited window of opportunity to act."

A recent U.S. Institute of Peace Study concluded that it is very difficult to generalize about the effects of timing on the success of constitution writing. Conference participants suggested that timing may be influenced strongly by at least five things:

the tasks have to be accomplished to support open deliberations, whether the government has the capacity to run its affairs without having a new constitution fully in place, the level of public awareness, the degree to which options have been refined in advance, and the level of fear or mistrust. The sequence of steps may matter too. Sponsoring transitional justice activities early in a process may make it harder to get actors to lay down arms, and it is probably best to settle political arrangements first. Elections are difficult to stage without prior disarmament of factions. Conducting constitution writing at the same time as judicial reform and civil service reform may mean that there is insufficient manpower available for any of these programs, because it is likely that many of the same people will be central to all of them.

**Use of deadlines**

Time frames are important. There must be a reasonable "end" so that "normal" politics can develop. Clear time frames (agreed to by parties) are necessary for this to happen.

Deadlines also help prevent reluctant parties from delaying processes endlessly. (To meet deadlines, delegates may agree to broad principles and work out the details later.) Of course, to impose a deadline assumes that is possible to impose a sanction. In the South African case, as in Uganda, failure to agree after a certain period meant that the issue would go to referendum, and the delegates would lose control of the issue. Curtailing the funding for a process past a certain date also may focus attention.

Where deadlines create a risk that key parties will feel excluded, then splitting some kinds of issues away from the main constitution drafting process might help. Mali and the Republic of Georgia were both mindful of the risk that a protracted process would cause the delegates to lose momentum and the public to lose interest, while a short process could not address key problems, in both cases a low-intensity armed conflict in a part of the country. When a country has many different problems, it might be advisable to split the process so that there is no danger of missing constitutional moment. In a country faced with an institutional crisis, constitution making to re-design the "power map" might take place on one track while conflict resolution proceeds in parallel and over a longer period.

**The one draft rule**

The form in which drafts are maintained may also shape ability to engage in a give and take. In South Africa, organizers tried to keep one draft and to insert options into the draft. In the second stage of constitution writing (i.e., in the constituent assembly), they produced a composite draft that initially included everyone's ideas. "Sometimes the alternatives proposed and included faithfully in the draft were flatly contradictory; on other occasions they offered different approaches to what was basically the same position. The practice helped avoid a sense that people weren't being listed to, allowed parties to see similarities in positions and negotiate towards agreement, and avoided the danger of competing versions." This approach made it easier to work out compromises. One could simply agree to "drop clause 1 for clause 79."

Special problems may arise in bicameral systems or tricameral systems. One participant suggested that it is usually a mistake to start constitutional negotiations in both chambers (Assembly and Senate), because both create their own drafts, which must then be reconciled.

**Create space for persuasion**

Conference participants who had played active roles in constitution building indicated that the process sometimes had a transformative effect and changed not only beliefs but also patterns of interaction. For example, they suggested, a lot of people in the African National Congress (ANC) did not believe strongly in the provisions discussed initially, but they later became staunch advocates. The process changed them. What was it about the process that transformed their beliefs? The open discussions that took place first, the engagement of the public—these may have helped. Sometimes encouraging small sub-groups of delegates to travel together to talk to people in small communities or to gather information abroad can have a transformative effect too, although foreign travel opportunities are often just boondoggles. In Fiji, too, the engagement of political leaders in direct dialogue with citizens during commission deliberations appeared to change perspectives.

Travel is a potential device for fostering persuasion, but it is discredited in many places because members of the public often view the trips as junkets, sometimes quite rightly. However, if carefully managed, travel to engage with citizens or explore examples abroad can potentially provide opportunities for the kind of transformation that builds a basis for negotiation and persuasion. Conference participants offered several observations:

- Travel usually removes delegates or commissioners from television cameras, creating space for learning, and it builds social ties. However, it may have very mixed results, and it costs a lot.

- The effects of travel depend in part on what the delegates return to. There was a clear sense in the meeting that in the case of Iraq, people whose views began to change on trips were herded back into sectarian corrals on their return and no transformative benefit was ultimately realized from the excursions.

- Some participants also suggested that traveling study groups should focus on the less controversial matters, if the aim is to build bridges. A focus on controversial issues is not necessarily helpful. What really matters is developing the interaction among the group members. Travel early in the process, rather than later, is also most helpful, given this ambition.

In the South African context, country-based workshops played a similar role. The ANC organized a series of conversations about different models and invited foreign academics, trade unions, party leaders, South African academics and others. There was

no negotiation at these sessions, just arguing about ideas. The series took place between 1990 and 1993, before the intense negotiations about the constitution itself, and a lot of potentially divisive issues disappeared in the course of these conversations.

Preparatory sessions may help shape frames of mind before negotiations begin. In Afghanistan, there was a two-day training session prior to negotiations. These meetings were ostensibly designed to teach everyone the rules of procedure to be used at the Loya Jirga, but they also aimed to help build an ability to engage in a dialogue. The break-out meetings placed people from diverse backgrounds together and engaged them in some mock exercises. Often people emerged from the sessions surprised to find that they weren't far apart in their ideas. The warlords did not attend, however.

NGOs and foundations can play an important role in bringing intellectuals and politicians together to explore points of convergence. In Chile this occurred primarily between the Christian Democrats and the moderate socialist Left (who had been at odds at the moment of the 1973 coup).

**Pay attention to tone**

The tone set by the chair of a process and key elder statesmen may provide a model for others. When the tone is forward-looking, delegates may be more willing to compromise than when leaders focus on the mistakes of the past and engage in or encourage recrimination. Saying that, "An objective is to limit abuse of power," is quite different from seeking criminal prosecution of particular individuals or detailing the abuses of the previous regime. The latter will almost inevitably intensify partisanship and reduce levels of trust.

The pursuit of justice may impede ability to move forward. Balancing demands to punish impunity against the need to constitute a functioning state and political community creates a set of difficult moral and practical issues.

**Manage publicity carefully**

Publicity can unleash grandstanding. In the words of one conference participant, "politicians get 'monkey brain' when they see a camera." If delegates think citizens are watching their speeches and actions in constitutional negotiations and may form opinions of them on that basis, they may try to pitch toward their likely electoral bases. Grandstanding may interfere with compromise and persuasion. In South Africa, a process that was initially open to the press was later partly closed in order to reduce this problem. Absent video cameras, it was possible to avoid protracted speeches. The organizers also issued many interim reports and invited discussion of these. In Colombia, the plenaries were televised, but the committees were not, in order to promote negotiation and persuasion. In Poland, the system was quite similar; all debates in the parliament were televised, but the real work was in committee sessions that were not televised, though full transcripts were available. In Afghanistan, as well, the plenary sessions were broadcast, but committee meetings were not. In Kenya, video cameras were everywhere and the process was protracted.

In some instances, media coverage of assembly proceedings could also affect the legitimacy of the process and the final product. If assembly delegates squabble, cut deals, or divert resources for themselves, publicity may be negative.

**Keep plenary sessions focused on the big picture**

It is difficult to discuss details in large plenary sessions, where the incentive to grandstand is greater and the time for serious discussion is short. Plenaries serve partly to engage the public and to win acceptance of broad principles. They are not the appropriate forums for efforts to craft legal text. Try to focus discussions in plenary and committee on principles, and in general terms. Avoid legal texts at this stage. Avoid lengthy discussions in plenary.

**Create technical committees**

Creation of technical committees to provide support during deliberation and the preparation of the final draft can enhance agreement. Although constitution making/review is a highly political exercise, at some stages it is necessary to stress the technical aspects of it and the consequences of choices in technical terms. This exercise can reduce political or ethnic tensions. Use expert commissions to frame the issues and options and consequences. Each party in the assembly should be able to choose one member of the technical committee. In reporting back, committee members should take turns. Chairs of the subcommittees of South Africa's constituent assembly were meticulous in giving all parties turns to report back on the outcomes of "breakaway" groups which settled various issues. Thus, only one person reported on decisions but responsibility for reporting rotated – completely informally.

In Poland, there was a group of law professors who worked together when politicians were unable to find a solution.

**Draw on senior leaders at strategic points but not in everyday negotiations**

Some principles may govern the involvement of the most senior leaders. High-level engagement in the development of principles and frameworks is important. Involvement of top leaders in negotiation of specific provisions often is neither necessary nor desirable, however. If leaders become involved in the negotiation of specific provisions, they cannot become deadlock breakers when the need arises.

**Use caution in engaging religious leaders**

A number of countries have engaged religious leaders to chair national conferences or assemblies or to serve as important interlocutors. In at least some of these instances, the religious leaders were essentially brought in as neutral third parties and respected elder statesmen, and sometimes they have carried out these roles very effectively. Often religious leaders cannot play the roles of neutral interlocutors, however. Where they are involved as partisans or interested parties, they may render negotiations difficult, often being unaccustomed to compromise or raising concern that their faiths will come to dominate others.

In a country such as Poland, where the church already plays an important political role and it is a critical social group, then it is very difficult to exclude religious leaders from the process. In these cases it is important to find ways to manage these tensions.

**Strategies for handling difficult subjects**

Some kinds of substantive issues present special challenges for negotiators and can de-rail constitution building processes or limit the durability of the documents developed. These may require special preparation and attention. Among the most frequent points of difficulty are the distribution of power between the legislative and executive branches, federalism v. decentralization, regional autonomy, distribution of oil revenues, derogations from rights provisions and clawback clauses, gender equity, property rights and restitution, the status of religious and customary law, capital punishment, abortion, and gay marriage. Sometimes the tension reflects deep divisions of opinion, while in other instances a few outsiders draw media attention and create a divide where before there was none.

The negotiating strategies and devices available for moving forward when these subjects threaten to divide are much the same as those useful for winning agreement among potential spoilers on interim arrangements (discussed above). For example, sunset clauses can prove helpful in creating time for adjustment and for a reduction in passions. Where possible, drafters should acknowledge the centrality of these matters, e.g., land reform, in the constitutional process and commit to address the specifics through an appropriate forum, set up by way of an impartial, credible process, at a later date. In the conference discussion, other suggestions surfaced as well. These include provision for judicial review and for moving the issue to the courts for gradual resolution, further discussion in joint commissions, delegation to the legislature as a "political question," and use of language that is creatively ambiguous, which effectively moves the issue to the courts at a future date.

Participants also agreed that, as a general matter, it is probably unwise to push for agreement on who is a citizen or a member of the community early in a constitution writing process, because this discussion inevitably inflames feelings. However, there may be some circumstances where the subject is unavoidable.

## What are the pros and cons associated with different decision rules?

In theory, decision rules strongly influence incentives to compromise and to adopt provisions that respond to a large range of interests. Voting rules are not the only decision rules that matter in this regard. What effect does voting article by article versus voting only on the finished product have? What about deadlock-breaking procedures? For instance, should chairmen only vote in the case of deadlock? Or do they get a regular vote and a deadlock breaking vote? How do different deadlock breaking provisions matter for process/product? Not all articles are equally important, so how do you decide how to prioritize and which should go up for vote, and when?

In theory, a constitution that takes into account the interests of the larger community is more likely to emanate from assemblies with super-majority rules than from assemblies that require only simple majorities. One colleague suggested that it was vital to avoid majoritarian electoral systems and decision by majority. "In a highly-charged situation, I would make every effort to assure that the resulting constitution is not identifiable as 'the constitution of Party X.'" Another concurred, saying, "In a system where a high majority is required, each party realizes that it would have to make compromises." How high a majority would depend on local circumstances, of course. Even with a super-majority rule, a dominant party may be able to get what it wants without making concessions to others. Zimbabwe is an illustration of this problem. Where one party alone can muster a two-thirds margin, it might be necessary to set the bar higher. Supermajorities are generally preferable to complete consensus, because the search for full consensus can unduly empower small minorities.

Culture may shape preferences for certain types of decision rules. In Africa and the Pacific, people tend to favor consensus building and consensus rules, for example. When pressed about whether consensus breeds immobilism and makes it difficult to conclude the process, most people from these areas qualify their claims and indicate that they aim for "sufficient consensus." Latin Americans political elites often favor majority rules. When pressed about what they do when a subject is especially delicate, they often hastily add that, "oh, in that case we would certainly seek broader agreement." In actual fact there may be considerable convergence; the default rule in most societies appears to be some sort of super-majority (a "sufficient consensus").

Most countries employ multiple rules. In the preparation of the first draft, sub-committees may operate by informal consensus rules, while committees may have to vote according to a super-majority rule, if not because of their size then simply because of the need for a clear record of the level of agreement. Further, there may be differences in voting rules at different stages. For example, in the Polish system, the draft had to be prepared and submitted by a constitutional committee and then approved by the assembly. In that second reading, each member of assembly could propose amendments. Adoption of amendment required 2/3 majority (whereas in committee each article required only majority). Then 2/3 majority required on whole draft. Then president could propose amendments, and for adoption of those, need only a 50 percent majority. A national referendum followed.

In the Republic of Georgia, the president instituted a rule that amendments of the language, no matter how small, required a consensus. Of the 118 on the drafting committee, 117 signed the draft constitution. Moreover, every article to be changed had to be published for public discussion. The draft then went to the legislature, where a two-thirds majority was required for adoption.

The choice of decision rules almost always entails trade-offs. Conference participants offered a number of observations.

- Voting on lots of individual provisions may inflame passions and interfere with the ability to reach agreement. In South Africa, an attempt was made to minimize voting in the development of the draft, for this reason. Committees reached agreement without clear votes, in most cases.

- Voting takes a lot of time; it may take three or four hours to get votes counted. If frequent votes are required and a single dissent can block a provision and require a vote, then one person can exercise enormous power.

- Drafting rules often do require consensus, but the difficulty is that there is no definition of the rule. Some interpret consensus as unanimity, while others do not. In South Africa, Buthelezi went to court to seek a definition of consensus. In Kenya, the real rule was "substantial agreement." The chair would ask for a show of hands. If a sufficient number objected to a ruling, they could ask for a formal vote and a 2/3 majority.

- Particularly where consensus or "sufficient consensus" rules are in effect, success depends heavily on the skills of leaders.

- In South Africa, a new chair was appointed each week. Each party had the opportunity to chair and to try to win consensus. People perceived this measure as a way to accommodate all the parties.

- Participants disagreed about the incentives associated with voting article-by-article or on drafts or significant portions of drafts. One participant observed that voting article by article allowed for horse-trading – trade-offs and compromises between clauses. Voting by article (or at least discussing them during the process) may also facilitate learning/information sharing. Others argued that compacts could best be achieved by asking people only to vote on packages of terms or on a whole draft. "Sometimes NOT voting article by article allows deals; that was the case of South Africa."

Limiting the numbers of points at which votes are taken can also prove useful in defusing conflict and bringing people together. Some participants suggested that the real constitutional process in South Africa was almost totally informal. For example, plenary sessions were mainly ceremonial. The hard issues, such as property provisions, were debated in parliamentary conferences that had no decision making power, then the recommendations/conclusions would go to a committee.

There has to be a deadlock breaking mechanism is essential. The form this mechanism takes may vary according to context. On the one hand, if a constitution is already in place, then the deadlock-breaking mechanism is only a reversion to the status quo. On the other hand, if there is no accepted constitution, then the deadlock mechanism has to be different.

- People who are not part of the actual negotiations may serve as deadlock breakers. For example, De Klerk, Mandela, and Buthelezi were called in to break deadlocks in South Africa, but they were not involved in the daily negotiations. Reddy-Rambuka played this role in Fiji.

- A court could also play this role, as it did, in a sense, in South Africa, but the ability to vest such power in a court may depend on the level of trust people place in the courts generally or in the people appointed to the court in question. The Inkatha Freedom Party re-joined the deliberations through the court certification process.

- When members of an assembly do not agree on key articles, some constitution making processes specify that the issue will be subject to a referendum. The Republic of Georgia had such a referendum on the number of seats in the parliament. In South Africa, if agreement was not reached in the constitutional assembly, then an issue would be put to a referendum in order to break the deadlock, although this procedure was not used. Uganda employed similar measures. In both cases, the prospect of a referendum created a basis for compromise, on occasion. Referenda are time-consuming and expensive. Furthermore, in divided societies, a referendum might privilege the largest population group. Concurrent majorities or some sort of double majority rule might be necessary instead of a straight count.

In Uganda, there were several difficult issues, among them the question of whether to reintroduce political kingdoms. In several instances the commission decided to resolve differences among the members by returning to the public submissions collected earlier to determine the preponderance of opinion. They agreed to abide by what they found.

## Management Maxims

Constitution writing processes pose many management challenges. Delays, petty antagonisms, and financial incentives can all complicate efforts to promote the long view and make constitution writing "transformative." What kinds of management considerations deserve special attention in the design of constitution writing processes?

**Size of assemblies.**

The size of deliberative bodies drew the attention of conference participants. Writing a constitution in a large assembly or conference is very difficult. The Philadelphia Convention that developed the United States constitution numbered only 55 people, many of whom were not present for the whole meeting. The breaking point is about 250-300 people. Above that number, delays set in. Just providing each person a chance to say a few words can take two months. A 15-minute tea break takes 45 minutes because of the difficulties of moving many people in and out of a room and allowing them to pour a cup of tea. In larger groups, committees may have 100 or more members,

and consensus is hard to fashion. The costs also rise. Housing allowances, per diems, and emergency travel support all become big ticket items, and the newspapers delight in revealing the size of the budget for such things when ordinary people cannot afford two meals per day, although not all countries pay such compensation to delegates.

**Chairperson's role**

A chairperson must be known for impartiality and integrity, have a demonstrated capacity to treat all parties and their positions respectfully, and possess the ability to steer discussions without biasing them. In the early stages, it is important to build bridges and ensure that all participants understand the procedural rules and how problems and stumbling blocks will be dealt with.

Among other responsibilities, the chairperson should find time to go to caucus meetings of special groups, hold occasional meetings over dinner with key actors to assess how the process is moving, and establish contacts with leading journalists and editors.

**Financial Management**

Without careful financial management, it is all too easy for constitution building to drain the treasury and attract public dismay. Several problems arise frequently and merit careful attention before a process begins. The first is the decision to pay delegates for their time and to provide them with transportation and living allowances. It seems reasonable to compensate delegates for time away from jobs and farms, especially because the people who are most valuable may be unwilling or unable to participate if they have to take time off with no compensation. However, in poor countries where people may be under-employed or poorly compensated, delegates' pay can become a reason to create delays; the longer the exercise continues, the more an individual may benefit. The local media are usually quick to notice this matter and focus more on "negative" coverage of squabbles and remuneration than on the terms debated. A useful adage might be to remunerate delegates modestly; otherwise they will never finish the work! It is worth noting that in the Republic of Georgia, delegates were unpaid, in order to forestall this problem.

Similarly, donor assisted processes may appear to be a source of cash for commissioners and ministries, alike. Quite a few constitution building processes have stumbled over diversion of funds, often through false invoicing for apparently essential items like paper, a practice colorfully called "air supply" in Uganda. Careful procurement practices, accounting procedures, and audits are essential to prevent scandals that discredit constitution drafting. In South Africa, the logistics associated with the interim process were managed by the independent business council, a local business-sponsored non-profit organization regarded as politically neutral. This organization managed the logistics, food, flights, and accounts. The business community provided some of the money and later, in 1994, there was a one-off "transition" tax to help fund the proceedings. High levels of transparency, including posting of accounts to the internet and release of financial data to the media, may also discourage misappropriation of resources.

**Facilities.**

The physical layout of the meeting hall for a large assembly influences ability to deliberate. In East Timor, party blocks all sat facing towards the presiding officer, and this arrangement was not conducive. In Kenya, the meeting took place in a round hall, but the acoustics were terrible!

**Record keeping**

Constitution drafting requires very careful record keeping. If an agreed text is lost or inserted at the wrong point, the meaning of the document can change. Moreover, if a political group senses that language it supported has altered, suspicions rise, trust breaks down, and the ability to secure compromises diminishes. The chair and staff members may be accused of deliberate falsification. Conference participants related a remarkable number of stories, drawn from a wide variety of places, about failures to maintain accurate minutes and texts.

It is important to create a record-keeping system that is foolproof. Appointing someone to be responsible for the record is a first step. Ensuring that there are qualified note-takers present is the second step. In many countries, there may not be a tradition of accurate note-taking, and employing stenographers, though expensive, may become necessary. However, where electrical outages are common, stenographic equipment may fail, so redundant note-taking using technologies that are not dependent on electricity is essential. Third, committee chairs and their staff must understand the need to read delegates the text of any provision on which they have agreed, to ensure that it accurately reflects what was said. Finally, posting records to a secure website may also help make it difficult for delegates or staff members to change or add language after the fact, as happens all too frequently.

**Use of electronic technology**

Websites can be useful as repositories or archives during deliberations, as well as vehicles for communicating decisions to the media and to donors. They may also be helpful for providing members of the diaspora a way to submit comments or ideas. In Kenya, the internet proved a very useful instrument in these ways.

**Translation**

Another common source of discord in highly charged constitutional negotiations is slow or incorrect translation. In divided societies, this problem can prove especially dangerous, as in Chad, where slow translation in the development of the 1996 constitution sparked suspicions between delegates from different regions. Even when translators are very good and work quickly, languages may not always have words that mean exactly what was intended and the character of a document may therefore vary. One conference member noted that even the French and English translations of the EU Convention on Human Rights are slightly different, and once an official document has been adopted, it is too late to make changes to help reconcile the meanings.

The language of the proceedings and the drafts can matter deeply. In East Timor, the younger members of the constituent assembly, or those younger people making submissions to committees of the constituent assembly, were handicapped by the stress on use of Portuguese and the exclusion of Indonesian, the language in which many younger people had been educated and in which they thought about law and politics.

**International advisers**

Several difficulties arise in connection with the involvement of donors and international advisers. Advisers can be very useful, but too often lack knowledge of local issues and conditions and frequently appear as strong lobbyists for whatever arrangements are in use in their home countries. Usually they come in and out quickly and have no sustained communication, whatever they may later claim about having "authored" a constitution. The problem may lie partly with the advisers themselves, but it is also too often the case that the organizations that invite assistance have not thought carefully about the role they want outsiders to play. Often these organizations are donor countries, who want to fund their own experts to compete to have an impact and in some settings the advisers are highly politicized. Much money is wasted in this way and the influx of "free" foreign advisers often drains the time available for more important matters.

If foreign advisers play a role, the consensus of the meeting was that a key figure or committee ought to be able to decide who will have access, for what purpose, and tell donors when they can more usefully contribute to constitution making by keeping their experts at home. In the South African case, there were specific opportunities created for foreign experts to provide their ideas, and there was external assistance in translating agreements into legal language. A main point for such contact was in early training sessions, where local academics and foreigners provided information to politicians. The Constituent Assembly set up the meetings and identified the people they wanted to include. In Afghanistan, Lakhdar Brahimi made it his role to regulate the influx of advisers.

Advisers who fly in to offer a lecture are less useful than those who remain available throughout the process and even afterwards. The Republic of Georgia's experience with advisers was at least moderately successful, because a core group of 7-9 people returned frequently and were available on email. They still answer questions today.

**Local capacity**

Engaging local experts is important for developing a sense of ownership, fostering a culture of service in local institutions, and propagating knowledge in the community. In many countries, and especially in some of today's post-conflict settings, local capacity does not exist. Often the expertise lies mainly in the diaspora. Even in Latin America, some participants suggested, the ethos often is absent. Building capacity in society itself is an important aspect of constitution building, and donors might consider using some of their experts to provide training courses to young academics.

Economists are addressing this kind of problem in places like sub-Saharan Africa through organizations like the African Economic Research Consortium (AERC), which brings together young African economists in government and academe for training sessions twice a year and finances research and other activities. Several conference participants noted that they had formed an International Network for Constitutional Development (INCOD) with a similar ambition. The aim is to pass knowledge onto a younger generation of constitutional experts in a wide range of countries. The first workshop the organization ran took place in Bangkok and brought together people from Sri Lanka, Nepal, Maldives, Thailand, Burma, Nagaland, and other places, mainly from mid-to senior levels of government and parties. INCOD developed a case to engage the participants in discussion. There was considerable transfer of skills and participants were extremely enthusiastic. The Council of Europe also has developed a network of experts, whose aims are related.

Engaging foreign experts, local academics, and lawyers at the same meetings may also facilitate development of local capacity or heighten the perceived status of quite capable local advisers.

**Publicity**

Although it may be inadvisable to allow media coverage of committee proceedings, too little transparency can endanger public acceptance of a constitution and become a source of discord. It is important to have an official, formal process of communicating with the public through the media at regular intervals. Selectively skewed leaks, as well as complete silence create suspicion and misinformation. Publicity should project a variety of types of information (full texts, simpler versions of passages, and messages) through a variety of mediums (print, electronic etc). The chairperson of the constitution building process should offer regular public briefings. One conference participant recommended that the chair, with other leaders, participate in a regular radio talk show to answer questions from the public.

## Next Steps

Conference participants noted several questions that merited more discussion in a subsequent meeting, prefaced by some background papers, as well as requests for the development of more information on some subjects.

There remains a need for background information on key cases, as well as a bibliography with suggested readings. Ideally, key selections would be available in several languages. Too often, language differences render important types of information inaccessible to people who could benefit. Asking specialists to review the list of bibliographic references and other materials on their countries of expertise would also be helpful for introducing some quality control.

Among the questions considered worthy of greater consideration were the following.

- Why do political elites or social movements in some countries promote reform of constitutions as an essential aspect of democratization while others do not? Under what conditions is a new constitution really essential to moving forward? Is constitution writing inevitably more attractive to weaker parties, who may see ability to channel conflict through institutions as an improvement?

- What do we know about the best ways to manage a process when calls for constitutional change are strongly associated with the opposition and are not generally shared or recognized as necessary?

- Can we learn more about the legal mechanisms for creating transitional authorities and the pros and cons associated with different choices?

- Are there better or worse ways to define the relationship between incumbent governments and transitional bodies? Are some kinds of institutional structures more effective than others in carrying out the twin tasks of governing and constitution writing? Are some structures more likely to generate discord and disruption?

- Are there circumstances in which hostilities might increase as a result of the way the interim phase is managed? What happens if the interim process fails?

- Is it a problem that the interests of main combatants or key parties may be "locked in" by interim arrangements? If so, what are the pros and cons associated with steps to reduce this influence?

- In roundtables and appointed national conferences, how have countries determined who gets a place at the table? Are there better and worse eligibility and selection rules?

- The pursuit of justice may impede ability to move forward. What do we know about the most appropriate ways to balance demands to punish impunity against the need to constitute a functioning state and political community?

- When can ambiguity prove helpful and when is it dangerous?

- To what extent does the choice of ratification procedures affect the content and legitimacy of a new constitution? How authority for ratification is vested—whether in the population, through a referendum, in an assembly, or in sub-national legislatures—may make a difference for the kinds of provisions that politicians craft. If the amendment and ratification process empowers the states in a federation, it is likely that proposed texts will respect or strengthen the status of

these units. Further, delay between initial agreement (or adoption) and ratification/promulgation may influence the political environment. A long delay may reduce the likelihood that delegates will try to use the proceedings to build their political bases. A long delay may also mean that a new political environment develops.

- There are some sorts of tensions that may deserve more thought. Entry into regional associations or into international organizations may require acceptance of a set of individual rights provisions. These constrain decision makers. They help ensure that most constitution making will be "liberal" in the sense of rights-respecting. Yet we know that when local practices do not conform—say, for example, when a constitution embraces gender equality but a large section of the populace does not—the legitimacy of the document may be undermined.

- Inadequate financing is often a problem in constitution writing. What can we say about ways to reduce costs? What are the most expensive elements of the constitution writing process and are there alternative ways to organize these?

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