

CONSTITUTION-BUILDING DURING THE WAR ON TERROR: THE CHALLENGE OF SOMALIA

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I. INTRODUCTION

In February 2006, the Somali transitional government and transitional Parliament came together in one location for the first time since leaving Kenya the year before. In a country racked for decades by conflict and divisions, this meeting ignited new optimism that it would be possible to rebuild a Somali state based on the 2004 Transitional Federal Charter (the “Charter”).¹ The meeting broke a yearlong stalemate between two powerful factions, and there was a sense that progress toward sustained peace would be possible with appropriate international support. In response to this positive step, the international community agreed to support various development projects, including the constitution-building process set out in the Charter.

These advances took place in the context of a globalized “war on terror,” however, and were accompanied by the rise of an increasingly radicalized version of Islam both in Somalia and across the Muslim world. At the time of writing, Somalia is in a new crisis, apparently driven by ideological and religious divisions but also involving the regional interests and clan partisanship that have sustained the many years of conflict in this region. The outcome for the Somali people, and for peace in this exhausted and devastated country, remains uncertain.

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1. The Transitional Federal Charter of the Somali Republic 2004 resulted from the 2002-2004 Inter-Governmental Authority on Development (IGAD) sponsored peace negotiations. TRANSITIONAL FEDERAL CHARTER OF THE SOMALI REPUBLIC (2004) [hereinafter CHARTER], available at <http://www.mpil.de/shared/data/pdf/finalcharter-feb2004.pdf>.

This paper discusses how a detailed process of constitution-building was developed and launched in Somalia and the difficulties that this process has encountered. It explores some of the challenges that the international community faces in supporting state-building in Islamic countries in the new context of the “global war on terror,” and highlights the need for this community to adjust its programs and approaches in light of the presence of highly polarized views concerning the influence of Islam in global politics.

II. THE SPECIAL CHALLENGES OF THE SOMALI CONTEXT

In October 2004, while still based in Kenya, a 275-member Somali Transitional Federal Parliament was selected on a 4.5 clan formula (according to which Somalia’s four major clans each select sixty Members of Parliament (MPs) and an alliance of small clans select thirty-five MPs), and Abdullahi Yusuf Ahmed was elected Transitional President.² However, soon after the elections, a falling-out occurred between the President and the Prime Minister on one side and the Speaker of Parliament on the other. This conflict resulted in the President setting up his headquarters in the town of Jowhar and the Speaker setting his up sixty kilometers away in Mogadishu.

After this break, each party to the dispute gained the support of a faction of Parliament. With Parliament divided and quorum-less, the business of the transitional government was frozen before it had even begun. Finally, in January 2006, negotiations between the President and the Speaker resulted in an agreement to work together and for Parliament to gather and sit in a third, neutral location—the town of Baidoa.

The process of establishing a permanent constitution was high on the agenda in Baidoa both because a constitution would provide the mechanism of transfer from transitional bodies to a new and legitimate set of institutions and because the clock was already ticking. Under the terms of the Charter, a referendum adopting the new constitution was to take place in the final year of the five year transitional period, after a two and a half year constitutional process.³ However, this final

2. HUMAN RIGHTS WATCH, HRW INDEX NO. A1912, SHELL SHOCKED: CITIZENS UNDER SIEGE IN MOGADISHU 15-16 (2007), *available at* <http://hrw.org/reports/2007/somalia0807/somalia0807web.pdf>.

3. Provisions of the Federal Charter include the following:

year began when the transitional Parliament was sworn in—a year and a half before the meeting in Baidoa.

The constitutional process outlined in the Charter required that a Federal Constitutional Commission be nominated by the Council of Ministers and approved by Parliament. Once nominated, the Commission had two and a half years to draft a new constitution. The constitution itself had to include a federal structure and was to be adopted by popular referendum.⁴

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- *The Commission:* The Charter mandates that an independent Federal Constitution Commission be created. CHARTER, *supra* note 1, art. 11, § 5. Its members are to be nominated by the Council of Ministers to the President. *Id.* The establishment, structures, and functions of all independent commissions “shall be proposed by the Council of Ministers and approved by Parliament.” *Id.* art. 68. The Parliament is to “make laws relating to the mandate of the Commission and the qualifications and terms of service of its members.” *Id.* art. 11, § 6. “The Transitional Federal Government shall promote and develop the State Governments [and] Regional and District Administrations subject to legislation and guidelines of the Federal Constitution Commission on the formation of the Transitional Federal Government.” *Id.* art. 11, § 4(a).
 - *A Referendum:* The Charter provides that an “internationally supervised National Referendum shall be undertaken to approve the new Constitution.” CHARTER, *supra* note 1, art. 11, §3(b).
 - *A Ministry of Federal and Constitutional Affairs:* The Charter also establishes a Ministry of Federal and Constitutional Affairs that is “charged with the task of implementing Constitutional and Federal affairs.” *Id.* art. 11, § 7.
 - *Timeline:* A constitutional draft is to be completed within two and a half years of establishing the commission, *id.* art. 11, § 9, and to be “adopted by popular referendum during the final year of the transitional period,” *id.* art. 71, § 9. Note that there has been some confusion over the timeline, but a careful reading of the Charter suggests that article 11, section 8, which states that “the process of federating Somalia shall take place within a period of two and a half years from the date that the commission is established,” should be taken as the correct reading and the relevant timeline. *Id.* art. 11, § 8.
 - *Substance:* The Charter gives some basic guidance as to the substance of the Constitution. To begin with, it provides that the Constitution is to be based on the Charter. *Id.* art. 71, § 9. Also, the Charter provides that the “Somali Republic shall recognize and enforce all international human rights conventions and treaties” it has entered into. *Id.* art. 14.
4. See *supra* note 3 (discussing various provisions of the Charter).

The Charter did not provide further details on the sort of process or methodology to be adopted in framing the constitution. Therefore, in order to assist the transitional government to initiate the constitutional process, a consortium of donors, NGOs and multilateral agencies (the “Consortium”) was formed to support a Constitution Building Process Programme for Somalia. I was brought in through the United Nations Development Programme as lead legal advisor to the project to assist in its shaping and implementation.

After the Consortium formed, the first step was to work with the transitional government and Parliament to explore the implications of undertaking a constitutional process in the Somali context and enrich their understanding of the experience through discussion of comparative constitutional processes and their outcomes.

A. *A Failed State*

In many ways, Somalia presented one of the most difficult contexts for constitution-building. Somalia has been in a state of civil war since at least 1988. It has experienced high levels of violence, inter-clan conflicts, warlord struggles for control, and ongoing smaller violent clashes over resources and land. Although Somalia was, in early 2006, enjoying a tentative period of relative peace, it was clear that the country remained a highly conflict-prone environment at risk of a return to large-scale violence. There had already been more than fourteen failed attempts by the international community to help Somalia achieve peace and rebuild itself as a state. Many entrenched divisions and points of conflict—ranging from war crimes, stolen property, occupied territory, and conflicting legal frameworks to difficulties with refugees and internally displaced peoples—remained unaddressed.

Moreover, any constitutional process would take place in an environment which has, for the last fifteen years, represented the archetype of a failed state. Somalia has no state-wide institutions.⁵ For at least the last fifteen years, the coun-

5. Somaliland, a former territory of Somalia that is still in dispute, does have functioning statewide institutions. However, these institutions as well as Somaliland more generally remained entirely and determinedly separate from the constitution-building process discussed in this Essay. *See infra* p. 603.

try has had no formal justice system, no police, no education system, no taxation, no customs regulation, and no one to issue passports or make agreements with the World Bank or other international institutions.

Even as the new constitutional process was beginning, Paul Simkin, an experienced practitioner in the Somali governance sector and one of the key advocates for coherent support of a constitutional process, warned of the challenges facing state-building in Somalia.⁶ He pointed to a number of factors indicating an ongoing risk of a return to war, including the presence of a war economy, the high level of small weapons ownership, the large number of people making a living through use or commercial trade of weapons, a fundamental erosion of trust within the culture, the many unresolved crimes stemming from years of conflict, and the intense poverty which has continually lead to new conflicts over basic resources such as water. Simkin also noted that, since 1991, sixty to seventy percent of the population has grown up with no experience of state governance.⁷

Moreover, what little governance Somalia has experienced has been largely negative. The country was ruled first through colonial occupation, then, after nine years of tentative democracy, by the Sayed Barre regime, which became increasingly repressive and dictatorial over the course of its reign. In Somalia, the state has historically been an instrument of accumulation and domination, enriching those who control it and repressing and exploiting the rest of the population. This reality became entrenched during the Cold War, when the state was almost entirely externally funded and was the primary source of power and wealth—a catchment point for foreign aid, control of government contracts, and the power to expropriate the property of others.

6. Paul Simkin, Presentation at Somalia Constitution-Building Process Technical Workshop for Members of the FCC (July 24, 2006) (on file with the New York University Journal of International Law and Politics).

7. A high proportion of the Somali people are thirty or younger. *See, e.g.,* WORLD BANK & UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), SOCIO ECONOMIC SURVEY 2002: SOMALIA 11 (2003), *available at* http://site.resources.worldbank.org/INTSOMALIA/Resources/swb_complete_report.pdf (showing age ranges for the Somali population). The most recent national government collapsed in 1990, and people who were fifteen years old in 1990 are now thirty-two.

The Somali context was further complicated, in terms of the prospects for a successful constitutional process, by lack of clarity regarding the role that traditional elders could or should play in the governance of the state. Traditional elders continue to be key players in Somali society, especially since they still provide most dispute resolution outside of the cities through the traditional legal system known as Xeer. However, as Simkins pointed out, the social systems within Somalia—which evolved over thousands of years to support a nomadic economy and a nomadic culture—have not adjusted well to the fundamental changes of the last fifty years, particularly those represented by large migrations to urban areas. (This is especially true in the North.) In some cases, the power and authority of societal elders has been eroded; in others, the elders have been displaced or replaced. The question of how to deal with traditional elders is all the more difficult since there are few examples of constitutional structures that have incorporated a role for traditional power mechanisms.⁸

The clannic nature of Somali society was a challenge in envisioning a coherent Somali state. In Somalia, a series of failed, self-interested regimes have reinforced the perhaps inherent fragmentation of interests within and across clans. Sayed Barre's regime responded to the various clan uprisings in the 1980s (now seen as the start of the Somali civil war) with escalating waves of government repression that eventually led to an explosion of Somali society into violence and anarchy. When Sayed Barre and his remaining supporters were forced to flee in early 1991, the power vacuum resulted in clan lineages and sub-lineages fighting over the spoils of the state. The state collapsed, and Somali society splintered into its component clan divisions. Today, clan, sub-clan, and even sub-sub-clan allegiances need to be taken into account in practically all interactions in Somalia, from hiring local staff to structuring executive power. These divisions formed the basis of the Charter negotiations, particularly the 4.5 clan ratio determining representation in Parliament and other governmental institu-

8. In the Somaliland Parliament, the elders have been institutionalized as the upper house of parliament (the House of Elders), but the structure, role, and method of appointment of the House of Elders remain controversial. The 1996 South African Constitution provides an interesting example of approaches to this question. S. AFR. CONST. 1996 arts. 211-12.

tions. Despite these attempts to negotiate clan politics, however, the nature of clan affiliation is complex and such politics can easily lead to unanticipated conflict.

The existence of Somaliland added another layer of complexity to the constitutional process in Somalia. Somaliland, a small area on the eastern horn of Africa, proclaimed its independence from Somalia in 1991 and has since succeeded in establishing a minimalist but stable state in the territory of the former British Protectorate. But it has not received international recognition as a separate nation, and many in Somalia do not accept Somaliland's claim to independence. Instead, they anticipate that Somaliland will be part of the reconstructed state of Somalia. At the same time, it is and was evident that the Somaliland government would rebuff attempts to involve it or the people of Somaliland in any constitutional process leading to a unified Somalia.

Finally, the emergence and rapid rise in response to global actions within the "war on terror" of a new political and military entity based in Mogadishu, the Islamic Courts Union (ICU), created a difficult challenge both for the Transitional Government and for the international community.

B. *The Emergence of a New Political Islamic Movement*

It came as a surprise to many that the ICU swept through Mogadishu and then across southern Somalia with ease and apparent local support in a few months in mid-2006. The great majority of the Somali population is Muslim, but most have traditionally practiced a moderate form of Sunni Islam. Shari'a law was one of the legal systems historically relied upon by Somali Muslims, but it was integrated or balanced with traditional law implemented by clan elders. And despite sporadic incidents, most in the international community had believed it very unlikely that radical Islam would take hold in Somalia.

In fact, the ICU coalesced in response to a U.S. counterterrorism tactic. In early 2006, the United States funded a "counter terrorist" alliance of Mogadishu warlords (the Alliance for the Restoration of Peace and Counter Terrorism) in

an effort to eliminate the Shari'a courts in Mogadishu. This turned out to be a particularly misguided strategy.⁹

The clan-based Shari'a courts around Mogadishu developed as an endogenous mechanism to deal with chronic lawlessness and insecurity and were one of the few methods of local justice in the area. The courts varied dramatically in religiosity and were generally a combination of elders, religious leaders, and a militia paid by the community to enforce court decisions.

The U.S. strategy provided a common enemy to the previously disparate courts, and the courts came together to counter the attack against them. The initial coalition of the Shari'a courts with the business community and civil society seems to have been truly inclusive and to have had broad support from the Mogadishu population. In any event, the newly named Islamic Courts Union swept through Mogadishu and expelled the warlords, dismantled the road blocks, and secured Mogadishu for the first time in fifteen years in June 2006. This was truly an impressive feat, and the international community watched in amazement as the ICU went about reestablishing basic security, cleaning the rubbish from the streets, and reopening the Mogadishu International Airport.

However, fairly soon after its initial rise to power, the new ICU began positioning itself in opposition to the transitional government and hence to the international community that was supporting it. By pacifying Mogadishu, the ICU had secured the most dangerous region in Somalia, while the transitional government was isolated in Baidoa and had control over only a small portion of the state. It is important also to keep in mind that while the ICU appeared to be driven by ideological and religious divisions, it also played into the clan partisanship that has sustained the many years of conflict in this region.

The implications of this very rapid rise of a strong oppositional political and military movement only became clear

9. See, e.g., HUMAN RIGHTS WATCH, *supra* note 2, at 19 ("On February 18, 2006, a few key warlords in Mogadishu formed a new alliance called the Alliance for the Restoration of Peace and Counter-Terrorism (ARPCT), with US backing."); INT'L CRISIS GROUP, POLICY BRIEFING NO. 45, SOMALIA: THE TOUGH PART IS AHEAD (2007), available at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/b45_somalia_the_tough_part_is_ahead.pdf [hereinafter INT'L CRISIS GROUP, TOUGH PART].

when the constitution-building process was already underway. As it turned out, it was this factor, above all else, that most seriously undermined the proposed constitution-building process.

III. ANTICIPATED BENEFITS AND RISKS OF A CONSTITUTIONAL PROCESS

A constitution-building process provides considerable opportunities for reconciliation, for negotiating solutions to major divisive issues in a non-violent context, for reaching consensus on the modalities of federalism best suited to a fractured state, for a symbolic break with the past, for creating an atmosphere of hope and renewal, and for the establishment of a legitimate and stable, if minimalist, state.

Comparative experience¹⁰ shows that constitution-building processes that involve bodies that are more inclusive and representative result in more successful transitions from conflict to peace and, ultimately, in more stable and effective constitutions. In Colombia, for instance, the 1957 constitution-building process resulted in a political pact known as the National Front. This pact successfully overcame the violence between political parties, but it “resulted in state power being shared by only two parties and resulted in the exclusion of indigenous people and other political forces.”¹¹ Therefore, it did not lead to a stable democracy despite being ratified by a referendum. Ultimately, the National Front exacerbated divisions and injustices already present in the country, and Colombia saw a quick return to conflict. In contrast, the representativeness of the bargaining group is considered to have assisted

10. For a background discussion of the author’s work on comparative experience in constitution-building processes, see generally Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L. 663 (2006); Kirsti Samuels, *Paradoxes and Compromises in the Design of Post-Conflict Constitutions* (Oct. 2006) (Unpublished Discussion Draft, Research Partnership on Postwar State-Building), available at http://www.statebuilding.org/resources/Samuels_RPPS_October2006.pdf; Kirsti Samuels, *Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies* (Int’l Inst. for Democracy and Electoral Assistance, 2006), available at <http://www.idea.int/conflict/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels.pdf> [hereinafter Samuels, *Constitution Building*].

11. Samuels, *Constitution Building*, *supra* note 10, at 24.

transitions in Spain, Hungary, South Africa, and Afghanistan.¹²

Participatory constitution-building processes increase the perceived legitimacy of a constitution and thus bolster support from the population, which is essential if the constitution is to play a meaningful role in creating a stable state. Popular consultation certainly brought about public support for constitutions in Rwanda, South Africa, and Uganda. In all three of these countries, the constitutional processes were highly participatory, and the resulting constitutions received strong popular support and a high level of perceived legitimacy. By comparison, new constitutions in Nigeria, Zimbabwe, and Bahrain have been controversial after being formed through less participatory processes for the very reason that these constitutions were seen as imposed from above rather than made by the people.

Thus, any process in Somalia needed to operate in a peace-inducing and inclusive manner in order to avoid the considerable risks of constitutional failure and of increasing conflict in the country. In this case, the process could have proven divisive if it were not sufficiently participatory or if its approach were not sufficiently consensus-based. A public education campaign can inflame divisions if it promotes extremist views rather than encouraging moderation and compromise. Likewise, a process can be rendered illegitimate by excluding the voices of women or of minorities. An adopted constitution may become a dead letter (e.g., if it is too ambitious or burdened with expensive provisions) or do more harm than good (e.g., if it induces conflict by failing to justly resolve land issues, deal with war crimes, or establish divisions of power and resources). Finally, the political and security situation in a country like Somalia may destabilize even a well-conducted constitutional process or result in its suspension.

IV. A HOPEFUL PROCESS DEVELOPED WITH THE TRANSITIONAL FEDERAL GOVERNMENT

In my role as lead legal advisor at the time, and following extensive consultation, I prepared a proposal for the transi-

12. *See generally id.* (discussing comparative constitution-building processes in Colombia, Spain, Hungary, South Africa, Afghanistan, and other countries mentioned *infra*).

tional government and Parliament presenting options for a constitutional process in light of the considerations discussed above. In the proposal, I suggested that the constitution-building process should include a civic education component, a consultation component, and some form of validation meeting, and that it should be guided by the following principles:

- **Sovereignty:** Constitution-building is a sovereign national process and that the process must be nationally owned and led.
- **Inclusiveness:** The process should be inclusive and participatory to best achieve a legitimate constitution and sustainable peace.
- **Peaceful Negotiation:** The constitution should be agreed upon through a peacefully negotiated constitution-building process.
- **Civil Society Involvement:** Non-governmental organizations (NGOs) and other civil society groups should be strongly encouraged to contribute to the constitution-building process. In addition, given the Somali culture of respect for clan elder advice, local clan elders and religious elders should be involved in the process.
- **Context Specificity:** All options, advice, and assistance provided to those involved in the process should be appropriate to the Somali local context. This includes ensuring access to context-sensitive legal and political options, taking into account clan-based politics, allowing the emergence of homegrown and traditional legal alternatives and governance institutions, and considering issues of federalism or consociational power-sharing.

This constitutional process was to take shape in the following stages and in the time frames indicated:

1. *Civic Education (Three Years, Including the Referendum Stage)*

The Transitional Federal Government and later the Federal Constitutional Commission agreed that in addition to producing a final draft of the constitution, the Constitution Commission should be tasked with overseeing a broad civic education program. If a new constitution is to reflect the views and values of a population, it is essential that the people understand why and how the constitution is being made and how

they may participate in the process in a meaningful way. Without a broad civic education program, any consultation process is meaningless, and the final referendum would be very risky as the people voting would not understand what they were voting on.

In this case, I suggested that the civic education program should be overseen by the Commission but undertaken by a Secretariat (with the support of international actors), and that civil society should be brought in as a key partner in this process. For most civic education programs to be successful, it is critical that civil society participate. This is the case because the voluntary social and civic organizations that make up this sector are able to reach a broader spectrum of the population and work with them over a longer time frame than would a governmental organization, and may therefore better assist the people in understanding the constitutional process.

2. *Consultation (Nine Months, Beginning Three Months After the Civic Education Program Begins)*

The Transitional Federal Government and, after it was appointed, the Federal Constitutional Commission agreed that the Commission should undertake a broad consultative process and initiate national debate on key issues after rolling out the first phase of the civic education program. In many instances, a consultative process has been used to establish some minimum of peace and begin the process of reconciliation in a country. In Somalia, it was hoped that a consultative process could bring divided and fragmented groups together to discuss a common future for the state. Consultation ideally ensures that everyone's voice is heard and anchors the constitution in the aspirations of the people. Such a process increases the legitimacy of the constitution, especially if the consultations are undertaken by the Commission that will be preparing the draft.

At the same time, the consultation and dialogue process had to be developed with care to prevent spoilers from hijacking it or using it to increase divisions and conflict through adversarial or inflammatory messages. Moreover, the process required the Commissioners to travel to many areas of Somalia, creating important security issues to be addressed.

In my proposal, I also emphasized the importance of making it clear in advance to the population that not all issues

raised by the consultation and dialogue process would be addressed in a constitution. Consultations may reveal deep divisions and disagreements that are difficult to reconcile, and it is important to explain to all participants how such issues will be addressed. If a reasonable consensus cannot be reached at the time, options may include adopting a compromise solution (if the matter is minor), including a constitutional provision guaranteeing that the issue will be explored further through an appointed commission (if the issue is likely to require ongoing debate and negotiation), or forging consensus on a broad principle and leaving details for later consideration. Such a notion of “gradualism” was important in the Somali context, especially for dealing with potentially contentious issues.

3. *Preparation of the Draft Constitution (Six Months)*

All Somali participants agreed that once the consultation process was undertaken, a draft constitution would need to be prepared. The Transitional Federal Charter gave some basic guidance on the substance of the future constitution, providing that the constitution was to be based on article 71(9) of the Charter and that the Somali Republic should recognize and enforce all international human rights conventions and treaties to which it was a party according to Charter article 14.

I proposed that the Commission request comparative and expert assistance as it went about identifying key issues that would benefit from innovative and Somalia-specific solutions. Possible issues included decentralization/federal structures for the Somali context, the future role of traditional governance structures, electoral models appropriate to such a conflict-prone environment, judicial and legal structures incorporating customary and Shari’a law, citizenship rights in the future states, and solutions to contested land rights.¹³ We also

13. Some relevant work includes: IOAN M. LEWIS ET AL., *A STUDY OF DECENTRALISED POLITICAL STRUCTURES FOR SOMALIA: A MENU OF OPTIONS* (London School of Economics and Political Science ed., 1995). Other literature addressing many of these issues includes: DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS (Peter Harris & Ben Reilly eds., 1998); Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 PEACE & CHANGE 153 (2001); Pipa Norris, *Ballots Not Bullets: Testing Consociational Theories of Ethnic Conflict, Electoral Systems, and Democratization*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 206, 214 (Andrew Reynolds ed., 2002); Yash Pal Ghai, *Constitutional Asymmetries: Communal Representation, Federalism, and Cultural*

agreed that it would be useful for the Commission to have technical drafters to assist them in framing legal solutions to these issues once options were selected.

4. *Representative Validation Meeting (One–Three Months)*

The one point that remained open to debate, even after the Constitutional Commission was appointed, was whether a Representative Validation Meeting or some form of Constituent Assembly would be part of the process. The purpose of such a Validation Meeting would be to refine a draft of the constitution through negotiation and ensure that the draft represented the varied interests in the country.

The advice that I prepared for the government and the Commission highlighted two possible risks of taking a draft prepared by a Federal Constitutional Commission directly to referendum. First, given the small number of individuals in the Federal Constitutional Commission, such a draft might not adequately represent all interests, which could lead to it being rejected at referendum or even encouraging a return to conflict if certain groups felt left out and alienated. Second, a draft might be too idealistic and even unenforceable if it were to fail to take account of political realities. In addition, I indicated that the Transitional Federal Parliament should not act as the Representative Validation Meeting on its own. This was both because the Parliament was a transitional body and because it was not appointed with this aim in mind. In particular, the transitional government did not include adequate representation of the ICU, which, as discussed earlier, was beginning to see itself in opposition to the transitional government.

However, I also recognized that a broad election would be difficult to undertake in Somalia. In response, I suggested a modification of the Kenyan approach, which created a forum of Parliament with representatives of civil society and key inter-

Autonomy, in *THE ARCHITECTURE OF DEMOCRACY*, *id.* at 141; Timothy D. Sisk, *Power-Sharing After Civil Wars: Matching Problems to Solutions*, in *CONTEMPORARY PEACEMAKING: CONFLICT, VIOLENCE AND PEACE PROCESSES* 139 (John Darby & Roger MacGinty eds., 2003); Arend Lijphart, *Constitutional Design for Divided Societies*, *J. DEMOCRACY*, April 2004, at 96, 101; Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, *J. DEMOCRACY*, July 2004, at 5; KIRSTI SAMUELS & VANESSA HAWKINS WYETH, *INT'L PEACE ACADEMY, STATE-BUILDING AND CONSTITUTIONAL DESIGN AFTER CONFLICT* (2006).

est groups. I did not recommend following the Kenyan approach too closely, however, as this approach resulted in an extremely long and acrimonious debate in the Constitutional Assembly. In that case, also, over-dominance by the Parliament in the final stages caused the debate to degenerate into raw politics instead of remaining focused on the vision and future of the nation. Ultimately, the Kenyan process led to a failed referendum in that country.

Given all these factors, I suggested that a National Forum composed of representatives of Parliament (i.e., a parliamentary constitution committee, rather than the whole Parliament), the executive branch, the judiciary (e.g., the Chief Justice of the Supreme Court), the members of the Federal Constitutional Commission, and civil society (including women, religious leaders, youth, elders, and the business community) could be established to discuss and refine the draft that came out of the public consultation before it was submitted to a national referendum. This would avoid the problems of a broad election and would also provide for more legitimacy than a draft taken directly from the Commission to referendum.

V. A CRISIS OF IMPLEMENTATION: THE FAILURE TO INCLUDE THE ISLAMIST VOICES

These proposed steps to implement a constitutional process initially unfolded smoothly. However, despite an awareness of the importance of inclusivity and the risk that a process would collapse if it did not include all the key voices in the society, neither the international community nor the Transitional Government were taking active steps to include the Islamist voices in Somalia. Although we were all very aware of the looming crisis in representation that was implicit in the dramatic emergence of the ICU, it was not yet clear that the two movements were set on a collision course.

A. *The Constitutional Commission Act*

Following extensive discussion of comparative constitution-building experiences, and taking into account our emphasis on the importance of reaching an agreement on process before the Commission was formed, a bill creating the Constitutional Commission was drafted by Abdalla Deerow Isaaq, the Minister for Constitutional Affairs. The members of

the Commission were put forward on the same 4.5 clan ratio used for nominating the Parliament, and the bill was the first act adopted by Parliament.

Article 5(4) of the bill (the "Act") provided that the Commission was to follow the Charter and the principles of Islam, democracy, and social justice and that it was to ensure that the constitutional process "(a) promote[d] public participation, transparency and accountability to the people; (b) [a]ccommodate[d] the diversity of Somalis and their opinions; and (c) [p]romote[d] stability, peace and reconstruction."¹⁴

The Act also provided that the stages of the constitutional process would include: "a) Setting up; b) Research and internal consultation; c) Civic education; d) Public consultation; e) Report writing; f) Drafting and concluding; [and] g) Referendum."¹⁵

B. *The Federal Constitutional Commission*

After Parliament adopted the Act, the Federal Constitutional Commission was inaugurated and the members of the Commission (which had at that time not yet met, given that its members were still scattered in different parts of Somalia) were invited to participate in an initial workshop in Nairobi. The workshop aimed to introduce the Commissioners to comparative experiences in constitutional processes and to provide them with options for different modalities of support from the international community.

The members of the Commission proved to be engaged and interested in the experiences that were presented to them by various experts, including by the former Secretary of the Kenyan constitutional process. They seemed very aware of the risks and challenges they faced and determined to take their responsibilities seriously. At the public launch of the support program that was agreed to at the end of the workshop, Minister Abdallah Deerow made a heart-felt speech about how important it was to find a peaceful way forward in Somalia after so many years of violence and division.

14. Constitutional Commission Act art. 5, §4(a)-(c) (Somal. 2006) (on file with the New York University Journal of International Law and Politics).

15. *Id.*, annex.

At this meeting, the discussion did turn to the problems of inclusion and representation that were created by the political emergence but exclusion from official power of the ICU. However, no one anticipated how rapidly events would move. In fact, only two days after his return to Baidoa, Minister Deerow was shot and killed coming out of a mosque after Friday prayers.¹⁶ His assassination was a terrible loss, and marked a turning point in the relationship between the transitional government and the ICU.

In fact, the constitutional process has essentially been on hold since that point while the focus of the transitional government has been on a new and complex civil war, this time also involving Ethiopia, which the transitional government invited in to assist it in regaining control.¹⁷

VI. LESSONS LEARNT

In retrospect, it seems that the crisis with the ICU was built into the very structure of the Charter. During the last round of peace negotiations undertaken in Kenya, the Islamic factions (most of which were neither radical nor jihadist) were deliberately excluded. This exclusion was effected primarily on the urging of Ethiopia, which feared a neighbor with too much Islamic influence, but also with U.S. support.¹⁸ The transitional government that emerged from the 2002–2004 negotiations was thus controlled by Ethiopian allies and excluded most of the powerful Harwiye clan based around Mogadishu. It might have been possible to rectify this inherent fault line through an inclusive and participatory constitution-

16. See, e.g., Jeffrey Gettleman, *A Killing Strains Somalia's Hold on Its Tenuous Peace*, N.Y. TIMES, July 29, 2006, at A3, available at <http://www.nytimes.com/2006/07/29/world/africa/29somalia.html>.

17. Following the assassination of Minister Deerow in late July 2006 and an attempt on the President's life a few days later, the transitional government reached out to Ethiopia for support (the ICU, meanwhile, received aid from Eritrea).

18. For a detailed discussion of the U.S. strategy and the way in which Islamists were excluded from the peace talks, see INT'L CRISIS GROUP, AFRICA REPORT NO. 116, CAN THE SOMALI CRISIS BE CONTAINED? (2006), available at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/116_can_the_somali_crisis_be_contained.pdf; INT'L CRISIS GROUP, AFRICA REPORT NO. 100, SOMALIA'S ISLAMISTS (2005), available at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/100_somalia_s_islamists.pdf; INT'L CRISIS GROUP, TOUGH PART, *supra* note 9.

building process had the issue been identified as key at an earlier stage and sufficient pressure put on all the parties to consider the option of moving forward in an inclusive fashion.

At a more general level, the international community seems to have failed to take sufficient strategic account of the importance of adjusting its programs and approaches in light of the new, highly polarized atmosphere surrounding Islam in the world. The international community was caught by surprise by the rise of the Islamist movement and its support among the Somali population. It hadn't anticipated the impact of the return of radicalized young Somalis educated abroad, especially in Europe; a perception among Somalis that the United States and the United Nations would never accept even a moderate Muslim government and would only support a secular-western government; the ongoing and long-term work by Islamic charities in providing basic services such as water, health, education, transportation, and financial services;¹⁹ and the fact that many of the partners with whom the international community worked in Somalia (for reasons of both necessity and convenience) were former warlords or people seen as morally dubious. Thus, the international community was not able to engage constructively with the new movement as it emerged.

As in all well-intentioned state-building undertaken with international assistance, the devil is in the details. At each decision juncture, from the very first intervention in a country, compromises and choices are made that may undermine the success of the ultimate state-building mission. Moreover, those decisions are made in situations of limited knowledge and under serious time pressure.

In a highly polarized world religious climate, it is not surprising that even innocent actions may risk fanning religious divisions, since actors may be primed to read everything through that lens. The current situation in Somalia illustrates this development in a dramatic fashion and demonstrates that state-building policy must develop strategies to better take account of the current level of religious polarization in world politics.

19. In Mogadishu alone, Islamic charities manage or support three universities, a training institution, two hospitals, and schools that furnish education for one hundred thousand students.