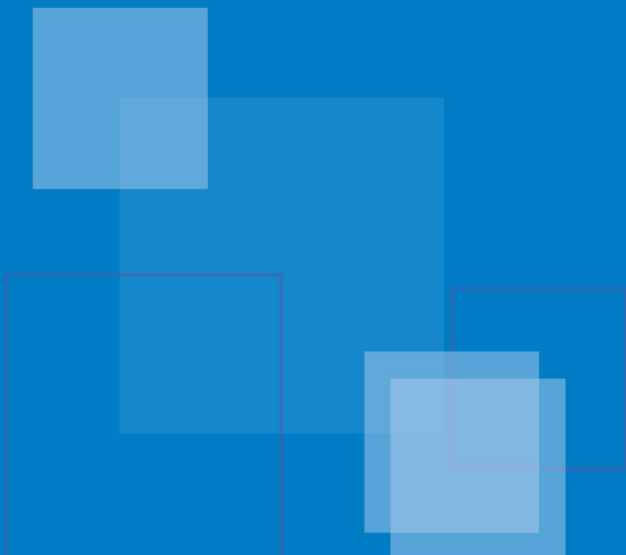# (S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings

International IDEA Policy Paper No. 16

(S)electing Constitution-Making Bodies in Fragile and Conflict-Affected Settings

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Contents

Acknowledgements

Key recommendations

1. Peace mediators and constitutional advisors should bear in mind that the constitution-building process after conflict often starts before the actual making of the new constitutional framework, and that the CMB, its selection and its rules of procedure are often decided upon far in advance of the start of the constitution-making process, through peace negotiations and/or in some form of transitional political/legal arrangement. Furthermore, the specific choice might be the result of the confluence of a number of key factors, including the legitimacy and capacity of existing institutions, the level of conflict at the time of the negotiations, the nature, strength and relationship between key stakeholders in the context in question, path dependency and/or historical precedent.

2. When thinking about the type of CMB that will be in charge of both the drafting and adoption of the new constitutional framework, stakeholders should consider a number of key issues, including not only the way in which the CMB will be selected, its mandate, its timeframes and its rules of procedure, but also the way in which the CMB will contribute to a legitimate constitution-making process and constitutional framework.

3. Elections are not always necessary or possible. However, when a CMB is not elected, other elements of the process must combine to build up a narrative of popular ownership of the constitution-making process including the use of a separate commission composed to reflect particular interests and political/ societal groups, a large-scale, genuine public participation campaign and/or a ratifying referendum.

4. Where external commissions are used in conjunction with existing legislatures, they are usually paramount in determining the overall legitimacy of the process and the content of the constitution. Their composition must therefore be carefully considered to make it inclusive of all major interests.

5. Decision makers need to be aware that holding elections in conflict-affected settings might be destabilizing; especially in those cases where the existing institutional framework endures after the conflict, and the existing

constitutional framework commands sufficient legitimacy to be changed according to its own rules, it might make sense for the existing legislature to be tasked with constitution-making. This decision will often be made as part of peace negotiations.

6. When deciding on the specific type of CMB, decision makers need to bear in mind particular issues deriving from the fact that the CMB might or might not have to conduct day-do-day legislative tasks. If the CMB is a separate body from the regular legislature, decisions about the electoral system design, for instance, will have to be less preoccupied with issues related to government stability, and may principally focus on the representation and inclusion of all societal groups in the resulting body. Furthermore, defining the relationship between the CMB and the regular legislature will be the key to avoiding power disputes between both institutions.

7. It is common in fragile and conflict-affected settings committing to a constitution-building process that elections might not be feasible at the outset of the process. Interim constitutions might give more time to local stakeholders for elections to be held and/or for the new constitutional dispensation to be drafted and adopted.

8. Decision makers should also bear in mind that, in those cases where the CMB has been specifically elected for the drafting and adoption of the new constitutional framework, ratifying referendums are rare and the urgency to hold general elections immediately after adoption is diluted.

Executive summary

Constitution-building in transitions from violent conflict to peace is a complex process that is often a critical element of the overall peace negotiations. At the negotiating table, decisions are commonly made regarding not only constitutional design issues but the constitution-building process itself. Among the issues important to stakeholders are the type of constitution-making body (CMB), the way in which it is selected, its mandate, its timeframes and its decision-making rules.

This Policy Paper examines the types of CMBs present in 37 constitution-building processes that took place from 1991 to 2018 in the aftermath of conflict. The list is derived from the Uppsala Conflict Data Program (UCDP). These processes include 22 cases in Africa (Angola 2010, Burundi 2005, Central African Republic 2016, Chad 1996, Comoros 2001, Congo 2005, Côte d'Ivoire 2000 and 2016, Democratic Republic of the Congo 2006, Djibouti 1992, Ethiopia 1995, Guinea 2010, Kenya 2010, Madagascar 2010, Mozambique 2004, Niger 2009 and 2010, Rwanda 2003, Senegal 2001, South Africa 1997, Uganda 1995, Zimbabwe 2013); 8 in Asia and the Pacific (Afghanistan 2004, Cambodia 1993, Kyrgyzstan 2010, Myanmar 2008, Nepal 2015, Thailand 2007 and 2017, Timor-Leste 2002); 4 in West Asia and North Africa (Egypt 2012 and 2014, Iraq 2005, Syria 2012); 2 in Europe (Bosnia and Herzegovina 1995 and Kosovo 2008); and 1 in Latin America (Colombia 1991).

What is a constitution-making body?

A CMB is an institution that, ideally, exercises the constituent power of the (sovereign) people, drafting and sometimes adopting a constitutional framework in their name. The form and composition of the CMB will determine the extent to which the CMB actually represents 'the people', and is therefore critical regarding both the content and the legitimacy of the constitution, as well as the constitution-building process as a whole.

CMBs may be specifically elected to engage in constitution-making, they may be indirectly elected, partly elected or non-elected with the same purpose, or an existing assembly may be tasked with constitution-making after its election. CMBs may also be established in tandem, with more than one CMB involved in developing the draft.

This paper distinguishes between six different types of CMBs:

1. those that are elected with the sole, exclusive and explicit mandate of constitution-making (constitutional conventions/assemblies);

2. those that are elected with a mandate for both regular legislation and constitution-making (mandated constituent legislatures);

3. those that are elected as regular legislatures, but later assume constitution-making powers (self-created constituent legislatures);

4. those that are elected with the unique mandate of constitution-making, but later assume a mandate as a legislature (self-created legislating assemblies);

5. indirectly, partly or non-elected constitutional conventions, which would include both situations where most if not all seats are appointed and those where all seats are elected but elections are held among only a subset of the population;

6. existing presidents or executive bodies that may take upon themselves the responsibility of both drafting and adopting a new constitutional framework, or may appoint a committee to do the actual drafting, and then (amend and) adopt the resulting text.

However, it disregards CMBs elected with the sole mandate of constitution-making that later assume a mandate as a legislature (category 4), as there is only one among the cases assessed (Colombia) and it is categorized as such only by evolution from a different type of CMB (a constitutional convention/assembly).

CMBs in the form of an assembly are often assisted by smaller, specifically constituted committees or commissions in preparing the initial draft and organizing public participation processes. These bodies are usually not elected but appointed by political institutions and/or political parties, with or without the participation of other social or political groups. The selection process for these additional bodies can be as critical as the selection process for the larger legislative body, as they sometimes bear the majority of the burden of developing a new draft constitution. For a list of issues to bear in mind when choosing a specific type of CMB see Table A.

How should a constitution-making body be selected?

Holding elections to a CMB is an often-used mechanism aimed at legitimizing those with the responsibility for drafting (and sometimes adopting) the new constitution, and as a result legitimizing the resulting constitution. The exact role of the CMB, either as only the body in charge of drafting (and sometimes adopting) the new constitution or in its combined role as a CMB and a regular legislature, will inform the specific electoral system design and determine the balance between government stability (and accountability) and (a high level of) inclusion. Sometimes, already-existing regular legislatures become (self-created) CMBs; the legislature adopts the constitution-making responsibility, but is often assisted in the drafting by smaller

additional bodies that might reflect power-sharing arrangements agreed by the parties to the conflict.

Where holding elections is not an option, by choice or because of external factors, there are a number of alternatives to an elected CMB. These include (partly) appointed (transitional) legislatures; (often indirectly elected) transitional bodies, such as the Constitutional Loya Jirga in Afghanistan; and national dialogues, or inclusive processes that attempt to build national consensus through an open and tolerant exchange of ideas. These variations that are not (fully or directly) elected, though, deal only partly with the lack of legitimacy that derives from the absence of elections, as a question remains regarding the actual representativeness (and legitimacy) of those selecting the members of the CMB.

What other ways are there to legitimize the constitution-making process?

Whether or not the CMB is elected, referendums can contribute to the building of popular legitimacy for the constitution and the constitution-making process. There are, however, also occasions when referendums are controlled, plebiscitary acts meant to disguise a non-inclusive process, rather than support public participation. Even in those cases where the referendum is meant to allow broad participation in the constituent act, decision-makers have to bear in mind that referendums allow only a yes-or-no vote on a complex document of which voters might have limited understanding; referendums may be polarizing, especially in fragile and conflict-affected settings; and referendums may also constrain constitution-makers in the actual drafting of the constitutional text, affecting its actual content.

Another question that process designers must face is how long the CMB should stay in place before elections under the new constitutional framework. In those cases where the CMB also functions as the regular legislature, key issues to be decided upon include the length of time the CMB should continue sitting after the new constitutional framework has been adopted. This would allow the CMB to continue working on constitutional implementation. Alternatively, holding immediate elections after the adoption of the new constitution might legitimize the process by giving the electorate the chance to elect a new government.

What does the data tell us?

Out of the 37 constitution-building processes, only 8 featured elections to mandated CMBs, with 7 of these consisting of a mandated constituent legislature and only Colombia featuring a directly elected CMB with the sole mandate of constitution-making. Of the others, 6 cases had a self-created constituent legislature; 10 cases used either an indirectly elected or a partly or non-elected CMB or transitional legislature; and 12 constitution-building processes were led by the executive. In addition, Bosnia and Herzegovina's Constitution was negotiated between national and international stakeholders and parties to the conflict. A total of 23 out of 37 processes were therefore led by the executive or a partly, indirectly or non-elected CMB, mostly

assisted by specifically composed and mandated committees or commissions tasked with the principal role in drafting (see section 3.2 and Table 3.2).

Eighteen processes had an interim constitutional framework before engaging in the final constitution-making process. Out of these, only four had an elected (and specifically mandated) CMB; seven had either indirectly elected or partly or non-elected assemblies or transitional legislatures; two had regular legislatures; and five had executive-led constitution-making processes. In all the five cases that featured an executive-led constitution-making process, the interim constitution was not the result of negotiations; in all the rest, the interim constitution (and the CMB) had been negotiated between key stakeholders (see section 3.3).

Regarding the electoral system design, it is generally maintained that proportional representation (PR) systems, especially when using country-wide electoral districts, might be easier to organize in fragile and conflict-affected settings where the institutional infrastructure might be weak or dominated by one section of society; PR might also help ensure that the legislature includes representatives of both majority and minority groups, including women. Interestingly, the choice of PR in elected constitutional conventions/assemblies is far from universal, with only four out of eight elected CMBs using this system. Furthermore, the use of quotas specifically meant to advance the inclusion of women or other marginalized or minority groups was not applied universally either (see section 3.4 and the Annex).

Concerning the timing of elections after the adoption of the new constitutional framework, elections were held several years after the adoption of the constitution in those cases where a mandated (elected) constituent legislature was in place. Where the process had been led either by the executive or by an indirectly, partly or non-elected CMB, the first general elections after the adoption of the new constitutional framework generally took less than a year to be organized.

Out of the 37 constitution-building processes, 25 held a referendum to ratify the new constitutional framework. Processes with specifically elected bodies were less likely to use referendums than processes with non-elected or executive-led processes; processes which featured existing legislatures were somewhere in between (see section 3.6 and Table 3.3). In other words, the more democratic the formal selection of the CMB, the less likely the holding of a referendum.

What is the potential impact of the choice of the type of CMB on the levels of conflict?

The relationship between the selection of CMBs and variable levels of conflict is difficult to gauge. More than half of the 37 case studies continued with violent conflict throughout the constitution-building process, and sometimes beyond, and only those processes that used a self-created legislature did not resume conflict in the years following the adoption of the new constitution. A plausible explanation for the latter is that, where existing institutions remain in place and have sufficient legitimacy to take on constitution-making, the level of conflict is likely to be less intractable to begin with than in other cases. With regard to the other forms of process/types of CMBs, there seems to be no significant finding on whether or not a certain choice of CMB might be linked to lower likelihood of conflict resumption.

Table A. Issues to bear in mind when choosing a specific type of constitution-making body

Type of CMB	Issues
Constitutional convention/assembly	An elected CMB, working in parallel with a regular legislature, is often perceived as (more) independent from day-to-day politics.
	The high level of resources needed to maintain two separate bodies may be (too) cumbersome for transitioning countries.
	It is critical to define the relationship between the CMB and the legislature to avoid power disputes.
	While the CMB's electoral system design does not need to provide government stability, but might concentrate on providing ample representation of particular societal groups, there is a risk of fragmentation, which may therefore prevent a constitution-making majority from forming.
	An internal committee structure, and rules of procedure, will be vital to organize the work of the assembly.
	A ratifying referendum might not be needed, as the elected CMB embodies the sovereign CMB.
Mandated constituent legislature	The electoral system design needs to balance the level of representation of particular societal groups with providing government stability (and accountability to its constituents).
	Especially in fragile and conflict-affected settings, whatever the electoral system design, party competition may be limited, and a system of quotas might help increase the representation of particular societal groups.
	Alternatively, a two-stage process whereby an interim constitution is adopted by non-elected elites in advance of the CMB being elected might give more time to local stakeholders to build their physical and institutional infrastructure, creating some form of level playing field for nascent political parties or movements.
	It is critical to decide whether the elected CMB will continue in its legislative function after the new constitution has been adopted—which may lead to uncertainty and self-serving behaviour on the part of the drafters—or it will be dissolved for elections to be held immediately—which may thwart the CMB's responsibility vis-à-vis the initial stages of implementation.
	A ratifying referendum might not be needed, as the elected CMB embodies the sovereign CMB.
Self-created constituent legislature	Regular legislatures that assume constitution-making powers after they have been elected often use additional bodies to develop a draft, either in cooperation with each other or one revising the other's work. Often, the final draft released by the additional body is passed unaltered by the larger, elected CMB.
	The composition of the additional drafting bodies might better reflect the weight of the different parties to the conflict than the previously elected legislature.
	The additional drafting bodies are often tasked with consulting the public, in addition to leading the political negotiations between the parties to the conflict.
Indirectly, partly or non-elected CMB or transitional legislature	It is vital to decide on the particular selection method for this type of CMB or transitional legislature, in view of what might be available in the given context. Most commonly a form of indirect election will be chosen, sometimes combined with selected appointments from specific societal groups.
	Without the legitimacy-providing effect of elections, there is a need to balance key political forces emerging from the conflict; these processes are seldom but sometimes open to the participation of civil society groups and groups/individuals that have not been involved in the conflict.
	With an often minimal or attenuated role for the public in selecting the constitution-making delegates, these processes often consider referendums as a means to attach popular consent to the constitution and the process at large (if possible given the security situation).
Executive-led processes	Either the executive itself or an executive-appointed commission will be tasked with preparing the initial draft. These processes are often unilateral and controlled by the individual/group in power, with little or no public participation.

Type of CMB	Issues
	These processes use referendums to achieve (the appearance) of popular consent and legitimacy of both the process and the resulting new constitutional dispensation.

Conclusion

The legitimacy of both the constitution-building process and the resulting constitution is defined by the degree to which the citizens engage in the process, either directly, through referendums, universal suffrage in elections or broad popular consultations, or indirectly by being (legitimately) represented by elites in their membership of particular societal groups or communities.

At the same time, there may not be a great deal of agency in the choice of CMB, but a number of structural factors may drive this choice. These factors include:

1. the physical security and institutional capacity of the country in question;

2. the legitimacy of existing institutions and of the extant constitutional framework;

3. the relative power balance of the conflict parties or other principal actors; and

4. path dependency and historical precedent.

These four factors may contribute not only to the choice of CMB and its particular outcomes, but also to other issues related to the overall process. They are obviously not the only factors at play but they have been key in all cases assessed in this paper.

1. Introduction

Constitution-building processes are increasingly seen as critical elements within both peace- and state-building processes. A constitution-building process in a conflict-affected or post-conflict setting (both of which phrases are used interchangeably in this paper) is often necessary to renegotiate access to public power and resources. The resulting constitution will ideally make the state more inclusive and therefore responsive to a higher number of social, political and/or economic groups (Acemoglu and Robinson 2012; Call 2012; Murray 2017), thereby contributing to sustaining peace and preventing the resumption of conflict. Who makes the constitution and how such bodies are selected are crucial parts of the constitution-building process, and serve to determine the overall legitimacy of the process, and the content and success of the constitution itself (Elkins et al. 2009).

In post-conflict settings, constitutional issues might already be discussed (and decided upon) as part of general peace negotiations, and in advance of the actual drafting of the constitutional text, as stakeholders seek constitutional guarantees when agreeing to demobilize or enter into a power-sharing arrangement with groups they previously fought against. The constitution-building *process* might also itself be the object of early negotiations, as stakeholders may seek to negotiate the type of constitution-making body (CMB), and related questions such as how the CMB will be selected, its mandate, the specific roadmap or timeframes, decision-making rules and if there will be a referendum or any other form of constitutional ratification. Early peace negotiations may also decide the legal framework under which the CMB will function, i.e. under the previous and still-existing constitutional framework or under a newly agreed transitional political or constitutional arrangement. These decisions will be informed by contextual factors including the history and the level of conflict, the perceived legitimacy of the existing constitution, past constitution-making processes and legal tradition, institutional capacity and other socio-political factors as well as the relative power relations among the actors.

It is sometimes assumed that the CMB is an elected body (Elster 2009), and that there is an ideal sequence in constitution-building processes after conflict that would involve a ceasefire and peace agreement and elections to a CMB, concluding in a ratifying referendum, in turn followed by general elections to the new political institutions. However, as the cases covered below reveal, processes are often more

complex, involving multiple bodies and forums to shape a constitutional settlement over time.

Furthermore, it should be noted that holding elections in fragile and conflict-affected settings is often impossible (or undesirable) because of ongoing violence, dysfunctional institutions or broken infrastructures, among other reasons. Alternatives to elections are sometimes found in seeking high levels of representation through direct participation (e.g. Yemen's National Dialogue), in going back to traditional institutions (e.g. Afghanistan's Constitutional Loya Jirga) or in instituting (sometimes only partly elected) transitional legislatures (e.g. Burundi's Transitional National Assembly).

This Policy Paper aims to address the gap in the constitution- and state-building literature, as well as in the literature on elections after conflict, concerning the selection of CMBs in conflict-affected settings. Similar to other policy papers in this series, this paper is an initial exploration that intends to provide preliminary recommendations and prompt further discussion on these and related issues. It also draws on discussions at the 2017 Edinburgh Dialogue on 'The Quest for Legitimate Stability: Understanding the Interactions between Elections and Constitutions in Fragile and Conflict-Affected State Transitions' (Underwood et al. 2018).

This paper assesses cases where a constitution-building process followed violent conflict after the end of the Cold War, that is, from 1991 to 2018. Throughout this period 33 countries went through a total of 37 constitution-building processes after conflict, which resulted in a new or amended constitution. The report also refers to specific, additional cases that are still ongoing. Data on the 37 completed constitution-building processes is qualitative in nature and was mostly collected using desk research and the upcoming International Institute for Democracy and Electoral Assistance (International IDEA) Database on Constitution-Building Processes in Conflict-Affected Settings. The paper refers to the Uppsala Conflict Data Program (UCDP) to define conflict-affected countries as those in which there have been 25 or more battle-related deaths per calendar year in one of the conflict's dyads, considering both state-based and non-state conflict parties.

The paper is structured as follows. Chapter 2 outlines the conceptual framework, defining the different types of elected and non-elected CMBs, as well as delineating ways in which the process design might constrain constitutional drafting. Chapter 3 analyses the data, in terms of how the specific CMB relates to other issues related to process design, such as adopting an interim constitution, organizing a ratifying referendum, the timing of elections after constitutional adoption or the electoral system design chosen for the CMB if it is elected. Chapter 4 examines some of the factors contributing to the findings of the paper. Chapter 5 concludes with a brief summary and a description of overarching factors contributing to the choice of CMB. The paper also includes an annex that provides details on the specific electoral system design of the CMB or body with the final responsibility over the draft constitution.

2. Selecting the constitution-making body, or ways to legitimize the constitution-building process after conflict: a conceptual framework

2.1. The constitution-making body

Ideally, the CMB is established as an institution intended to exercise constituent power on behalf of the sovereign people, as difficult to define as 'the sovereign people' might be (Loughlin and Walker 2007: 2). The main task of the CMB is to draft, and sometimes adopt, a constitutional framework in the name of 'the people'. Whether or not the CMB legitimately represents 'the people' will have a likely impact on the legitimacy of both the process and the ultimate constitutional dispensation. Hence, the decision on the form and composition of the CMB is of critical importance for both the content and the legitimacy of the constitution, as well as for the successful conclusion of the transition as a whole.

The CMB functions within an institutional framework, nascent as it might be in a post-conflict environment. In some cases, constitutional continuity is adhered to, which means that the constitution-building process—including the composition of the CMB—is governed by rules in the pre-existing constitutional framework or by rules established by an amendment of the pre-existing framework. In other cases, though, there may be a total break with the past, which might be referred to as constitutional rupture (Arato 2009; Tushnet 2013).

CMBs may be specifically elected to engage in constitution-making, or they may be indirectly, partly or non-elected with the same purpose. CMBs may also be established in tandem, with more than one CMB involved in developing the draft.

With regard to elected CMBs, Jon Elster (2009) identifies four main types, considering two key responsibilities which must be fulfilled during the constitutional transition: making the constitution and, as would be the role of a regular legislature, managing the regular affairs of day-to-day politics.

Elster's typology includes the following:

1. Constitutional conventions: those that are elected with the sole, exclusive and explicit mandate of constitution-making. In line with modern usage, in this paper the term 'constitutional convention/assembly' is used for this category.

2. Mandated constituent legislatures: those that are elected with a mandate of both regular legislation and constitution-making.

3. Self-created constituent legislatures: those that are elected as regular legislatures, but later assume constitution-making powers.

4. Self-created legislating assemblies: those that are elected with a sole mandate of constitution-making, but later assume a mandate as a legislature.

The last type of CMB in Elster's categorization is very rare and appears only once in the cases listed below: in Colombia 1991, where a rivalry developed between the Constituent Assembly and the Congress. It ended up with the latter being dissolved and the Constituent Assembly electing a new legislature from within its membership, and therefore becoming a self-created legislating assembly (Fox et al. 2010: 474). Since this is the only case in this category, and it evolved from a different category— category 1—this paper will not be dealing with it any further.

Two more types can be added to these elected variations, in post-conflict contexts where elections are not possible or are possible in only some limited form:

5. Indirectly, partly or non-elected constitutional conventions/assemblies. These would include both situations where most if not all seats are appointed (e.g. Burundi 2005, where the transitional legislature was partly formed of parliamentarians elected in the 1993 elections) and those situations where all seats are elected but elections are held among only a subset of the population (e.g. Afghanistan 2004).

6. Existing presidents or executive bodies that may take upon themselves the responsibility of both drafting and adopting a new constitutional framework, or may appoint a committee to do the actual drafting and then (amend and) adopt the resulting text.

It is also important to recognize that CMBs in the form of an assembly are often assisted by smaller, specifically constituted committees (selected from, and sitting, within the assembly) or commissions (selected from, and sitting, outside the assembly) in preparing the initial draft, as well as in organizing public participation processes and receiving and analysing the views of the public (Ghai 2005: 25). These bodies are usually not elected but appointed by political institutions and/or political parties, with or without the participation of other social and/or political groups. The selection process for these additional bodies can be as critical as the selection process for the larger legislative body, as they often bear the majority of the burden of developing a new draft constitution.

As a last general point, to say that there is a choice of the type of CMB may be misleading, as the ultimate decision will probably be driven by contextual factors,

including the legitimacy and capacity of existing institutions, the extant legal framework (Mazo 2015), the balance of power between different stakeholders, the level of conflict and broader historical precedent. Particularly in conflict-affected settings, the decision over the type of CMB is often the result of negotiations between parties to the conflict.

2.2. Electing a constitution-making body after conflict

Constitutions represent a binding agreement on how public power may be exercised, and often—especially in post-conflict contexts—they serve to combine different societal groups within the same political community. To realize these disparate roles, the constitution must be both effective in pursuing its declared goals and perceived as legitimate. The perceived legitimacy of the constitution depends to some extent on the perceived legitimacy of the actors involved in making the constitution.

Elections are one of the most frequent mechanisms used to legitimize those who will be negotiating a new constitution (see also Sisk 2009: 196). In general, the growing consensus seems to be that 'elected constituent assemblies or legislatures will be more representative than other types of forums and ought to produce terms that are more "other-regarding" as well as constitutions that enjoy more public support and endure' (Widner 2008: 1518; see also Ghai 2005). The representativeness of elected CMBs, however, will generally depend on the specific electoral system, the level of participation in the elections and the degree to which patronage voting takes place (Widner 2008: 1518).

Regarding whether or not the CMB should also serve as a legislature, the election of two parallel bodies might allow each body to be chosen through an electoral system that primarily responds to the main objectives of the body in question: the constituent assembly should be as inclusive (and representative) as possible, and the regular legislature should also provide for government stability and accountability. Electing two separate bodies, however, can be resource intensive, especially considering fragile and conflict-affected settings where institutions will probably be weak if they exist at all. Electing two separate bodies will also involve finding consensus among power holders twice about the selection method, and may also cause institutional conflict, as both bodies will need to include powerful elites in their ranks to ensure their decisions carry adequate authority. While Negretto (2018) has shown that these considerations may be minimal in democracies, there is no existing study of the use of dual-purpose constituent legislatures versus single-purpose constitutional conventions/assemblies in fragile and conflict-affected settings.

Where the same body is tasked with both constitutional drafting and regular legislating tasks, the electoral system will have to balance government stability (and accountability) with (a high level of) inclusion. At the same time, while it is less resource intensive to have only one elected body rather than two, each representative will have to balance their legislative and constitution-making responsibilities, as will the support staff.

Another situation to consider is where elections are not possible immediately but an elected CMB is required to draft and/or adopt the constitution. These processes—such as in South Africa in 1997, Iraq in 2005 and Nepal in 2015—use an unelected

round table or informal forum for elite bargaining to negotiate an interim constitution, which sets both substantive and process-related parameters for the drafting of the 'final' constitution, including the election of a mandated constituent legislature.

Lastly, sometimes regular and existing legislatures become self-created CMBs. This has also been the case in contexts of post-electoral violence, such as Kenya 2010 and Zimbabwe 2013. In both of these cases, the legislature had already been elected, and the parties to the conflict agreed to an executive power-sharing arrangement for a transitional period that would include constitution-building. The existing legislature would remain in place with responsibility as a CMB but would be assisted by specially composed smaller bodies to reflect the power-sharing arrangements.

2.3. Alternatives to electing the constitution-making body

There may be two reasons why elections to a CMB may not occur. In some settings, violence (and/or the lack of an electoral infrastructure) prevents elections altogether before (and sometimes even after) a new constitutional framework is adopted. On these occasions, stakeholders need to find legitimate alternatives to elected CMBs. Second, the designers may prefer an unelected body, such as a national conference or some form of partly or indirectly elected body.

In instances where elections cannot be held because of security or other environmental factors, the process might either feature a wholly or partly appointed legislature as a new transitional legislature, such as in the Central African Republic 2015, or use traditional bodies with a certain degree of historical resonance, such as the Constitutional Loya Jirga in Afghanistan: a body 'intended to be a national manifestation of community decision making' (Thier 2010: 558), which was elected with very limited suffrage, principally from an electorate of 15,000 community representatives grouped into approximately 260 districts (Thier 2010: 546). Somalia used an even more restricted process for its National Constituent Assembly, with what came to be called the '4.5 formula': a fixed proportional representation (PR) system, with an equal number of places reserved for the four major Somali clans (Hawiye, Darod, Dir and Rahaweyn) and the remaining 0.5 reserved for smaller clan groups, all nominated by clan elders (Ainte 2014: 62). Both of these systems constituted a way to build at least some limited legitimacy in contexts where free elections were hampered by, among other things, high levels of violence.

Alternatively, stakeholders may organize national dialogues: inclusive processes that attempt to build national consensus around social, political or economic concerns through an open and tolerant exchange of ideas (Murray 2017: 4). While national dialogues do not usually prepare and/or adopt final constitutions, they may be responsible for deciding on transitional government arrangements, preparing an interim constitutional framework or setting (substantial or procedural) parameters for future constitution-building processes (Murray 2017: 8). Exceptionally, when institutions are very weak, and powerful groups, such as armed forces, support the process, national dialogues may declare themselves sovereign, as happened in Benin in 1990, assuming some powers, including authority over some design issues and the constitution-building process at large (Murray 2017: 14–15).

Both national dialogues and indirectly or non-elected conventions deal only partly with the lack of legitimacy that derives from the absence of elections, as the question remains regarding the actual representativeness (and legitimacy) of those who select the members of the CMB. Who the selectors of the CMB are, and how they themselves are chosen, will be questions of fundamental importance in legitimizing, or delegitimizing, the CMB and resulting constitution.

2.4. Referendums

Whether or not the CMB is elected, referendums can form an important piece of the puzzle in the building of popular legitimacy for the constitution and the constitution-making process. As the ultimate expression of popular sovereignty, ratification through referendum can allow broad participation in the constituent act, providing legitimacy to a constitution that may have been drafted by unelected elites—Burundi 2005—or without broader public consultation—as was the planned process in Somalia. Having said this, there are numerous cases where referendums are controlled, plebiscitary acts that are a mere disguise for a non-inclusive process, rather than a truly participatory phenomenon.

Three more points are worth making here. First, constitutional referendums are blunt instruments in which the voters get only a yes or no vote on a complex document of which they may have limited understanding. Often, the vote is driven by party allegiance or guided by specific emotive issues rather than constitutional reform as whole. That happened in Kenya, where issues such as abortion and religious courts dominated the public debate (Murray 2013: 757). Second, referendums create losers and may be unduly polarizing in fragile and conflict-affected states. Referendums might also be used by certain interest groups to inflame supporters. Third, referendums can act as 'downstream constraints' in that they can force political elites to draft the constitution in a way that will gain majority consent (Elster 1995: 374). Thus, the very fact that a referendum might be held can affect the content of the constitution.

An interesting variation in the use of referendums is as a deadlock-breaking mechanism, whereby a referendum is called only if a supermajority cannot be reached on a draft which has the support of a majority of the CMB. For more on constitutional referendums in fragile and conflict-affected settings see Tierney (2018).

2.5. Elections after constitutional adoption

Another key question to ask about elections and constitution-building processes is about the timing of the first elections after the promulgation of the constitution. Especially in those cases where the CMB also acts as a regular legislature, two decisions have to be made: should the CMB continue to sit as a legislature after it has passed the constitution, and if not how long should it continue *in situ* before the next elections? There are arguments both for allowing the CMB to take the first steps in constitutional implementation and for dissolving the CMB immediately. These are discussed in section 3.5.

For those cases where either the CMB does not function as a regular legislature or it was not specifically or directly elected to act as a CMB, stakeholders deciding on the timing of the first elections after adoption might need to think about two separate issues: first, if holding elections sooner rather than later might help legitimize both the process and the resulting constitutional framework; second, if the adoption of the new constitution might contribute to stabilizing the context, thereby enabling elections to be held.

3. Selection of constitution-making bodies: analysing the data

This chapter includes a descriptive account of the empirical primary data underlying this Policy Paper. It then focuses further on some key features of the constitution-building process in fragile and conflict-affected settings in an attempt to examine the interaction between the type of CMB and broader issues around process design, including the elections to the CMB.

3.1. Cases and means of selection

New constitutions were adopted in a total of 37 post-conflict political-settlement processes from 1990 to 2018: 22 in sub-Saharan Africa, 8 in Asia and the Pacific, 4 in West Asia and North Africa, 2 in Europe and 1 in Latin America and the Caribbean (see Table 3.1).

Table 3.1. New constitutions adopted from 1990 to 2018

Region	Country
Sub-Saharan Africa	Angola 2010, Burundi 2005, Central African Republic 2016, Chad 1996, Comoros 2001, Congo 2005, Côte d'Ivoire 2000 and 2016, Democratic Republic of the Congo 2006, Djibouti 1992, Ethiopia 1995, Guinea 2010, Kenya 2010, Madagascar 2010, Mozambique 2004, Niger 2009 and 2010, Rwanda 2003, Senegal 2001, South Africa 1997, Uganda 1995, Zimbabwe 2013
Asia and the Pacific	Afghanistan 2004, Cambodia 1993, Kyrgyzstan 2010, Myanmar 2008, Nepal 2015, Thailand 2007 and 2017, Timor-Leste 2002
West Asia and North Africa	Egypt 2012 and 2014, Iraq 2005, Syria 2012
Europe	Bosnia and Herzegovina 1995, Kosovo 2008
Latin America and the Caribbean	Colombia 1991

These 37 cases were conflict affected—or had an active conflict—at some point before or during the constitution-building process, according to the UCDP, which defines a conflict as active when there have been at least 25 battle-related deaths per calendar year in one of the state-based and/or non-state conflict parties. Another six

cases (Eritrea, Libya, Somalia, South Sudan, Sudan and Yemen) initiated their political-settlement process in that period but a new constitution has not yet been adopted or entered into force.

While it is difficult to identify states that have undergone a constitution-building process with the sole purpose of managing or transforming conflict, it is possible to broadly identify types of transitions that have led states to new constitutional dispensations. While most countries were essentially dealing with a transition from conflict to peace, i.e. after inter- or intra-state conflict, post-secession or post-electoral violence, there were also countries dealing with a transition from an autocratic to a more democratic form of government, including post-coup transitions (e.g. Madagascar, Niger 2010), transitions after a popular revolution (e.g. Egypt 2012, Yemen) or transitions following an executive-led or 'controlled' transition to democracy (e.g. Myanmar, Egypt 2014, Syria).

3.2. Types of constitution-making bodies (main and derivative)

The CMB is understood as the body ultimately responsible for the constitutional draft. By analysing the 37 case studies, this paper identifies five different types of CMB (see Table 3.2). Often, externally appointed constitutional commissions/ committees, committees appointed from within the assembly, expert bodies or similar institutions assisted these CMBs in the actual making—the negotiation and drafting—of the constitution (Brandt et al. 2011: 264–65).

Interestingly, out of 37 cases, only 8 featured elections to mandated CMBs, with 7 of these consisting of a mandated constituent legislature (see Table 3.2, row 2) and only Colombia featuring a directly elected CMB with the sole mandate of constitution-making (more recently Libya also decided to adopt this form of CMB, but the process is still ongoing). Except for Ethiopia and Iraq, the drafting took place within the elected CMB. In the case of Ethiopia, the constituent assembly was elected to debate and adopt the draft constitution that the non-elected transitional parliament had drafted (Regassa 2010). In the case of Iraq, a constitutional committee was followed by the US-established Leadership Council (Morrow 2010: 574).

Table 3.2. Types of constitution-making bodies

Type of constitution-making body	Countries
Constitutional convention/assembly	Colombia*
Mandated constituent legislature	Cambodia, Ethiopia*, Iraq, Nepal, South Africa, Timor-Leste, Uganda
Self-created constituent legislature	Angola, Kenya, Kosovo, Mozambique, Senegal, Zimbabwe
Indirectly, partly or non-elected CMB or transitional legislature	Afghanistan, Burundi, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Egypt (2012)*, Guinea, Rwanda
Executive-led constitution-making process	Bosnia and Herzegovina*, Côte d'Ivoire (2000 and 2016), Djibouti, Egypt (2014), Kyrgyzstan, Madagascar, Myanmar, Niger (2009 and 2010), Syria, Thailand (2007 and 2017)

Note: * Denotes cases that do not perfectly fit in these categories (variations explained in the text).

A total of six countries had self-created constituent legislatures (see Table 3.2, row 3). These processes featured a plethora of different committees and/or commissions that either led or supported the constitution-making process:

- Kenya had a committee of experts working with parliament through a select committee which included the leadership of key political parties.

- Mozambique and Zimbabwe both had multiparty parliamentary committees established specifically for the task as outlined in peace agreements.

- Senegal had an executive-appointed expert commission.

- Angola had an external technical committee appointed by the legislature.

- Kosovo had a constitutional commission appointed by the legislature.

In many of these cases, the legislature conducted minimal or no revisions to the draft produced by the smaller committee/commission, upon whose shoulders the principal task of drafting lay, regardless of whether or not the ultimate legal responsibility for the draft remained with the legislature.

A total of 10 countries used an indirectly elected, partly elected or non-elected CMB or transitional legislature (see Table 3.2, row 4). Here too the bodies assisting the CMB varied fundamentally from case to case, and included executive-appointed drafting commissions (e.g. in Afghanistan, Burundi and possibly the Central African Republic and Guinea), assembly-appointed constitutional commissions (e.g. in the Democratic Republic of the Congo (DRC) and Egypt 2012), national dialogues (e.g. in Congo) or committees appointed by peace commissions (e.g. in the Comoros).

Finally, there is a relatively large number of processes where constitution-making was led by the executive, totalling 13 (see Table 3.2, row 5). Bosnia and Herzegovina is an exception in that it did not have a subordinate body responsible for the actual drafting, as the Constitution was an annex to the Dayton Peace Agreement and therefore negotiated between national and international stakeholders and parties to the conflict (O'Brien 2010). For the rest, executive-appointed committees or commissions carried out the drafting of constitutions in Côte d'Ivoire (2000 and 2016), Djibouti, Egypt (2014), Madagascar, Niger (2009 and 2010), Syria and Thailand (2017). In Thailand (2007) the executive appointed not only a Constitutional Drafting Assembly, which had previously been nominated by the National People's Assembly, but a Constitutional Drafting Committee (Constitution of the Kingdom of Thailand (Interim) 2006: clauses 22, 23, and 25); in Kyrgyzstan the interim government appointed a 75-member Constitutional Council (Hierman 2018: 278); and in Myanmar the military government established a 54-member drafting commission, which prepared a draft based on the work of a partly elected (but mostly military-appointed) National Convention (HRW n.d.: 7).

In sum, a majority (23 out of 37) of conflict-affected processes after 1991 were executive-led or had a partly, indirectly or non-elected CMB. Elected CMBs mostly drafted the constitution using internal committees; however, in most processes led by the executive or with a partly, indirectly or non-elected CMB, specifically composed and mandated committees/commissions were tasked with the principal drafting role.

3.3. Elected constitution-making bodies and interim constitutional frameworks

Of the 37 processes, 18 had an interim constitutional framework before engaging in the final constitution-making process. These were Afghanistan, Angola, Burundi, the Central African Republic, Chad, the DRC, Egypt 2012, Egypt 2014, Ethiopia, Iraq, Kosovo, Madagascar, Nepal, Niger 2010, Rwanda, South Africa, Thailand 2007 and Thailand 2017. Out of these, only four had an elected (and specifically mandated) CMB: Iraq, Ethiopia, Nepal and South Africa. In Ethiopia, the elected Constituent Assembly served to discuss and adopt the constitution drafted by a constitutional commission established by a non-elected transitional parliament (Regassa 2010: 100). Moreover, seven had indirectly, partly or non-elected assemblies or transitional legislatures (Afghanistan, Burundi, the Central African Republic, Chad, the DRC, Egypt 2012 and Rwanda), two had regular legislatures (Angola and Kosovo) and five had executive-led constitution-making processes (Egypt 2014, Madagascar, Niger 2010, Thailand 2007 and Thailand 2017). Egypt (2012) is slightly anomalous in that the legislature was elected with a constitution-making mandate, and the constitutional assembly was elected by the legislature, before the legislature was disbanded (see Ahram Online 2012; Al Jazeera 2012). Interestingly, in all five cases that featured an executive-led constitution-making process, as well as in Egypt 2012, the interim constitution was not the result of negotiations; in all the rest, the interim constitution (and the CMB) had been negotiated between key stakeholders.

In 19 out of the 37 cases, there was no interim constitution throughout the process. Out of these, four cases (Cambodia, Colombia, Timor-Leste and Uganda) featured elected (and specifically mandated) CMBs and another six (Angola, Kenya, Kosovo, Mozambique, Senegal and Zimbabwe) used self-created constituent legislatures.

3.4. Electoral system design and quotas in the CMB

It is generally understood that PR systems are meant to 'reduce the disparity between a party's share of the national vote and its share of the parliamentary seats' (Reynolds et al. 2005: 29). Especially in divided and conflict-affected societies, where the institutional infrastructure might be weak or dominated by one section of society, PR —especially when using country-wide electoral districts—might ensure that 'the legislature includes members of both majority and minority groups' (Reynolds et al. 2005: 60). Interestingly, the choice of PR in elected constituent assemblies is far from universal. In the eight cases with elected constitutional conventions/assemblies or mandated constituent legislatures, four used PR (Cambodia, Colombia—although four members of parliament (MPs) were appointed—Iraq and South Africa); two used mixed electoral systems (Nepal and Timor-Leste); and two used majoritarian electoral systems, specifically first-past-the-post (FPTP) (Ethiopia and Uganda, with one quarter of MPs in the latter appointed or indirectly elected; Tripp 2010: 165). For more information see the Annex.

Another way to ensure broad societal representation in CMBs entails the use of quotas, specifically for women or for other minority or marginalized groups.

However, only three out of nine elected constituent assemblies used gender quotas for seats in parliament: in Iraq, Nepal and Uganda. South Africa had no legal quotas but the African National Congress had an internal party quota of 30 per cent women (Tamaru and O'Reilly 2018: 64). Only two out of nine had quotas for other marginalized groups: Egypt (for workers and farmers) and Uganda. Quotas in Uganda were meant for appointed or indirectly elected MPs: 39 women were to be elected by an electoral college of subcounty councillors and members of the subcounty, 3 MPs were to be appointed by the National Youth Council and 1 MP was to be appointed by the National Union of Disabled Persons of Uganda (see Tripp 2010: 165). The Electoral Law in Nepal had a complex system of quotas for political parties which proved effective in ensuring the representation of the major marginalized groups in the constituent assembly (Vollan 2011).

Existing legislatures that were tasked with constitution-making after conflict mostly did not have legal quotas either. Only Kosovo had a gender quota and only two cases had other quotas: Angola had 3 seats reserved for expatriates (which remained unoccupied), and Kosovo had 20 seats reserved for national minorities. Still, while most of these countries did not have formal quotas for their legislatures, sometimes one or more of their main political parties abided by voluntary gender quotas. These include Angola, where the ruling People's Movement for the Liberation of Angola included a 30 per cent women quota (EISA 2009); Mozambique, where the ruling Mozambique Liberation Front (FRELIMO) had a 35 per cent women quota (EISA 2008); and Senegal, where a few of its political parties used a voluntary 25–40 per cent women quota (Ballington 2004: 66). In Kenya, there was no quota but an appeal for gender balance in the committee of experts (Tamaru and O'Reilly 2018: 57).

Perhaps one might expect that CMBs that had been indirectly, partly or not elected would make use of quotas to enhance the body's legitimacy in the eyes of its constituencies. However, almost none of the indirectly, partly or non-elected assemblies included quotas for women; only Afghanistan decreed that 64 women had to be elected by women representatives, in addition to a minimum of 15 per cent of the 42 members elected by representatives of refugees in Pakistan and Iran, displaced people, nomads, and Hindus and Sikhs, and 25 appointed directly by the president (Brunet and Helal 2003: 16). Other quotas have been more common: in Afghanistan, nomadic tribes, internally displaced persons, refugees, Hindus and Sikhs had in and of themselves a voice in the Constitutional Loya Jirga (Thier 2010: 546); in Burundi, seats were reserved in the senate for the ethnic Twa minority and two representatives from each province from different ethnic groups other than the Twa; and in the Comoros, the entire Tripartite Commission was made up of the same number of delegates appointed from each of the three islands, Grand Comore, Anjouan and Mohéli (Global Security n.d.).

3.5. Timing of elections after adoption of the new constitutional framework

Whenever a mandated constituent legislature was in place, elections were held several years after the adoption of the constitution. Out of seven processes that included a

mandated constituent legislature, six held elections between two and five years after the adoption of the new constitutional framework: in Cambodia, Ethiopia, Iraq, Nepal, South Africa and Timor-Leste. In Ethiopia, elections were held just before the constitution came into force, and hence took five years to be held again. Only one—Uganda, a one-party system at the time (Tripp 2010: 161)—took less than a year to organize elections.

Where the CMB was a regular legislature, the existence of an electoral cycle meant that the first elections after the adoption of the new constitutional framework took a variable amount of time to organize. These countries took between 2 months and 2.5 years to organize general elections. In Colombia, for instance, which had an elected constituent assembly initially working in parallel with the regular legislature, elections to the latter were scheduled to be held five months after the constitution had been adopted (Base de Datos Políticos de las Américas 1999).

Finally, those countries that had indirectly, partly or non-elected CMBs or transitional legislatures, or where the process had been led by the executive, generally took less than a year to organize the first general elections after the adoption of the new constitutional framework. The reason for this could lie in a need to promptly legitimize both the process and the resulting constitutional text. There are three exceptions—Madagascar, Myanmar and Thailand—where the first elections were between two and three years after adoption of the new constitutional framework; in the case of Thailand (2017) elections have not yet been held but are scheduled for 2019, two years after the adoption of the new constitution (Hariraksapitak and Niyomyat 2018). In Egypt (2012) the constitution was suspended and a new constitution-building process initiated before new elections were planned (Brown 2013).

In sum, the first elections after the adoption of the new constitutional framework can be critical to legitimize a process that otherwise has lacked broad representation and/or participation. Hence, mandated constituent legislatures usually have enough legitimacy to be able to remain in place after the adoption of the new constitution. However, processes that have indirectly, partly or non-elected CMBs, or where the process has been led by the executive, generally hold elections less than a year after the adoption of the new constitutional framework.

3.6. Referendums in constitution-building processes after conflict

A total of 25 out of 37 constitution-building processes held a referendum to ratify the new constitution (see Table 3.3). Processes with specifically elected bodies were less likely to use referendums than processes with non-elected or executive-led processes; processes which featured existing legislatures were somewhere in between.

Except for Bosnia and Herzegovina, all executive-led constitution-making processes held a referendum to ratify the new constitution. In the case of Bosnia and Herzegovina, the constitution was an annex to the Dayton Peace Agreement, and a ratifying referendum was never seriously considered, perhaps given the difficult history of referendums in Bosnia and Herzegovina, but also given the ongoing divisions over the unity of the country and the dangers of exacerbating these and undoing the agreement just reached (European Parliament 2005).

Table 3.3. Choice of CMB related to holding or not holding a referendum

Type of constitution-making body	Referendum	No referendum
Constitutional convention/assembly		Colombia
Mandated constituent legislature	Iraq	Cambodia, Ethiopia, Nepal, South Africa, Timor-Leste, Uganda
Self-created constituent legislature	Kenya, Senegal, Zimbabwe	Angola, Kosovo, Mozambique
Indirectly, partly or non-elected CMB or transitional legislature	Burundi, Central African Republic, Chad, Comoros, Congo, DRC, Guinea, Rwanda, Egypt (2012)*	Afghanistan
Executive-led constitution-making process	Côte d'Ivoire (2000 and 2016), Djibouti, Egypt (2014), Kyrgyzstan, Madagascar, Myanmar, Niger (2009 and 2010), Syria, Thailand (2007 and 2017)	Bosnia and Herzegovina

Note: * In Egypt (2012), the constituent assembly was indirectly elected by a directly elected legislature with a constitution-making mandate.

Afghanistan—also an exception in its category of cases—did not hold a referendum to ratify the constitution despite its CMB not being directly elected. Beyond the logistical difficulties in holding a nationwide referendum at that time, the Constitutional Loya Jirga had historically been used as a form of constituent body in Afghanistan, whereas constitutional referendums had never been held (Thier 2010: 535, 558).

Where either a constitutional convention/assembly or a mandated constituent legislature had been elected, seven out of eight cases did not hold a referendum to ratify the new constitution, and only Iraq did. In Iraq, the process did not include a mandated constituent legislature from the start, but the CMB was elected only after a prominent religious figure—Grand Ayatollah Ali Sistani—insisted on it in a religious ruling (Morrow 2010: 564–65); and a double-majority referendum was included following external pressure as a means of giving the Kurds a veto over the draft (Morrow 2010: 571).

South Africa included an important variation, in that a referendum constituted a deadlock-breaking mechanism, whereby if the Constitutional Assembly passed the constitutional text not by a two-thirds majority, but only by a majority of its members, it would need to be ratified in a national referendum (article 76(3) of the 1993 Interim Constitution of South Africa). It never came to that, as the Constitutional Assembly approved the draft by more than a two-thirds majority (Ebrahim and Miller 2010: 127). In the case of Nepal, article 157 of the 2007 Interim Constitution states that 'if a two-thirds majority of the total number of the then members of the Constituent Assembly decides that it is necessary to decide any issue of national importance through referendum, such issue may be decided through referendum'. The Constituent Assembly, however, decided against holding a referendum to ratify the constitution.

In brief, as one progresses from elected to executive-led CMBs, there is an increased frequency of ratification through referendum.

4. Understanding the data

This chapter analyses the particular considerations that may arise vis-à-vis elections and the overall realization of the legitimacy of the constitution and the constitution-building process, including the impact a specific choice of CMB has on conflict dynamics.

Once again, the types of CMBs identified in this paper include (a) an elected constitutional convention/assembly; (b) a mandated constituent legislature; (c) a self-created constituent legislature; (d) an indirectly, partly or non-elected CMB or transitional legislature; and (e) an executive-led constitution-making process.

4.1. Choosing a type of CMB

Once a particular form of CMB is chosen, what are the particular considerations that follow in terms of elections and legitimacy?

Constitutional convention/assembly

In this form of CMB, elections bestow on a single institution the power to make a constitution, while another body of representatives—usually a regular legislature—carries on with the day-to-day tasks of managing regular politics.

Advantages of having two separate bodies would include the fact that an elected CMB that functions independently from a regular legislature is often perceived as more independent from day-to-day politics, and therefore the expectation is that the resulting text will better represent the broader population. This is especially the case when the legitimacy of politicians and parties is low, and the members of the CMB are elected as independents, and in those cases where the CMB does not become the new legislature after constitutional adoption. On the other hand, financial and human resources needed to maintain two separate bodies might be too cumbersome for countries that have recently transitioned out of conflict (Brandt et al. 2011: 235–36).

Second, and as exemplified strongly by our only case in this category, defining the relationship of the CMB with the legislature will be critical, especially for avoiding power disputes between both institutions. In Colombia, the Constituent Assembly was formed in spite of the objections of the Congress and through extra-constitutional means, whereby voters during a general election marked an extra 'X' to

signify a call for a Constituent Assembly (Fox et al. 2010: 470). The rivalry over legitimacy never subsided, and in the end the battle was (at least temporarily) won by the Constituent Assembly, which resulted in the dissolution of Congress (Fox et al. 2010: 474). Managing this problem of 'dual legitimacy' is a challenge inherent in this form of CMB. The ongoing process in Libya, which has also been using a constitutional convention/assembly, has also experienced tensions and institutional battles between the CMB and the legislature (Gluck 2015).

Another key issue is the composition of these constitutional conventions/assemblies. The electoral system design is key in terms of reflecting the level of representation of particular societal groups, but also sometimes in terms of correcting for majority–minority imbalances and/or minority discrimination. Furthermore, the electoral system design does not need to provide for government stability, unlike in other types of elected constituent legislatures. This usually leads to more proportional forms for the electoral system. One potential disadvantage of using PR, however, is that it may lead to a highly fragmented constitutional convention/assembly, which may prevent a constitution-making majority from forming.

Naturally, as with all the assemblies discussed here, an internal committee structure will be important in organizing the work of the assembly. The rules of procedure of the CMB—in particular the decision-making rules—will also be of paramount importance, as they can determine which groups have predominant responsibility for the development of the draft, who—if anyone—will have a veto and what the incentives will be for compromise. Finally, these bodies generally have power to negotiate, draft and adopt the constitution, meaning that referendums might not be necessary, as the CMB is considered to embody the sovereign constitution-making power.

Mandated constituent legislature

In this form of CMB, a single institution is elected with both constitution-making and day-to-day legislative power.

Electoral systems

As covered in more detail in an accompanying paper (Ellis 2018), the choice of electoral system is a critical, and often contentious, issue in the constitution-building process. Some commentators have posited that optimal design of CMBs should be based on PR (Elster 1995: 395), but a slight majority (four out of seven) of the mandated constituent legislatures covered here used either majoritarian or mixed systems.

Nepal and Timor-Leste provide interesting insights into issues of elected mandated constituent legislatures which are particularly salient in post-conflict contexts. Mixed systems were used in both of these processes, but what ensured inclusivity in the Nepali constitution-building, as opposed to Timor-Leste, was the use of an elaborate set of quotas regarding the candidates to the Constituent Assembly elections. While the quotas helped, the electoral performance of some of the minority ethnic group political parties ensured further representation of minority and marginalized groups.

The mixed system in Timor-Leste—with a majority of seats elected using PR—handed a constitution-making majority to the dominant party (Fretilin), which then

had little incentive for compromise, consultation or negotiation with other groups (Aucoin and Brandt 2010: 257). While FPTP might have given an even bigger majority to the dominant party, a different type of CMB—a constitutional convention/assembly or a constitutional commission to be used in conjunction with an elected body to approve the draft—might have helped to ensure broader representation.

The leadership of the United Nations Transitional Administration in East Timor (UNTAET), however, insisted on an elected Constituent Assembly as the best mode of constitution-making (Aucoin and Brandt 2010: 253). In many fragile and conflict-affected settings, party competition can be limited, and a single party may dominate elections without representing the majority of interests in society. Timor-Leste raises the question of whether or not appointed CMBs, or a mix of appointed and elected bodies, may provide a more inclusive and legitimate process than mandated constituent legislatures.

Elections and interim constitutions

In many cases of mandated constituent legislatures, elections may not be desirable or possible at the outset of the process. Low security, lack of electoral infrastructure and paucity of financial resources may all make holding elections in fragile and conflict-affected settings difficult or impossible. Furthermore, elections, even when possible, may be undesirable for other reasons. In post-revolution or post-secession contexts in particular, a strong and competitive political marketplace able to represent society in its entirety is unlikely. There may be one dominant party, whose superior organization and name-recognition can allow it to dominate elections and produce a one-sided constituent assembly. Even where there is some electoral competition, elections create losers and, during high-stakes constitution-building, consensus and compromise can be more important than majoritarian decision-making.

To overcome this problem, constitution-building processes have used round tables, or other forms of informal negotiations among non-elected elites, to produce interim constitutions detailing the parameters and process for an eventual elected constituent assembly to produce a 'final' constitution (Arato 2009). The paradigmatic example of this two-stage process led to the South African constitution of 1996.

Of the cases covered here, Iraq—if one ignores the heavy external involvement and Sunni boycott—and Nepal—if one ignores the eventual necessity of electing two constituent assemblies—most closely conformed to this model. Where a mandated constituent legislature is to be arrived at via an interim constitution, a new set of considerations arise including the process for making the interim constitution, the level of detail to be included in the interim document and the supremacy of the interim constitution over the process and content of the 'final' constitution. These questions are covered in a previous International IDEA policy paper (Zulueta-Fülscher 2015).

Post-promulgation elections

Another key decision to be made includes whether the mandated constituent legislature continues in its legislative function until elections take place under the new constitution, or it dissolves and elections are held immediately.

As the data above shows, the general tendency is that the mandated constituent legislature stays in place for several years until elections. There are arguments on both sides here, and much will depend on the perceived legitimacy of the body and the strength of the public demand for new elections. On one hand, keeping the body in place has the advantage of continuity between the development of the constitution and the initial stages of implementation. The main disadvantage is that the CMB will be self-serving, and will look to strengthen its own role as a legislature in the design of the constitution (Elster 2009: 189). This argument makes intuitive sense, but some large-N empirical studies have found that it is not the case in practice (Ginsburg et al. 2009).

Furthermore, especially in post-conflict contexts, the CMB is not one holistic body with a common objective or sense of its own desired goals. It is divided along party/ethnic group lines with each group seeking to gain maximum advantage in the constitutional design in terms of access to public power and resources. Moving elections further into the future increases uncertainty regarding each group's chances at elections, and thus can lead to more cooperative bargaining increasing the chances of consensus (Negretto 2013: 10–11). Where representatives have to face their constituents immediately, they may be less likely to make concessions that might lead to a loss of support, or they may prolong the drafting process to avoid having to vacate their seats in the assembly. Security in their position for a period of time might give CMB members more freedom to negotiate and bargain.

Referendums

Lastly on mandated constituent legislatures, the only case to use a referendum was Iraq. The logic for not needing a referendum is similar to that of the constitutional convention/assembly, in that the sovereign constituent power has been explicitly delegated to the CMB at the time of elections and therefore no further recourse to the people is needed. Iraq is an exception for a specific reason in that the referendum was included in the process from the beginning—unlike the elected CMB (Morrow 2010: 564–65)—and was designed with a double-majority requirement, in order to give the Kurdish population a veto (Morrow 2010: 571).

Self-created constituent legislatures

These types of CMBs are elected as regular legislatures, and assume constitution-making powers thereafter. These processes often use different bodies to work on the drafting and adoption of the constitution. Rather than a one-off manifestation of constituent power through a mandated assembly—as in the two cases above—the use of different bodies to successively or cooperatively develop a draft may reflect the constituent power being refracted through several forums that provide different modes of representing societal groups.

These additional bodies are often composed to reflect a power-sharing agreement between the different sides of the conflict. As the composition of the existing legislature may not accurately reflect the actual power balance following the conflict, the smaller additional body might ensure that the development of the draft constitution is closely tied to resolving the issues that gave rise to the conflict in a way

that the main stakeholders will accept. Furthermore, these additional bodies are often tasked with consulting the public to base the draft on their views.

Sometimes, as in Kenya, these two functions can be divided—the Committee of Experts was responsible for public consultations, while a cross-party Parliamentary Select Committee was composed from within parliament to undertake political negotiations (Murray 2013: 755). In Zimbabwe, on the other hand, the Parliamentary Select Committee was internal to parliament but with cross-party representation, and led both the political negotiations and broad public consultations.

In some cases—such as Angola, Kenya and Zimbabwe—the final draft released by a smaller commission/committee was passed unaltered by the larger, elected CMB. This makes the composition of these bodies of crucial importance. In cases where they have succeeded in developing a draft with broad political and public support, two critical elements could be identified: a politically inclusive membership and an institutionalized link with the political leadership. In Kenya, this was provided through working with a Parliamentary Select Committee, in Zimbabwe and Angola the members of the Committees were drawn from the legislature and in Kosovo the members of the Constitutional Commission were either political leaders themselves or close associates of political leaders.

Indirectly, partly or non-elected constitution-making bodies or transitional legislatures

In this category of CMBs—where direct elections might not be possible and where there might not exist extant institutions with sufficient legitimacy to function as a CMB—finding a selection method for the CMB will very much be driven by what is available in the context. The most common selection method can broadly be described as the indirect election or appointment of members from a non-elected set of elite groups that were parties to the preceding conflict, sometimes combined with appointments from specific societal groups, including marginalized and broad public-interest groups.

For example, in the Comoros each of the three islands sent a delegation of 24, composed of 8 from each of three political parties. In the Central African Republic political parties and rebel groups appointed members who sat alongside former political leaders and representatives of interest groups and marginalized groups. In Afghanistan, small groups of community leaders elected representatives, as did women and refugee groups, who were joined by 50 presidential appointees, many of whom were former warlords whose buy-in was deemed critical to the constitutional project (Thier 2010: 546). In Rwanda and Guinea appointments were made by the rival political forces.

Without the legitimacy-providing effect of elections, these CMBs are generally concerned with balancing the key political forces emerging from the conflict to construct a constitution through an elite pact, while either counting on the legitimacy and authority of those leaders to bring their constituents with them or making some—often token—effort at including civil society groups.

As might be expected, with an at most minimal or attenuated role for the public in selecting the constitution-making delegates, these processes must often consider

referendums as a means to attach popular consent to the constitution and the process at large. The outlier in this category is Afghanistan, which did not use a referendum. This choice can be explained by both the practical impossibility of holding a referendum in certain parts of Afghanistan at that time and the historical practice prevalent through Afghanistan's constitution-making history whereby the Loya Jirga has the power to ratify Constitutions (as happened in both 1923 and 1964) (Thier 2010: 536–40).

Executive-led processes

In this last category, elections are withheld in favour of an existing executive that leads the constitution-making process. Executive-led processes may include executive-appointed commissions tasked with delivering a draft constitution to the executive, or the draft may emanate from within the executive itself. In all these cases the constitution-making process is unilateral and the development of the draft is controlled entirely by the group or individual in power. They are most likely to arise in situations where there are calls for constitutional reform, and a powerful incumbent proceeds with such reforms with little or no public participation or concern to respond to needs and demands of the population; or they may arise in situations where an executive wishes to further entrench its power through authoritarian constitution-making.

Without any electoral legitimacy in the drafting process, many of these processes use referendums to achieve the appearance of popular consent. However, these referendums are often carried out in less than free and fair conditions, whereby passage of the draft is assured through repression of civil and political liberties and the threat of violence.

4.2. The impact of the selection of CMBs on levels of conflict

Finally, the relationship between the selection of CMBs and variable levels of conflict is difficult to gauge. More than half of the 37 case studies continued with violent conflict throughout the constitution-building process, and sometimes beyond. This was the case whether or not the conflict was directly related to the constitution-building process. In sum:

- No processes which used a self-created legislature resumed conflict following the adoption of the new constitution.

- Those processes that had an elected constitutional convention/assembly or a mandated constituent legislature were evenly divided in terms of violent conflict continuing in the years following the adoption of the new constitution: four out of eight cases did not (Ethiopia, Nepal, South Africa and Timor-Leste), whereas four did (Cambodia, Colombia, Iraq and Uganda).

- Of the eight processes that had indirectly, partly or non-elected CMBs or transitional legislatures with a constitution-making role, five had violent conflict continuing throughout and beyond the constitution-building process.

- In the 12 cases where the executive led the constitution-building process, 7 processes had violent conflict continuing throughout and beyond the constitution-building process.

Regarding the finding that processes which used self-created legislatures did not resume conflict, no causality is attributed. It may be that, where existing institutions remain in place and have sufficient legitimacy to take on constitution-making, the level of conflict is likely to be less intractable than in other cases. With regard to the other forms of process, there seems to be no significant finding either way on whether or not a certain choice of CMB might be linked to lower likelihood of conflict resumption.

5. Conclusion

Constitution-building processes do more than produce a document outlining government institutions and procedures. In order to produce a constitution that successfully constrains public power, and in some contexts proclaims universal values and norms for society, the design of the constitution-building process often seeks, inter alia, to construct a narrative which roots the origins of the constitution in popular sovereignty.

By locating the source of authority for the constitution in the citizens, the constitution may be clothed with adequate legitimacy in the eyes of the people to carry out its role as the basic law for state and society. Citizens—or 'the people'—may engage in the constitution-building process as the population at large, through referendums, universal suffrage in elections or broad popular consultations, or by being represented by elites, in their membership of particular societal groups or communities. Popular sovereignty, and the legitimacy of both the process and the resulting constitution, is therefore defined by the degree to which both direct involvement of the general populace and representation by elites are present in any given process.

The cases analysed in this paper reveal how the search for legitimacy of both process and resulting framework takes place, by having 'the people' speak as the constituent power, through either elections or a referendum. However, the cases also reveal a myriad of alternatives, nuances, challenges and also deceptions in the way in which the narrative of popular legitimacy is constructed. What becomes apparent from the cases is that the perception—or sometimes the reality—of popular sovereignty in constitution-building processes is of paramount importance to the success of the overall constitution-making project, and the forms and mechanisms of specific CMBs.

The cases also elucidate an understanding that there may not be a great deal of agency in the choice of CMB. Rather, certain structural factors may drive this choice, including the following:

Physical security and institutional capacity

Where violent conflict is still ongoing, and both the physical infrastructure and the institutional capacity have broken down, elections may be too dangerous or outright

impossible to organize. In these cases, indirectly, partly or non-elected CMBs or executive-led processes will be more common than directly elected CMBs, mandated or self-created. While conflict is a defining feature of all cases considered in this paper, those countries with long-lasting intractable violent conflicts are found predominantly in the former two categories.

In many of these cases, conflict was ongoing at the time of constitution-making, which raises the question of whether or not constitution-making should occur before the context allows elections to the CMB to be held. The counterpoint to this argument is that often constitution-making is a necessary element of the peace-making process itself, and political settlements aimed at ending the conflict often involve agreement over a new constitutional order.

Therefore, frequently, consideration needs to be given on how to arrive at a legitimate constitution without an elected CMB (for example by giving the process more time using an interim constitutional framework) or with a broadly representative but not directly elected CMB and/or through a meaningful public consultation process, if the latter is possible under the circumstances.

Legitimacy of existing institutions and constitutional framework

Where existing institutions are sound and intact (in particular the legislature), and an extant constitutional framework still commands sufficient legitimacy—despite consensus on the need to change—to be changed according to its own rules, recourse to fresh elections may destabilize and/or delegitimize the process. This generally leads to the use of a self-created constituent legislature. A similar result may occur when previous elections have destabilized the political landscape and/or led to conflict. In these contexts too, the most viable option may be to use the existing legislature as the CMB.

It is important to note that, while technically these CMBs fall within Elster's definition of being 'self-created' constituent legislatures, in that they are not bestowed with an explicit constitution-making mandate during their election, in conflict-affected settings the mandate is generally given by some outside political settlement or peace accord, which outlines the constitution-making process—for example the Global Peace Accord in Zimbabwe.

Relative power balance between the principal actors

The balance of power between conflict parties that engage in constitutional reform is also key to understanding the specific choice of CMB. This paper identifies three different scenarios: in the first one, existing governing authorities maintain the upper hand in the negotiations, and might therefore be inclined to engage in reviewing the constitutional framework working through already existing state institutions; in the second scenario, actors coming from outside the existing political structures have gained critical leverage, and may be able to force an agreement to create a newly elected CMB; and the third scenario features an existing political leader who might acquiesce to constitutional change as a concession to rebel groups, though maintaining a certain control over the process, sometimes through an executive-led

process. In these cases constitutional change is often sought as a superficial accession to demands for change, but the new constitutional dispensation is often no more democratic than the previous one.

Path dependency and historical precedent

Path dependency or historical precedent sometimes explains why countries sometimes follow a certain constitutional process design, often with the understanding that this choice may bolster legitimacy more than any of its alternatives. The clearest example from our cases is the Constitutional Loya Jirga in Afghanistan, which had been used in the 1964 and previous processes of constitution-making (Thier 2010: 536–40).

These four factors may contribute not only to the choice of CMB but also to particular outcomes related to the latter, either collectively or severally, and they may be present in different contexts to a greater or lesser degree. They also clearly contribute to other factors beyond choice of CMB that are linked to the process at large. For example, historical precedent might also contribute to the choice of electoral rules based on continuation of familiar practice (e.g. FPTP in Ethiopia) or the use of referendums (e.g. in the Egypt cases, following the popular ratification of the 1971 Constitution); the relative power balance between the principal actors also clearly contributes to the choice of electoral system and timing of elections.

Furthermore, it should be noted that these are not the only factors at play, but in each case covered in this paper they have been key in driving the decisions behind the form of the CMB. Once a particular course has been set regarding the choice of CMB, the considerations in chapter 4 become paramount in bolstering the popular legitimacy of the process and resulting constitution.

In sum, the cases reaffirm the particularity of fragile and conflict-affected settings for constitution-making. They highlight the difficulties in the search for popular legitimacy caused by the absence of a regular electoral landscape, and the challenges posed when elections are not possible. However, they also highlight the numerous mechanisms and pathways through which the crucial narrative of popular ownership can be constructed where elections are not possible.

References

Acemoglu, D. and Robinson, J. A., *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Publishing Group, 2012)

Ahram Online, 'Egypt's parliament choosing constituent assembly amid disagreements and protests', 24 March 2012, <http://english.ahram.org.eg/NewsContent/1/0/37562/Egypt/0/Egypts-parliament-choosing-constituent-assembly-am.aspx>, accessed 9 February 2018

Ainte, A., 'Somalia: legitimacy of the provisional constitution´, *Accord*, 25 (2014), pp. 60–64, <https://www.c-r.org/downloads/Accord25_Somalia.pdf>, accessed 20 October 2018

Al Jazeera, 'Egypt court orders dissolving of parliament', 14 June 2012, <https://www.aljazeera.com/news/middleeast/2012/06/2012614124538532758.html>, accessed 12 May 2018

Arato, A., 'Redeeming the still redeemable: post sovereign constitution making', *International Journal of Politics, Culture and Society*, 22/4 (2009), pp. 427–43, <https://doi.org/10.1007/s10767-009-9070-z>

Aucoin, L. and Brandt, M., 'East Timor's constitutional passage to independence', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington DC: United States Institute for Peace, 2010), pp. 245–74

J. Ballington (ed.), *The Implementation of Quotas: African Experiences* (Stockholm: International IDEA, 2004), <https://www.idea.int/publications/catalogue/implementation-quotas-african-experiences>, accessed 11 May 2018

Base de Datos Políticos de las Américas, 'Colombia: Elecciones Legislativas de 1990 (Camara de Diputados)' [Colombia: 1990 legislative elections (Chamber of Deputies)], Georgetown University and Organización de Estados Americanos, 1999, <http://pdba.georgetown.edu/Elecdata/Col/Elecamara90.html>, accessed 13 May 2018

Brandt, M., Cottrell, J., Ghai, Y. and Regan, A., *Constitution-Making and Reform: Options for the Process* (Geneva: Interpeace, 2011)

Brown, N., 'Egypt officially declares what is and isn't important', New Republic, 9 July 2013, <https://newrepublic.com/article/113792/egypt-president-adli-mansour-makes-constitutional-declaration>, accessed 12 May 2018

Brunet, A., and Helal, S.S., *Seizing an Opportunity: Afghan Women and the Constitution Making Process*, Rights and Democracy Mission Report (Montréal: International Centre for Human Rights and Democratic Development, 2003), <http://publications.gc.ca/collections/Collection/E84-15-2003E.pdf>, accessed 19 October 2018

Call, C. T., *Why Peace Fails: The Causes and Prevention of Civil War Recurrence* (Washington, DC: Georgetown University Press, 2012)

Ebrahim, H. and Miller, L. E., 'Creating the birth certificate of a new South Africa', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010), pp. 111–57

Electoral Institute for Sustainable Democracy in Africa (EISA), 'Mozambique: women's representation quotas', African Democracy Encyclopaedia Project, March 2008, <https://www.eisa.org.za/wep/mozquotas.htm>, accessed 11 May 2018

—, 'Angola: women's representation quotas', African Democracy Encyclopaedia Project, March 2009, <https://www.eisa.org.za/wep/angquotas.htm>, accessed 11 May 2018

Elkins, Z., Ginsburg, T. and Melton, J., *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009)

Ellis, A., *Electoral system design in the context of constitution-building*, International IDEA Discussion Paper 4/2018, <https://www.idea.int/publications/catalogue/electoral-system-design-context-constitution-building?lang=en>, accessed 26 October 2018

Elster, J., 'Forces and mechanisms in the constitution-making process', *Duke Law Journal*, 45 (1995), pp. 364–96, <https://doi.org/10.2307/1372906>

—, 'Legislatures as constituent assemblies', in R. W. Bauman and T. Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2009), pp. 181–97

European Parliament, Directorate-General for External Policies, 'Note on the Main Elements of the Dayton Agreement for Bosnia and Herzegovina', PolDep/KM, 28 September 2005, <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/afet_111005_0/afet_111005_004.pdf>, accessed 3 May 2018

Fox, D. T., Gallón-Giraldo, G. and Stetson, A., 'Lessons of the Colombian constitutional reform of 1991: toward the securing of peace and reconciliation?', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010), pp. 467–82

Ghai, Y., 'The role of constituent assemblies in constitution making', Unpublished paper commissioned by International IDEA, 2005, <http://www.constitutionnet.org/sites/default/files/the_role_of_constituent_assemblies_-_final_yg_-_200606.pdf>, accessed 24 April 2018

Ginsburg, T., Elkins, Z. and Blount, J., 'Does the process of constitution-making matter?', *Annual Review of Law and Social Science*, 5 (2009), pp. 201–23, <https://doi.org/10.1146/annurev.lawsocsci.4.110707.172247>

Global Security, 'Comoros—Politics', [n.d.], <https://www.globalsecurity.org/military/world/indian-ocean/cr-politics.htm>, accessed 13 May 2018

Gluck, J., 'Constitution building in a policy vacuum: Libya and Yemen in 2014' in International IDEA, *Annual Review of Constitution-Building Processes: 2014* (Stockholm: International IDEA, 2015), <https://www.idea.int/publications/catalogue/annual-review-constitution-building-processes-2014>, accessed 25 October 2018

Hariraksapitak, P. and Niyomyat, A., 'Thai vote faces delay after lawmakers amend election law', Reuters, 25 January 2018, <https://www.reuters.com/article/us-thailand-politics/thai-vote-faces-delay-after-lawmakers-amend-election-law-idUSKBN1FE25Y>, accessed 13 May 2018

Hierman, B., *Russia and Eurasia 2017–2018* (Lanham, MD: Rowman and Littlefield, 2018)

Human Rights Watch (HRW), 'Chronology of Burma's Constitutional Process', [n.d.], <https://www.hrw.org/sites/default/files/reports/burma0508chronology.pdf>, accessed 31 January 2018

Loughlin, M. and Walker, N., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007)

Mazo, E., 'The upstream problem in constitutionalism', *Wake Forest Law Review*, 50/4 (2015), pp. 795–842

Morrow, J., 'Deconstituting Mesopotamia: cutting a deal on the regionalization of Iraq', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010), pp. 563–98

Murray, C., 'Kenya's 2010 Constitution', *Neue Folger Band Jahrbuch des öffentlichen Rechts*, 61 (2013), pp. 747–88

—,*National Dialogues and Constitution Making*(Berlin: Berghof Foundation, 2017), <https://www.berghof-foundation.org/fileadmin/redaktion/Publications/ Other_Resources/NationalDialogue/NDH__Murray_ND___Constitution- making.pdf>, accessed 1 April 2018

Negretto, G. L., *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (New York: Cambridge University Press, 2013), <https://doi.org/ 10.1017/CBO9781139207836>

Negretto, G. L., 'Democratic constitution-making bodies: the perils of a partisan convention', *International Journal of Comparative Law*, 16/1 (2018), pp. 254– 79, <https://doi.org/10.1093/icon/moy003>

O'Brien, J. C., 'The Dayton Constitution of Bosnia and Herzegovina', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010, pp. 332–49)

Regassa, T., 'The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice', *Afrika Focus*, 23/1 (2010), pp. 85–118, <https://doi.org/10.21825/ af.v23i1.5038>

Reynolds, A., Reilly, B. and Ellis, A., *Electoral System Design: The New International IDEA Handbook* (Stockholm: International IDEA, 2005), <https:// www.idea.int/publications/catalogue/electoral-system-design-new-international- idea-handbook>, accessed 25 October 2018

Sisk, T. D., *International Mediation in Civil Wars: Bargaining with Bullets* (London: Routledge, 2009)

Thailand, Kingdom of, Constitution of the Kingdom of Thailand (Interim Edition) B.E. 2549 (2006), <http://www.constitutionnet.org/sites/default/files/ thailand_constitution_of_the_kingdom_of_thailand_2006-2007.pdf>, accessed 20 October 2018

Tamaru, N., and O'Reilly, M., *How Women Influence Constitution Making after Conflict and Unrest*, Inclusive Security Research Report, January 2018, <https:// www.inclusivesecurity.org/wp-content/uploads/2018/02/How-Women- Influence-Constitution-Making.pdf>, accessed 11 May 2018

Thier, J. A., 'Big tent, small tent: the making of a constitution in Afghanistan', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010), pp. 535–62

Tierney, S., *Reflections on Referendums*, International IDEA Discussion Paper 5/2018 (Stockholm: International IDEA, 2018), <https://www.idea.int/publications/ catalogue/reflections-referendums>, accessed 20 October 2018

Tripp, A. M., 'The politics of constitution making in Uganda', in L. E. Miller (ed.), *Framing the State in Times of Transition* (Washington, DC: United States Institute for Peace, 2010), pp. 158–75

Tushnet, M., 'Constitution making: an introduction', *Texas Law Review*, 91/7 (2013), pp. 1983–2013

Underwood, W., Bisarya, S. and Zulueta-Fülscher, K., *Interactions between Elections and Constitution-Building Processes in Fragile and Conflict-affected States: Fourth Edinburgh Dialogue on Post-Conflict Constitution-Building, 2017* (Stockholm: International IDEA, 2018), <https://www.idea.int/publications/catalogue/elections-constitution-building-processes-fragile-conflict-affected-states>, accessed 25 October 2018

Uppsala Conflict Data Program (UCDP), UCDP Conflict Encyclopedia, <http://www.ucdp.uu.se>, accessed 9 August 2018

Vollan, K., 'Group representation and the system of representation in the Constituent Assembly and future parliaments of Nepal', *International Journal on Minority and Group Rights*, 18/3 (2011), pp. 343–68, <https://doi.org/10.1163/157181111X583323>

Widner, J. A., 'Constitution drafting in post-conflict states symposium', *William and Mary Law Review*, 49:4 (2008), pp. 1513–41

Zulueta-Fülscher, K., *Interim Constitutions: Peacekeeping and Democracy-Building Tools*, International IDEA Policy Paper No. 11 (Stockholm: International IDEA, 2015), <https://www.idea.int/publications/catalogue/interim-constitutions-peacekeeping-and-democracy-building-tools>, accessed 25 October 2018

Annex

Table A.1. Electoral system design of the CMB or body with the final responsibility over the draft constitution

Country	Type of CMB	Size of CMB	Selection design	Gender quotas	Other quotas
Cambodia 1993	Elected constituent assembly	120	List PR	No quota	No quota
Colombia 1991	Elected constituent assembly	74	List PR (70 MPs) and appointed by the government (4 MPs)	No quota	No quota
Egypt 2012*	Elected parliament (indirectly elected constituent assembly)	498/180	Mixed/parallel system: (1) lower house, 166 majoritarian and 332 list PR; (2) upper house, 60 majoritarian and 120 list PR	No quotas (but requirement for parties to include at least one woman candidate in each list)	Quota: 50% of the lower and upper houses for farmers and workers
Ethiopia 1995*	Elected constituent assembly	547	Majoritarian system: FPTP	No quota	No quota
Iraq 2005	Elected constituent assembly/ transitional national assembly	275	List PR	25% women quota	No quota
Nepal 2015	Elected constituent assembly	601	Mixed/parallel system: 335 list PR and 240 FPTP	At least one-third of the total number of MPs women (article 63(5) of the Interim Constitution)	No quota
South Africa 1997	Elected constituent assembly	400/90	List PR: (1) National Assembly, 400 MPs; (2) Senate, 90 MPs	No quota	No quota
Timor-Leste 2002	Elected constituent assembly	88	Mixed system: 75 list PR and 13 FPTP	No quota	No quota

Country	Type of CMB	Size of CMB	Selection design	Gender quotas	Other quotas
Uganda 1995	Elected constituent assembly	286	Majoritarian system (214 MPs) and appointed (72 MPs: 10 by the President; 10 by the National Resistance Army; 2 by the National Organisation of Trade Unions; 2 by each of the four political parties; and 42 appointed/ indirectly elected from within other social groups)	39 female MPs (indirectly) elected by an electoral college of subcounty councillors and members of the subcounty	2 MPs appointed by the National Youth Council; 1 MP appointed by the National Union of Disabled Persons of Uganda
Angola 2010*	Elected legislature	220 + 3	List PR	No quota	3 seats reserved for expatriates (remained unoccupied)
Côte d'Ivoire 2016*	Elected legislature	255	Majoritarian system: FPTP	No quota	No quota
Kenya 2010*	Elected legislature	208	Majoritarian system: FPTP	No quota	No quota
Kosovo 2008*	Elected legislature	100 + 20	List PR	30% quota	20 seats reserved for national minorities
Mozambique 2004	Elected legislature	250	List PR	No quota	No quota
Senegal 2001*	Elected legislature	140	Mixed/parallel system	No quota	No quota
Zimbabwe 2013	Elected legislature	210	Majoritarian system: FPTP	No quota	No quota
Afghanistan 2004*	Constitutional Loya Jirga (mostly selected from within different groups)	501	50 appointed by the President (25 of whom were to be women); 451 indirectly elected	25 women appointed by the President; 64 women elected by women; and 15% of the 42 members elected by representatives of refugees in Pakistan and Iran	24 MPs elected from among refugees from Pakistan and Iran; 9 elected by nomadic tribes; 6 elected internally displaced persons from three provinces; and 3 elected Hindus and Sikhs
Burundi 2005*	Transitional National Assembly	185	Partly elected and partly appointed: 185-member National Assembly (85 elected, 100 appointed by the signatories to the Arusha Peace Accords) and 54 members appointed for the Senate	No quota	2 seats in the Senate reserved for former presidents; 1 seat for President Buyoya when he leaves office; 3 seats reserved for the ethnic Twa minority; the remainder allocated among the 15 provinces

Country	Type of CMB	Size of CMB	Selection design	Gender quotas	Other quotas
Central African Republic 2016*	National Transitional Council	135	Appointed members of/by political parties, rebel groups, former ministers and members of parliament, as well as civil society groups, i.e. unions, religious groups, youth and women	No quota	No quota
Chad 1996	Superior Transitional Council	57	Elected from among the delegates of the Sovereign National Conference	No quota	No quota
Comoros 2001	Tripartite Commission	72	24 delegates appointed from each of the three islands, i.e. Grand Comore, Anjouan and Mohéli, making up 8 delegates from three political parties within each island	No quota	24 delegates appointed from each of the three islands, Grand Comore, Anjouan and Mohéli
Congo 2005*	National Transitional Council	75	(Indirectly) elected by members by the Forum for Unity and National Reconciliation (1,420 delegates)	No quota	No quota
DRC 2006*	(Non-elected) Senate and National Assembly	500 + 120	The National Assembly was made up of 500 members from the numerous parties to the inter-Congolese dialogue. The Senate was made up of 120 members from the various parties to the national power-sharing accord	No quota	No quota
Guinea 2010*	National Transitional Council	155	Appointed by opposition leader and (appointed) Prime Minister	No quota	No quota
Rwanda 2003*	Transitional National Assembly	74	Appointed by their own political forces (article 60 of the 1993 Arusha Accord)	No quota	No quota

Note: * CMB assisted by externally appointed commission for the preparation of the draft.

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About the organizations

This paper is a product of the Edinburgh Dialogues on Post-Conflict Constitution-Building, jointly convened by International IDEA; the Political Settlements Research Programme of the Global Justice Academy; and the Edinburgh Centre for Constitutional Law at the University of Edinburgh.

International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on good international democratic practices; offers technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<http://idea.int>

Global Justice Academy

The Global Justice Academy is an interdisciplinary network that supports research, teaching and knowledge exchange on global justice issues. It seeks to build on, consolidate and expand the work of existing centres and collaborations at the University of Edinburgh. In particular, the Global Justice Academy aims to provide:

- An interdisciplinary hub for the exploration of what global justice is;

- An intellectual meeting place for the discussion of novel ideas regarding a more just world;

- An institutional forum for dialogue with practitioners engaged in justice issues locally and globally.

The Global Justice Academy is active in facilitating discussions to enable individual academics and existing centres and networks to expand their scope.

The goal is to allow the members of the Global Justice Academy to broaden their horizons with regard to research, teaching and knowledge exchange. In the medium-term, hopefully this will lead to collaborative research projects, new teaching initiatives and original forms of engagement with the public at large.

<http://www.globaljusticeacademy.ed.ac.uk>

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The Edinburgh Centre for Constitutional Law at the University of Edinburgh provides a focal-point for research in public law and constitutional theory, addressing current constitutional developments in the United Kingdom and beyond.

The Centre has a broad membership including colleagues working in public law, EU law, international law and legal theory, and focuses on four main research areas: electoral law and the law of referendums, federalism and multinational states, constitutional theory, and constitutionalism beyond (and below) the state.

Centre members work at the cutting edge of developments in constitutional law, constitution-making, peacebuilding, electoral law, human rights and environmental law.

<http://www.centreforconstitutionallaw.ed.ac.uk/>

Constitution-building processes are increasingly seen as critical elements within both peacebuilding and state-building processes. A constitution-building process in a conflict-affected setting is often necessary to renegotiate access to public power and resources. The resulting constitution will ideally make the state more inclusive and, therefore, responsive to a higher number of social, political and/or economic groups, thereby contributing to sustaining peace and preventing the resumption of conflict.

Who makes the constitution? How are they selected? These are crucial questions in the constitution-building process, which serve to determine the overall legitimacy of the process, and the content and success of the new political framework itself.

This Policy Paper examines the types of constitution-making bodies (CMBs) present in 37 constitution-building processes that took place from 1991 to 2018 in the aftermath of conflict, and ways in which they were selected. Additionally, the paper focuses on the frequency of specific types of CMB in conflict-affected settings, and on whether the broader constitution-building process and its specific design has an impact on the type of CMB chosen.