



**Reconstituted Joint Monitoring and Evaluation Commission  
(RJMEC)**

# **POST-CONFLICT CONSTITUTION- MAKING PROCESSES**

***LESSONS AND BEST PRACTICES FOR SOUTH SUDAN***

**FINAL REPORT**

**2020**

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## ACRONYMS

B & H	Bosnia and Herzegovina
CAR	Central African Republic
CNRT	National Congress of the National Council for Timorese Resistance
CODESA	Convention for a Democratic South Africa
CoE	Committee of Experts
CPA	Comprehensive Peace Agreement
DDRR	Disarmament, Demobilization, Reintegration and Repatriation
DRC	Democratic Republic of the Congo
EPRDF	Ethiopian Peoples Revolutionary Democratic Front
KRG	Kurdistan Regional Government
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MPNP	Multi-Party Negotiating Process
NCC	National Constitutional Conference
NRM/A	National Resistance Movement/Army
PDPA	Peoples' Democratic Party of Afghanistan
R-ARCSS	Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan
RJMEC	Reconstituted Joint Monitoring and Evaluation Commission
RTGoNU	Revitalized Transitional Government of National Unity
TAL	Transitional Administrative Law
UCC	Uganda Constitutional Commission
UNTAET	United Nations Transitional Administration in East Timor

## **MESSAGE FROM THE INTERIM CHAIRPERSON OF RJMEC**

As the Interim Chairperson of the Reconstituted Joint Monitoring and Evaluation Commission (RJMEC), I am honored to bring to you this very detailed comparative report on the “post-conflict constitution making-processes”. This report builds on our continuous and ongoing efforts, to help the people of the Republic of South Sudan in their search for enduring peace, justice and good governance based on the rule of law and constitutionalism. It is intended to provide a useful reading and background material for the parties and stakeholders in the country as they consider the best possible path towards the making of a permanent constitution.

There are many cases documented in this study and many lessons to be drawn by any country embarking on such an important journey. As indicated in the report, the making of a permanent constitution is not an easy task, especially in transitioning countries emerging from conflicts. Many of the case studies were countries which were grappling with a myriad of issues akin to South Sudan today. However, some of these countries that have navigated this path before, did it successfully, but others not very successfully.

Having examined about twenty-one of such countries, with similar experiences and different outcomes, the study report offers a wide range of examples and approaches for the South Sudanese parties to learn from. It is my hope that it will contribute to their choices of a combination of approaches that would yield positive results within the South Sudan context. The R-ARCSS already lays a framework for the making of a permanent constitution which mirrors many of the processes highlighted in the study.

Under Chapter Six of the R-ARCSS, amongst other things provides that: it is the responsibility of the RTGoNU to initiate and oversee the permanent constitution making process; the RTGoNU is required to adequately budget for the process; there are clear parameters that be adhered to in the making of the permanent constitution; a law should be enacted to govern the process; the National Constitutional Review Commission should be reconstituted; a Preparatory Sub-Committee for the convening of the National Constitutional Conference should be appointed;

assistance must be sought from regional and international experts; the draft Constitutional Text must be adopted by the Constitutional Conference; the permanent constitution making process should be completed within 24 months; and the TNLA shall transform itself into the Constituent Assembly and adopt the Constitution.

Therefore, what the parties are expected to achieve at the constitution process workshop is simply to fill in the gaps, for example, on who will draft the text of the constitution, conduct civic education, public consultations, how they are constituted, when and where etc. including integrating some of the emerging best practices, including those highlighted in this report.

I want to sincerely thank Dr. Busingye Kabumba, our consultant for the thoroughness of his work in developing this report, as well as Mr. Stephen Oola, our Senior Advisor on Legal and Constitutional Affairs for his guidance on this matter and contributions to the report. I also wish to acknowledge the contributions of Dr. Job Baptist Akuni and Mr. Guy Gabriel for editorial comments.

I also extend my appreciation to the regional and International Partners and Friends of South Sudan who provided both financial and in-kind support to the RJMEC Secretariat to undertake this kind of work. Finally, I extend my gratitude to the Chief of Staff of the RJMEC and all the Staff at the Secretariat for their contribution to this report and I hope the parties and people of the Republic of South Sudan and all readers will find this report useful.

Sincerely,

**Amb. Lt. Gen. Augustino S.K Njoroge**  
**Interim Chairperson**  
**Reconstituted Joint Monitoring and Evaluation Commission**



## EXECUTIVE SUMMARY

This report examines the experiences of selected countries, in so far as these might provide lessons and best practices for South Sudan as it envisages a process towards the adoption of a permanent constitution. It compares the constitution-making processes adopted in 21 jurisdictions from around the world – Africa (13 countries), Asia (5), South America (1) and Europe (2).

The case studies were carefully selected, taking into account the extent to which their contexts resonated with that of South Sudan. The factors taken into account in this regard included, among others, experiences with armed conflict; ethnic tensions; militarization in the process of state building; and the presence of significant natural resources.

The study is presented in four parts. Section 1 introduces the study and provides a brief background to it. Section 2 contains a broad review of the selected case studies with individualized analyses of each of the jurisdictions, and at its end, a table containing summarized key facts about each profiled country's constitution-making process.

The report then proceeds with analysis, in Section 3, of the specific issues and features which emerge from the different case studies. This Section also identifies trends and best practices in this regard. Finally, Section 4 reiterates the key findings of the study, and makes appropriate recommendations for the envisaged constitution-making process in South Sudan.

In the main, the study identifies the need for: i) legitimate and effective constitution-making bodies, including a Constitutional Commission (charged with conducting public education and consultation, and developing the first draft of the new Constitution) and an elected Constituent Assembly (tasked with deliberating upon the draft Constitution and adopting a final draft Constitution); ii) the adoption of broad guiding principles to inform the constitution-making process, which should also allow for judicial oversight over the process; iii) robust public participation and engagement, which should be preceded by thorough, indepth and widespread civic education, and which should enable and encourage the participation of vulnerable or traditionally



excluded groups; iv) sufficient allocation of time for the process (1-3 years), and the separation of constitution-making from the negotiation of peace agreements; v) a limited role for the international community and expert groups so as to ensure a truly organic and home-grown constitutional document; vi) the adoption of the final draft Constitution by a referendum and vii) post-adoption safeguards, including continued civic education as well as judicial oversight over the new constitutional dispensation.

## 1.0 INTRODUCTION

The Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS), signed on 12<sup>th</sup> September 2018 in Addis Ababa, Ethiopia, mandates the Revitalised Transitional Government of National Unity (R-TGoNU) to initiate and oversee a permanent constitution-making process during the Transitional Period.<sup>1</sup> The permanent constitution-making process is expected to be completed not later than twenty-four (24) months following the establishment of the Transitional Period and shall be in place to guide the elections towards the end of the Transition.<sup>2</sup>

Article 6.7 of the Agreement mandates the Reconstituted Joint Monitoring and Evaluation Commission (RJMEC) to convene a workshop for the Parties to the peace agreement to discuss and agree on the details of conducting the constitution-making process. The workshop is expected to be facilitated by an institute renowned internationally for constitution-making. The outcome of the workshop shall form the basis for drafting the legislation to be enacted to govern the constitution-making process.<sup>3</sup>

In preparation for the convening of the constitutional process workshop for the parties to the R-ARCSS, the RJMEC Secretariat commissioned this study on comparative constitutional making processes, as part of generating the requisite background documents for the workshop, to inform the parties in their deliberations.

This report contains a comparative analysis of the constitution-making processes adopted by 21 jurisdictions from around the world, from which best practices, emerging trends and lesson-drawing can be made for the process in South Sudan. Although it was initially envisaged to analyze the experiences of 6 countries, the number of case studies was expanded so as to ensure greater explanatory power for the conclusions derived from their examination.

The jurisdictions for analysis were carefully chosen. In large part, this was on the basis of the circumstances in which the constitution-making processes occurred, which made

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<sup>1</sup> See Article 6.1, R-ARCSS 2018.

<sup>2</sup> See Article 6.4, R-ARCSS 2018.

<sup>3</sup> See Article 6.8 and 6.9, R-ARCSS 2018.

them apt for comparison with South Sudan. These circumstances include experiences with armed conflict; ethnic tensions; militarization in the process of state building; significant natural resources; and religious and other factors. The case studies selected and profiled herein are therefore relevant for the envisaged constitution-making process in South Sudan because of the similarities they have to the circumstances of South Sudan.

The study is presented in four parts. The present Section introduces the study and provides a brief background to it.

Section 2 contains a broad review of the selected case studies with individualized analyses of each of the jurisdictions, and at its end, a table containing summarized key facts about each profiled country's constitution-making process (Table A).

The report then proceeds with analysis, in Section 3, of the specific issues and features which emerge from the different case studies, including such matters as public participation; the role of experts; the question of time; public education; judicial review of constitutional drafts and others. This Section also identifies trends and best practices in this regard.

Finally, Section 4 reiterates the key findings of the study, and makes appropriate recommendations for the envisaged constitution-making process in South Sudan.

## **2.0 COMPARATIVE EXPERIENCES OF CONSTITUTION-MAKING**

The 21 jurisdictions examined are mainly drawn from Africa (13 countries),<sup>4</sup> with a few others from Asia (5),<sup>5</sup> South America (1)<sup>6</sup> and Europe (2).<sup>7</sup> The Constitutions in the selected countries all are modern Constitutions, made in the twentieth and twenty first centuries. The specific circumstances of the countries centre mostly around modern governance problems in developing and fragile states; armed conflict; ethnic

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<sup>4</sup> Benin, the Central African Republic, South Africa, Kenya, Uganda, Nigeria, Eritrea, Burundi, Ethiopia, the Democratic Republic of the Congo, Sudan, Somalia, and Rwanda.

<sup>5</sup> Afghanistan, Iraq, India, Pakistan, and East Timor.

<sup>6</sup> Colombia.

<sup>7</sup> Bosnia and Herzegovina and Poland.

rivalry and violence; disputes over significant natural resources, militarization of the state and others.

## 2.1. Benin

Benin gained its independence from France in 1960, and its current Constitution is the Constitution of 1990.<sup>8</sup> The Constitution of 1990 was drawn by a Constitutional Commission established by a National Conference that fast became a model for peaceful democratic transition in Francophone Africa,<sup>9</sup> and adopted by the people through a referendum, all in 1990.

Between 1963 and 1972, Benin experienced eight *coups d'état*, adopted ten constitutions, and saw ten presidents,<sup>10</sup> earning herself the moniker 'the sick child of Africa'. The political and constitutional instability that plagued the country between 1960 and 1972 had partial foundation in a North-South regional and ethnic divide. Benin's 1990 Constitution thus focuses on democratisation and the protection of fundamental rights and freedoms, and sought to 'heal the Benin political and constitutional instability syndrome.'<sup>11</sup> Twenty eight years after its current Constitution was promulgated, Benin has now seen four changes of government, has never missed any presidential or municipal election, and has never had its Constitution successfully amended although four attempts have been made, most recently in 2017 after the incumbent's attempt to introduce one-term limits for the presidency failed.

The apparent success of the 1990 Constitution is attributable to its drafting history (the enactment process) in addition to the role of civil society and the supervision by Benin's Constitutional Court.<sup>12</sup> More specifically, Benin's 'legacy of broadly inclusive and participatory processes in the making of the original (1990) constitution' is thought to have established 'expectations of similar levels of participation for significant

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<sup>8</sup> Available here: <[https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cf2ff43e6cfeb09dc125768e0048233f/\\$FILE/19243233.pdf/Benin%20-%20Constitution.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/cf2ff43e6cfeb09dc125768e0048233f/$FILE/19243233.pdf/Benin%20-%20Constitution.pdf)> last accessed on 1 October 2019.

<sup>9</sup> Dirk Kohnert, 'On the Divide between Constitutional Legislation and Constitutional Reality in the Democratization Process in Benin' (1996) 1 Nord-Sud, pp. 73-84. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1024706](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024706)> accessed 4 October 2019.

<sup>10</sup> HS Adjolohoun, 'Benin' <[http://www.icla.up.ac.za/images/country\\_reports/benin\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/benin_country_report.pdf)> last accessed on 4 October 2019.

<sup>11</sup> Adjolohoun (n 10 above) 2.

<sup>12</sup> As above.

amendments among the public and other stakeholders, including crucial veto players, such as courts,' thereby explaining the four failed attempts at amendment and thereby making the process of amending the existing constitution positively rigid.<sup>13</sup> A brief account of the history of the constitution-making process in Benin is given below.

In 1972, Mathieu Kérékou took power via a *coup d'état* and for the next 17 years, established a police state under a Marxist-Leninist and one-party state government. By 1989, the Kérékou government was facing an economic crisis accompanied by increased political agitation for reform. In this context, Kérékou bowed to pressure and facilitated the convening of a national conference in February 1990. The Constitution of Benin was then drawn up by a Constitutional Commission established by the National Conference and then approved by the people of Benin, in a referendum.

With regard to political and constitutional reforms, Kérékou appointed a committee of ministers to organise the national conference, a conference of all forces (parties, movements, other organisations etcetera). This committee was headed by Robert Dossou who had, in fact, been a moderate opposition leader.

The Dossou committee, comprising both government and opposition members, decided the composition and the agenda of the national conference. It also agreed on the basic principles that a new constitution had to meet. The Committee was therefore a roundtable of sorts and this contributed quite a lot to the success of the national conference by ensuring a basic understanding amongst key opponents before the conference met.

The national conference had approximately 488 members and about 10% of the seats were reserved for government supporters. 52 'political tendencies' were represented, including unionists, religious groups, agricultural producers, civil servants, students, and Beninese living abroad. Representatives of international missions and international financial institutions also attended the conference.

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<sup>13</sup> Dr. Segnonna Horace Adjolohon, 'Benin's Fourth Failed Constitutional Reform Effort: The Decisive Legacy of Participatory Processes' (2017) Constitutionnet. <<http://constitutionnet.org/news/benins-fourth-failed-constitutional-reform-effort-decisive-legacy-participatory-processes>> last accessed on 1 October 2019.

However, the vast majority of the members of the conference were drawn from the political and elite classes, contrary to the statement that the conference represented all 'living forces of the nation.'<sup>14</sup>

The conference sat for only ten days (19-28 February 1990), but because of the prior agreements reached by the Dossou committee, it was able to achieve a lot. Its proceedings were broadcast live on television and radio, and a great deal of international media attention was attracted.

In December 1989, Kérékou had also made a public request for suggestions on how to reconstruct the country, leading to the presentation of the seven volumes of responses to the national conference.<sup>15</sup> The conference deliberated on these views. The conference also declared itself sovereign, put in place a transitional constitution and dissolved the national legislature and executive existing then, replacing them instead with a transitional legislature and a transitional executive.

In Benin's case, there was a one-year transition period between the old military, one-party constitutional order and the new order based on the 1990 Constitution. The conference further adopted plans for multiparty elections and designated the High Council responsible for developing the final draft constitution.

In exchange for accepting the conference's declaration of sovereignty, President Kérékou gained a pardon for any crimes he might have committed during his past and then-present tenure.<sup>16</sup> This decision to grant Kérékou a pardon maintained the focus of the conference as a forward-looking entity.

Much of the conference's work was done in committees, the most significant of which was the Commission of Constitutional Affairs—which prepared the preliminary draft text for the constitution that was submitted to the High Council. The referendum of 2

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<sup>14</sup> M Brandt, J Cottrell, Y Ghai and A Regan, 'Constitution-making and Reform: Options for the Process' (2011) Interpeace, available at <[https://www.interpeace.org/wp-content/uploads/2011/09/2011\\_11\\_Constitution-Making\\_Handbook\\_English.pdf](https://www.interpeace.org/wp-content/uploads/2011/09/2011_11_Constitution-Making_Handbook_English.pdf)> last accessed on 30 July 2019.

<sup>15</sup> As above.

<sup>16</sup> John R. Heilbrunn, 'Social Origins of National Conferences in Benin and Togo' (1993) 31(2) *The Journal of Modern African Studies*, p. 293. <<https://www.cambridge.org/core/journals/journal-of-modern-african-studies/article/social-origins-of-national-conferences-in-benin-and-togo/286A023864E60E2FE9C02E25530BD54B>> last accessed 5 October 2019.

December 2 1991 resulted in overwhelming support for the draft constitution which was thus approved.

Benin's 1990 Constitution was therefore drafted by a Commission of Constitutional Affairs (a committee of the National Conference) and a High Council designated by the National Conference which had, in turn, been organised by a committee of ministers appointed by the President from amongst both the ruling 'party' and members of the opposition. This National Conference was broadly inclusive and participatory, and the final Constitution was ultimately adopted in a referendum thereby ending a one-year constitution-making process.

## 2.2. East Timor

In 1975, East Timor became independent of Portugal but was, nine days later, invaded and annexed by Indonesia. Indonesian rule lasted 23 years, ending in 1999 when in a UN-supervised independence referendum held on August 30, 1999, 78.5% of the Timorese population voted for independence from Indonesia and therefore against East Timor being an autonomous province of Indonesia.<sup>17</sup>

Following the independence referendum of 1999, the UN Security Council set up a transitional government for East Timor—the United Nations Transitional Administration in East Timor (UNTAET)—which provided both a civil administration and peace keeping force until 20 May, 2002 when the country became independent again with its own internal government. 20 May, 2002 is also the date on which East Timor's current constitution commenced operation.<sup>18</sup>

Most of the decision-making power with regard to the making of East Timor's 2002 Constitution resided with the UNTAET. UNTAET was under pressure to effect a speedy transition and therefore eventually leaned in favour of an expedited process that would involve election of a Constituent Assembly which would then be obligated to

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<sup>17</sup> Dionisio Babo Soares, 'Political Developments Leading to the Referendum' in James J. Fox and Dionisio Babo Soares (eds.), 'Out of the Ashes: Destruction and Reconstruction of East Timor' (2003) ANU E Press, p. 53. <<https://www.oapen.org/download?type=document&docid=459402#page=78>> last accessed on 25 September 2019.

<sup>18</sup> See: <<http://www.unesco.org/education/edurights/media/docs/50746c462d89e335c721fad02cda4291c2c60ee6.pdf>> last accessed on 28 September 2019.

draft and adopt a Constitution within 90 days. On the other hand, an umbrella group of the major political parties in East Timor at the time—the National Congress of the National Council for Timorese Resistance (CNRT) wanted a ‘long-term’ process characterised by broad-based public consultation.

UNTAET adopted the expedited process and thus, the making of East Timor’s 2002 Constitution was quite rushed. It was decided that an 88-member Constituent Assembly would be elected and given 90 days within which to enact a Constitution. It would also have the option of transforming itself into the first Parliament under the new Constitution. The drafting period was, however, later extended by a further ninety days.<sup>19</sup> The 88-member Constituent Assembly was sworn in on 15 September 2001 and the Constitution it enacted entered into force on 20 May 2002.

This Constitution was not subjected to a referendum. The election itself – of members to the Constituent Assembly – was seen by the UNTAET as a sufficiently democratic founding act that would legitimise the process. Although the Catholic Church in East Timor had proposed the adoption of a transitional interim constitution (as in South Africa’s case), this was rejected. For the Constitution to be adopted, 60 of the 88 members (68%) of the Constituent Assembly had to consent.

The voter turnout for the Constituent Assembly elections was 90%, and 16 political parties were engaged in the process. Only 27% of the elected members of the Assembly were women. FRETILIN, a political party, won most of the seats (55 out of 88), establishing it as the dominant party.

The discernible flaws in the process adopted in East Timor are several. Firstly, the makers of the constitution were not required to consult with the public. Secondly, the process was rushed and therefore civic education and public consultation were conducted simultaneously. This meant that the public had little time to reflect on the constitutional proposals put to them.<sup>20</sup>

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<sup>19</sup> Hilary Charlesworth, ‘The Constitution of East Timor, May 20, 2002’ (2003) in *Constitutional Developments*, ICON 1(2), p. 327. < <https://academic.oup.com/icon/article-abstract/1/2/325/650666>> last accessed 3 October 2019.

<sup>20</sup> The Timorese civil society had strongly advocated for the formation of an independent Constitutional Commission that would widely consult with the people and prepare a draft Constitution to be debated [and adopted] by an elected Constituent Assembly. As mentioned before, this longer process was not



Thirdly, because the process was rushed, the views of the people were not carefully gathered and analysed. Lastly, the process was not truly national/Timorese because of the far-reaching role played by UNTAET.

The Timorese Constitution of 2002 largely followed the draft constitution prepared by FRETILIN beforehand, and FRETILIN was the dominant party and voice.<sup>21</sup> This dominance made the Constituent Assembly less representative and affected consensus building. Nevertheless, a few compromises were made with other parties or interest groups in the process.

Due to pressure from civil society and the media, the Constituent Assembly eventually held a one-week public consultation process on the draft Constitution, although its planning was poor; particularly, the public had little time to read it, it was not always available in a language they understood, and their views were gathered in an *ad hoc* manner. Public consultation, in fact, had little impact on the final content of the Constitution.<sup>22</sup>

Thus, FRETILIN's dominance and the limited participation of the Timorese public both weakened the legitimacy of the 2002 constitution, which was not viewed as a product of broad consensus building and dialogue.

Conclusively, the Timorese Constitution was drafted by an elected, 88-member Constituent Assembly within 180 days,<sup>23</sup> in process that was organised by a UN Administration—the United Nations Transitional Administration in East Timor (UNTAET). The process was an expedited one without sufficient public participation and consultation, and no referendum was held on the final adoption of the Constitution. Furthermore, the limited civil education and public consultation that did occur was conducted simultaneously, and the constitution-making process largely followed a draft that had been drawn up by the dominant party—FRETILIN.

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adopted, although as a compromise, UNTAET organized thirteen commissions to educate the public and obtain their views and suggestions regarding the Constitution.

<sup>21</sup> Sven Gunnar Simonsen, 'The Authoritarian Temptation in East Timor: Nation Building and the Need for Inclusive Governance' (2006) 46(4) Asian Survey, p. 581-582. < [www.academia.edu/download/30853229/AS460405.pdf](http://www.academia.edu/download/30853229/AS460405.pdf)> last accessed 5 October 2019.

<sup>22</sup> As above.

<sup>23</sup> At first, 90 days were allocated, but later, a further 90 were granted.

### 2.3. Afghanistan

The current Constitution of Afghanistan is the Constitution of 2004. In 1978, the Peoples' Democratic Party of Afghanistan (PDPA)—with Soviet support—successfully deposed President Mohammed Daoud Khan. A civil war soon broke out, pitting Pakistani and USA-backed Afghan Mujahideen guerrillas against the PDPA government. In 1994, the Taliban—an Islamist fundamentalist military and political organisation—rose as one of the factions in the Afghan civil war and, between 1996 and 2001, controlled close to three quarters of Afghanistan.<sup>24</sup>

Following the September 11 attacks on US soil by Al-Qaeda, the US and its allies undertook a military campaign (part of Operation Enduring Freedom) against the Taliban government and ultimately overthrew it. This fall of the Taliban presented an opportunity for Afghans to forge a new consensus and reconstruct their state.

In 2001 a meeting of Afghan leaders in Bonn, Germany (called the Bonn Conference) to choose the leader of an interim authority, was held under the auspices of the United Nations.<sup>25</sup> These leaders represented a few political factions and sought to agree on a path of political transition. Although this Conference left out some key stakeholders, the Afghan political transition in general gradually became more representative.

Partly because of Afghanistan's perceived centrality to the war on terror, the international community was highly interested and involved in the transition process from Taliban rule and civil war to peace and democratic governance.<sup>26</sup>

The Bonn Conference led to the adoption of an agreement, the Bonn Agreement of 5 December 2001. This Agreement provided that the Afghan Transitional

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<sup>24</sup> Thomas H. Johnson and M. Chris Mason, 'Understanding the Taliban and Insurgency in Afghanistan' (2007) *Orbis*, pp. 73-74. < <https://apps.dtic.mil/dtic/tr/fulltext/u2/a593979.pdf>> last accessed on 28 July 2019.

<sup>25</sup> J. Alexander Their, 'The Making of a Constitution in Afghanistan' (2006-2007) 51 N.Y.L. Sch. L. Rev., p. 557. < <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nyls51&div=31&id=&page=>> last accessed 2 October 2019.

<sup>26</sup> As above. See, also, K Samuels 'Constitution building processes and democratization: a discussion of twelve case studies' (Stockholm: International IDEA, 2006), p. 13, available at <<https://agora-parl.org/sites/default/files/Constitution%20Building%20Processes%20and%20Democratization%20a%20Discussion%20of%20Twelve%20Case%20Studies.pdf>> (last accessed 10 August 2019).

Administration would establish a Constitutional Commission to prepare a draft Constitution which would then be debated and adopted by an Assembly – the Constitutional Loya Jirga. This Constitutional Loya Jirga was to be convened within eighteen months of the establishment of the Afghan Transitional Administration. The Bonn Agreement did not set a deadline for the adoption of a Constitution, and also did not provide for the mode of selection of members of the bodies charged with making a new Constitution.

The Constitutional Loya Jirga, which comprised 502 delegates, had:

- a) 52 experts appointed by the president (25 of these had to be women);
- b) 344 delegates elected by the approximately 18,000 former Emergency Loya Jirga representatives; and
- c) 24 elected refugees from Iran and Pakistan, 64 women elected by women's groups (2 women per province), 9 elected Kochi's (a nomadic people), 6 elected internally displaced persons from three provinces, and 3 elected Hindus and Sikhs.

This combination – of electoral and selection processes (direct, indirect and varied) – created a fairly representative body. Furthermore, the quotas for women, minorities, and marginalized groups such as internally displaced persons, led to the advancement of those special groups' rights in the final draft of the Constitution (with the backing of the United States and the United Nations).<sup>27</sup>

Although the Constitutional Loya Jirga's rules of procedure were drafted to try and exclude influential warlords out of the process, a few were elected and they exerted significant influence in the Assembly, at times silencing opposing views. Intense negotiations amongst the powerful warlords took place in private.

Furthermore, the United States ambassador to Afghanistan and the United Nations put forward certain non-negotiable constitutional positions that were, expectedly, followed by the Constitutional Loya Jirga.

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<sup>27</sup> As above.

In October 2002, a nine-member drafting committee was set up to prepare a draft of the Constitution.<sup>28</sup> Within six months, the Committee submitted to the interim President (Hamid Karzai) a draft Constitution which was largely similar to Afghanistan's 1964 Constitution. This Committee's work was primarily conducted behind closed doors and as a result, civil society and other groups felt excluded. In partial response to this problem, a more representative 32-member Constitutional Commission was mandated to carry out civic education and public consultation in each province of Afghanistan and within the diaspora.

An expanded secretariat was also put in place to assist with the numerous tasks involved. It created and maintained additional departments such as logistics, information and technology, press relations, civic education, public consultation, research and data processing, and protocol. The secretariat established offices in all eight regions of Afghanistan, and in Iran and Pakistan. It partnered with civil society which linked with approximately sixteen hundred local leaders to raise awareness about the process and key constitutional issues within all of the provinces. Mass media, such as radio and print media, were also utilized. However, despite the nationwide reach of the constitutional campaign, the limited time-frame set negatively affected its impact.

Between 8 June and 20 July, 2003, commissioners travelled (in teams of three; two men and one woman) to each Afghani region, Iran and Pakistan to hold public consultation meetings with key stakeholders such as women, religious leaders, farmers, the youth, and village elders. More than 15,000 Afghans orally gave their suggestions while the views of over 100,000 were gathered using questionnaires. However, the Constitutional Commission was not independent; and President Karzai and influential members of his cabinet largely decided the content of the final draft without taking the views of the public into account.

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<sup>28</sup> Barnett R. Rubin, 'Crafting a Constitution for Afghanistan' (2004) 15(3) *Journal of Democracy*, p. 10. < <https://muse.jhu.edu/article/170837/summary> > last accessed 6 October 2019.

On 4 January, 2004, nearly all members of the Constitutional Loya Jirga approved the draft Constitution which was signed and promulgated by President Karzai on 26 January, 2004.<sup>29</sup>

Unlike in many other constitution-making processes, the secretariat was not immediately disbanded upon adoption of the Constitution. It remained operational for three extra months in order to conduct a civic education campaign on the contents of the newly adopted constitution.<sup>30</sup>

Thus, the Afghan constitution-making process involved the drafting of a Constitution by a drafting committee, civic education and public consultation conducted by a Constitutional Commission, the functioning of a varied 502-member Constitutional Assembly (the Loya Jirga), and the operation of an expanded secretariat. Because the President and cabinet ultimately and unilaterally determined the Constitution's final content, the process was compromised.

#### **2.4. The Central African Republic (CAR)**

The Central African Republic became independent from France in 1960. Since then, it has had a series of Constitutions and is currently governed under the Constitution of 2016. This constitution was approved by referendum on 15 December, 2015 (93% in favour of adoption) and formally adopted on 27 March, 2016.<sup>31</sup>

CAR is a semi-presidential republic. The President (elected to a six-year term) is the head of state while the Prime Minister (appointed by the President) is the head of government.

Since 2012, the Central African Republic has had a number of civil wars and related internal conflicts. These are traceable to another civil war — the 'bush war' of 2004-2007/2012. Since 2014, it has been home to a UN Peace Keeping Mission – the United

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<sup>29</sup> K Samuels, (n 26 above).

<sup>30</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).

<sup>31</sup> Nathalia Dukhan, 'The Central African Republic Crisis' (2016) GSDRC, University of Birmingham, p. 8. < <https://www.africaportal.org/documents/12177/CAR-Report-.pdf> > last accessed 6 October 2019. Also see the Report of the UN Secretary General on the Situation in the Central African Republic, 2016, *S/2016/305*, < <https://reliefweb.int/report/central-african-republic/report-secretary-general-situation-central-african-republic-s2016305> > last accessed on 6 October, 2019.

Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).

In 2003, François Bozize's forces ousted President Ange-Felix Patasse, who was abroad at the time. In 2004, a civil war (the CAR bush war) broke out between rebel forces (the UFDR) and the Bozize government. Several peace agreements were signed between 2007 and 2012 in a bid to end the war. In 2012, more fighting broke out between rebels who accused the government of not honoring the peace agreements of 2007-2012. Currently, three major parties to the Central African Republican civil war remain; the ex-Seleka rebels (Muslim rebels), the anti-balaka (Christian) militia, and government forces under the leadership of President

In 2015, CAR authorities successfully launched a nationwide reconciliation process, in an attempt to address longstanding grievances and the drivers of fragility. Several months of broad consultations culminated in the May 2015 Bangui National Forum, a National Reconciliation Conference which defined the country's peace-building priorities and paved the way for elections. The runoff vote in February 2016 resulted in the victory of President Faustin Archange Touadéra, in what were described as peaceful and credible elections.<sup>32</sup>

CAR's constitution of 2016 was seen as crucial to restoring stability in the country and replacing the transitional charter. The constitutional referendum was also a step towards ensuring a return to normal constitutional order and stability in Central Africa.<sup>33</sup>

The main guiding principles of the 2016 constitution were key recommendations of the Bangui Forum, organised during the political transition of 2013, and related to the fight against impunity, tribalism, corruption and the prohibition of *coups d'état*.

The Bangui Forum (4-11 May 2015) brought together CAR's transitional authorities, political parties, religious and civil society representatives, and armed groups. It took place as part of a broader process which sought to advance the country's national

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<sup>32</sup> Central African Republic: National Recovery and Peacebuilding Plan 2017-21, p 1, available at: <<http://documents.worldbank.org/curated/en/817461516999933538/pdf/122994-WP-PUBLIC-CAR-RPBA.pdf>> (last accessed 15 August 2019).

<sup>33</sup> As above.

reconciliation and reconstruction following collapse of the Government and explosion of violence in late 2012. The Bangui Forum on National Reconciliation resulted into several significant recommendations including:

- a) a consensus on the need to carry out a revision of the Constitution and the code of nationality enabling Muslims to become CAR nationals; a referendum on the Constitution followed by Presidential, legislative and local elections, as well as a call to postpone elections to a realistic date;
- b) a consensual model of disarmament, demobilization, reintegration and repatriation (DDRR) allowing for the reintegration of rebels in the national armed forces or reinsertion into civilian life;
- c) The establishment of a special criminal court and a popular truth and reconciliation process, as well as a strong call against impunity; and,
- d) an agenda of humanitarian and development priorities including support to the return of refugees, infrastructural works and taxation of diamonds, oil and forestry exploitation.<sup>34</sup>

Thus, the Bangui Forum was relatively inclusive and operated as a negotiation round-table for conflicting parties.<sup>35</sup>

The Constitution of CAR was finally adopted by the Transitional Council, and by the people in a referendum held in December 2015. It came into force in 2016.

During the drafting process, a constitutional review workshop had been held, in which representatives of civil society, traditional leaders and other groups collaborated with both the Transitional Council and the Transitional Government to make amendments

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<sup>34</sup> Central African Republic reaches historic national reconciliation pact and agreement with armed groups on disarmament (2016), available at: <<https://reliefweb.int/report/central-african-republic/central-african-republic-reaches-historic-national-reconciliation>> (last accessed 15 August 2019).

<sup>35</sup> Christina Murray, 'National Dialogues and Constitution Making' (2017) Berghof Foundation, pp. 5 and 11. <[https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Other\\_Resources/NationalDialogue/NDH\\_Murray\\_ND\\_\\_\\_Constitution-making.pdf](https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Other_Resources/NationalDialogue/NDH_Murray_ND___Constitution-making.pdf)> last accessed on 3 October 2019.

to the draft Constitution. The revised draft was then submitted to the Constitutional Court, pursuant to a Transitional Charter.

The constitution-making process in CAR therefore involved a crucial role for a national reconciliation conference (the 'Bangui Forum') and a referendum in which the final constitution was approved and adopted.

## 2.5. Colombia

Colombia is a unitary, presidential, constitutional republic in South America. It gained its independence from Spain in 1810, and is governed according to its ninth Constitution (ninth since 1830)—the Constitution of 1991.

Before the Constitution of 1991 was promulgated on 4 July 1991, Colombia was governed by its Constitution of 1886. The Constitution of 1886 became outdated in the latter half of the 20<sup>th</sup> Century and Colombia became engulfed in political violence on multiple fronts, especially between the government and guerrilla movements and drug cartels. All round, there was a call for political and therefore constitutional reform.

Two referenda were held on the question of whether a 'constitutional' assembly should be convened to form a new Constitution, both being answered in the affirmative.<sup>36</sup> The constitutional assembly was thus established, which comprised 70 members elected by popular vote. Additionally, some membership slots—although lacking voting rights—were assigned to demobilised guerrillas. The Constitution subsequently formed is the current Constitution of 1991.

In the process of creating Colombia's current constitution, there was a great deal of constitutional litigation and therefore a prominent role for the Supreme Court of Justice of Colombia. For example, the Court ruled in 1991 that the restrictions placed on the enactment scope of the constitutional assembly was unlawful since, in exercising the primary constituent power of the people as ultimate popular sovereigns, the constitutional assembly could not be so limited.

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<sup>36</sup> Mauricio Cardenas, Roberto Junguito and Monica Pachon, 'Political Institutions and Policy Outcomes in Colombia: The Effects of the 1991 Constitution' (2006) University of California, Department of Political Science, p. 11. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1814757](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1814757)> last accessed on 5 October 2019.



The Colombian case is also interesting from the perspective that all persons who were members of the constitutional assembly were prohibited from running for congressional positions immediately filled after the coming into force of the Constitution of 1991.

It is noteworthy that the composition of the Constitutional Assembly was diverse; it including, for example, ten demobilised guerrillas and three representatives of indigenous groups.<sup>37</sup>

In sum, the Colombian Constitution-making process involved the holding of two referenda on the question of whether a new Constitution was necessary; the popular election of 70 members to the Constitutional Assembly; provision for non-elected membership slots to demobilised guerrillas; considerable litigation before the Colombian Supreme Court of Justice; and the prohibition of members of the Constitutional Assembly from being members of Congress immediately after the coming into force of the new Constitution.

## 2.6. Eritrea

In 1962, Eritrea was forcibly annexed by Ethiopia (under Emperor Haile Selassie). In 1991, the Ethiopian occupation of Eritrea ended when the Eritrean People's Liberation Front (EPLF) defeated Ethiopian forces within Eritrea. In a UN-supervised referendum organized thereafter, the Eritrean people overwhelmingly voted in favour of independence over a political association with Ethiopia.<sup>38</sup>

Eritrea's current Constitution is the Constitution of 1997. Although this Constitution was ratified and is, theoretically, in effect, it has never been implemented. This

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<sup>37</sup> Maria Pilar Garcia-Guadilla and Monica Hurdato, 'Participation and Constitution-Making in Colombia and Venezuela: Enlarging the Scope of Democracy?' (2000) Latin American Studies Association (LASA), p. 9. <[https://www.researchgate.net/profile/Maria\\_Pilar\\_Garcia\\_Guadilla/publication/228687478\\_Participation\\_and\\_constitution\\_making\\_in\\_Colombia\\_and\\_Venezuela\\_enlarging\\_the\\_scope\\_of\\_democracy/links/55afdade08ae32092e06f858.pdf](https://www.researchgate.net/profile/Maria_Pilar_Garcia_Guadilla/publication/228687478_Participation_and_constitution_making_in_Colombia_and_Venezuela_enlarging_the_scope_of_democracy/links/55afdade08ae32092e06f858.pdf)> last accessed 5 October, 2019.

<sup>38</sup> BH Selassie 'Constitution making in Eritrea: A process-driven approach', available at: <<http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1648&context=ncilj>> (last accessed 10 August 2019).

Constitution was drafted by a Constitutional Commission and ratified by a Constituent Assembly.<sup>39</sup>

The Constitutional Commission, which was accountable to the National Assembly, comprised a fifty-member Council and a ten-member Executive Committee. It was charged with organizing and managing a broad and inclusive national debate on the Constitution and to conduct public civic education on constitutional principles and practices.

The Commission was required to submit its draft to the National Assembly following the incorporation of the views of the public obtained from public consultations. The National Assembly would then consider and approve this draft before sending it to the Constituent Assembly for ratification.<sup>40</sup>

Public consultation took approximately two years and, after a debate on the draft by the public and with the approval of the National Assembly, the draft was submitted to the Constituent Assembly, which ratified it in 1997.<sup>41</sup> It has however been argued that, 'the Commission's process took place in an anti-democratic landscape that did not tolerate dissident political opinion or engage the different national communities in interest based negotiations.'<sup>42</sup>

Collectively, the entire process lasted over four years. As already noted, however, this Constitution has not been implemented.

Conclusively, Ethiopia's 1997 Constitution was drafted by a Constitutional Commission that was accountable to the National Assembly, and ratified by a Constitutional Assembly. The entire process lasted four years, including the two years

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<sup>39</sup> Simon M. Weldehaimanot, 'Eritrea's Two Constitutions: A Comparison' (2010) Eritrean Law Society Occasional Papers No. 4, pp. 15-17. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1576969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1576969)> last accessed on 3 October 2019.

<sup>40</sup> Selassie (n 38 above).

<sup>41</sup> As above.

<sup>42</sup> Joseph Eliot Magnet, 'Constitution Making in Eritrea: Why it is Necessary to go back to the Future' (2015) University of Ottawa Working Paper Series 2015-32, p. 2. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2691461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691461)> last accessed on 25 September 2019.

spent on public consultations, and the draft constitution was scrutinized by both the National Assembly (first) and a Constitutional Assembly.

## 2.7. Burundi

Burundi's current Constitution is the Constitution of 2005, which was adopted by referendum in February 2005.

The Constitution of Burundi of 2005 was promulgated in the context of political and institutional instability,<sup>43</sup> specifically a history of genocide, civil war, *coups d'état* and political assassinations. It was preceded by the signing of a peace agreement called the Arusha Peace and Reconciliation Agreement for Burundi (August, 2000), a transitional constitution (2001), and an interim constitution (2004). It was adopted through a referendum in which 92% of the people voted in favour of its adoption.

The Arusha Peace Agreement was signed by 17 parties,<sup>44</sup> and contained provisions for the permanent cessation of fighting, the creation of a transitional government, and the eventual creation of a final constitutional text for Burundi.

According to the Arusha Peace Agreement, the creation of the final or post-transition Constitution of Burundi was to be done by the transitional National Assembly and traditional Senate while the Constitutional Court was tasked with certifying that the text of the post-transition Constitution was compliant with the principles set forth in the first chapter of the Agreement.<sup>45</sup> Under the Constitution of 2005, Burundi is a unitary state with decentralisation featuring provinces and communes.

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<sup>43</sup> P Manirakiza, 'The 2005 Constitution of Burundi' University of Ottawa. <[http://www.icla.up.ac.za/images/country\\_reports/burundi\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/burundi_country_report.pdf)> last accessed on 1 October 2019.

<sup>44</sup> 1) The Government of the Republic of Burundi, 2) The National Assembly, 3) The Alliance Burundo-Africaine pour le Salut (ABASA), 4) The Alliance Nationale pour le Droit et le Développement (ANADDE), 5) The Alliance des Vaillants (AV-INTWARI), 6) The Conseil National pour la Défense de la Démocratie (CNDD), 7) The Front pour la Démocratie au Burundi (FRODEBU), 8) The Front pour la Libération Nationale (FROLINA), 9) The Parti Socialiste et Panafricaniste (INKINZO), 10) The Parti pour la Libération du Peuple Hutu (PALIPEHUTU), 11) The Parti pour le Redressement National (PARENA), 12) The Parti Indépendant des Travailleurs (PIT), 13) The Parti Libéral (PL), 14) The Parti du Peuple (PP), 15) The Parti pour la Réconciliation du Peuple (PRP), 16) The Parti Social-Démocrate (PSD), 17) The Ralliement pour la Démocratie et le Développement Economique et Social (RADDES), 18) The Rassemblement du Peuple Burundais (RPB), and 19) The Union pour le Progrès National (UPRONA).

<sup>45</sup> Article 15 (4&5) of the Arusha Peace Agreement.

In the case of Burundi therefore, the constitution-making process was heavily influenced by the Arusha Peace Agreement and its parties, and the National Assembly.<sup>46</sup> Public participation was greatly limited and restricted to the final referendum for approval of the draft Constitution.

In sum therefore, Burundi's 2005 Constitution was created within the framework of the Arusha Peace Agreement, by Burundi's traditional National Assembly and traditional Senate, and adopted by way of a referendum in 2005.

## 2.8. Ethiopia

Ethiopia is a two-tier federal state in which the sub-national regions are built along ethnic lines. Ethiopia's system of government thus features 'ethnic federalism'.<sup>47</sup>

Ethiopia's current constitution came into force in 1995 (although it was drawn up and adopted in 1994) and replaced the Constitution of 1987. The Constitution of 1987 had proclaimed a unitary albeit multi-ethnic state at the insistence of the Mengistu Haile Mariam regime and against the contentions of the Constitutional Commission.<sup>48</sup>

The 1995 Constitution of Ethiopia was adopted by a Constituent Assembly on 8 December 1994. It came into force on 21 August, 1995. This Constitution was keen on recognising Ethiopia's ethno-linguistic diversity.

Between 1991 and 1995, Ethiopia was governed according the 'Transitional Period Charter,' a negotiated arrangement between ethno-linguistic national fronts and therefore a quasi peace agreement. This Transitional Charter also detailed the process for making Ethiopia's current (permanent) Constitution. An 87-member Council of Representatives was tasked with establishing a Constitutional Commission to create a draft Constitution which would in turn be submitted to the said Council of

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<sup>46</sup> Stef Vandeginste, "Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error" 44(3) Africa Spectrum, p. 72. <  
<https://journals.sagepub.com/doi/pdf/10.1177/000203970904400304>> last accessed on 24 September 2019.

<sup>47</sup> JM Cohen (1995) "Ethnic Federalism" in Ethiopia, *Northeast African Studies* 2(2), 157-188. Michigan State University Press (retrieved 10 July 2019, from Project MUSE database).

<sup>48</sup> As above.

Representatives for adoption.<sup>49</sup> Upon adoption by the Council of Representatives, the draft would be 'presented to the people for discussion' and ultimately to an elected Constituent Assembly for adoption.<sup>50</sup> The Constituent Assembly would be elected pursuant to the final draft of the Constitution.

In producing the initial draft Constitution, the Constitutional Commission consulted a large number of foreign and local experts; and conducted comparative analyses of other countries' constitutions. According to observers, there was little meaningful public participation especially on the debate on devolution versus ethnic federalism.

The dominance of the EPRDF in the process to the detriment of other political groupings affected the legitimacy of the process as a broad-based and inclusive exercise.

It is noteworthy, in this regard, that Ethiopia has over 80 ethnic communities, the predominant ones being the Oromo, Tigray, Somali and Amhara communities. In 1996, Ethiopia's fourteen historical provinces were dissolved and in replacement, nine autonomous regions and two chartered cities (Addis Ababa and Dire Dawa) were created.<sup>51</sup> Six of the nine regions are each almost entirely occupied by a single ethnic group while the other three are ethnically diverse.<sup>52</sup>

When the military regime of Mengistu was overthrown in 1991, a coalition of four ethnically-based liberation fronts/movements took over.<sup>53</sup> This coalition, collectively referred to as the Ethiopian People's Revolutionary Democratic Front (EPRDF), comprised; the Oromo People's Democratic Organisation, the Amhara National Democratic Movement, the Tigrayan People's Liberation Front and the Southern Ethiopian People's Democratic Movement.<sup>54</sup> It is this coalition of ethnic-based

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<sup>49</sup> Assefa A. Lemu, 'The Making of the Ethiopian Constitution of 1995' (2018) Agia Forum. <<http://aigaforum.com/article2018/The-Making-of-Eth-Constitution-1995.htm>> last accessed on 21 September 2019.

<sup>50</sup> T Regassa 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice' (2010) *Afrika Focus* 23(1), 85-118.

<sup>51</sup> <<http://www.forumfed.org/countries/ethiopia>> last accessed on 24 September 2019.

<sup>52</sup> As above.

<sup>53</sup> See, generally, A Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) 35(2) *The Journal of Federalism*, pp. 313-335. <<https://academic.oup.com/publius/article/35/2/313/1875229/>> last accessed on 20 September 2019.

<sup>54</sup> As above.

liberation forces that oversaw the creation of an ethnic federalist state whose Constitution, under Article 39(1), proclaims that, ‘Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.’

These ethnocentric forces were preoccupied with the nationalities question when making the Constitution.<sup>55</sup> On the other hand, it is also thought that it was not possible to have had a Constitution that was not sensitive to the ethnic question and that in a positive sense, ethnic federalism has promoted inclusiveness with regard to some hitherto marginalised groups.<sup>56</sup>

Accordingly, Ethiopia’s 1995 Constitution was drafted by a Constitutional Commission set up by a Council of Representatives – after extensive consultation of experts but with insufficient public consultation – and eventually adopted by a Constituent Assembly.

## **2.9. Somalia**

Somalia has been at war since its inception as an independent republic. The commencement date for the Somali Civil War is a subject of dispute; what is clear is that it is still ongoing.

In August 2012, a Federal Government of Somalia was established, becoming the first attempt to create a central government for Somalia since the collapse of Siad Barre’s Somali Democratic Republic in 1991.

At the moment, the Federal Government of Somalia is governed under a provisional constitution—the Provisional Constitution of the Federal Republic of Somalia of 2012. This constitution provides for two levels of government (the Federal Government level and the Federal Member State level of government). Currently, Somalia has 5 states; Galmudug, Hirshabelle, Jubaland, Puntland and the South West State and they each have a degree of autonomy over regional affairs. They also have their own police and

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<sup>55</sup> As above.

<sup>56</sup> As above.

security forces. It remains to be determined whether Mogadishu (Benadiir) will become the sixth state or remain the capital for all regions.

The initial draft of Somalia's Provisional Constitution of 2012 was debated and adopted by a Constituent Assembly comprising 825 delegates. Although it was supposed to be approved by way of a referendum, this did not come to be. The process of establishing the Constituent Assembly and adopting a draft was, however, rushed due to a stringently set timetable, which affected the legitimacy of the process.<sup>57</sup>

The developments leading to the adoption of Somalia's Provisional Constitution of 2012 were complex and marked by significant international involvement. Its eventual adoption was preceded by the conclusion of agreements, such as the Djibouti Accord and the Kampala Accord, to unite different parties – such as the Alliance for the Re-liberation of Somalia and the Transitional Federal Government of Somalia.<sup>58</sup> There is an ongoing constitutional review process intended to culminate in the creation of a permanent constitution that will then be the basis of universal adult suffrage elections in 2020.

The Somali civil war has involved fighting by and between countless factions, many of them clan-based. The northern part of Somalia also declared independence as 'Somaliland' in 1991 and has been relatively stable to-date compared to the South, although no foreign government has recognised it as an independent state. These numerous warring factions make a non-federal union unlikely, especially in the absence of a strong central government that has enough coercive power to force unity and total control.

In sum, Somalia's current (provisional) constitution was debated and adopted by a Constituent Assembly comprising 825 delegates, and was not approved by way of a referendum although this was the original intention. The process of making this provisional constitution was also preceded by the signing of such agreements as the

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<sup>57</sup> Laura Hammond, 'Somalia Rising: Things are Starting to Change for the World's Longest Failed State' 7 (1) *Journal of Eastern African Studies*, p. 185. <<https://www.tandfonline.com/doi/pdf/10.1080/17531055.2012.755316>> last accessed on 24 September 2019.

<sup>58</sup> A Kouroutakis, 'The Provisional Constitution of the Federal Republic of Somalia: Process, Architecture, and Perspectives' (2014) *Cambridge Journal of International and Comparative Law* 3(3), 1-13.

Djibouti and Kampala Accords, in a bid to unite conflicting factions. There is also an ongoing constitutional review process, which is expected to culminate in the conclusion of a permanent constitution for Somalia.

## 2.10. Rwanda

Rwanda is a unitary republic whose current Constitution was promulgated in 2003, nine years after the Rwandan Genocide of 1994.

Between 1994 and 2003, Rwanda was governed under a series of texts collectively called the Fundamental Law. These comprised: the 1991 Constitution; the Arusha Peace Accord; the RPF Declaration of July 1994; and the Political Parties Agreement of November 1994.<sup>59</sup> The Rwandan Genocide of 1994 was ethnically motivated and saw the killing of hundreds of thousands of Tutsis and moderate Hutus.<sup>60</sup>

The constitution-making process in Rwanda, between 2002 and 2004, was initiated and controlled by the Rwandese Patriotic Front (RPF). The Government initiated it by setting up a Legal, Judicial and Constitutional Commission to consult widely with the population and to then prepare a new Constitution. In essence, the government itself appointed most of the commissioners, since twelve commissioners were elected by the National Assembly from a list of only 15 candidates. Furthermore, the Commission was not a broadly representative body, as it included mostly allies of the RPF.

The process of consultation itself was participatory. The commission undertook an extensive education and training campaign on the role of the constitution and then spent six months in the provinces undertaking public consultations, through public meetings and questionnaires.<sup>61</sup>

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<sup>59</sup> See, generally, J Kauzya, 'Political Decentralisation in Africa: Experiences of Uganda, Rwanda, and South Africa' (2007). < <https://www.semanticscholar.org/paper/POLITICAL-DECENTRALIZATION-IN-AFRICA%3A-EXPERIENCES-Kauzya/f98fe5d287a755896c93a750822d016f408a37d6> > last accessed on 2 October 2019.

<sup>60</sup> See, generally, T Turner (2007) 'Congo-Kinshasa leans Towards Federalism' Forum federation, available at <[http://www.forumfed.org/libdocs/Federations/V7N1e\\_cd\\_Turner.pdf](http://www.forumfed.org/libdocs/Federations/V7N1e_cd_Turner.pdf)> last accessed on 21 August 2019.

<sup>61</sup> Samuels (n 26 above) 18-19.



A draft was produced and submitted to the legislature where it was debated and amended. The transitional legislature was not a representative or democratically elected body, but rather an appointed one – the 8 political parties which had not participated in the genocide each received 13 seats, and 6 seats were allocated to the army.

The constitution was finally adopted with strong support in a referendum held in May 2003; and confirmed by the Supreme Court in June of the same year.<sup>62</sup> There is concern that the constitution favoured RPF interests and included too many limitations on freedom of expression and on political parties. The constitution was negotiated in an atmosphere of restricted political freedom which has existed since 1994 when the RPF entered Kigali.<sup>63</sup>

Nevertheless, in the aftermath of a horrific genocide, the participatory constitutional process seems to have helped to restore a sense common vision, instituted a governance framework, and began a process of dialogue and reconciliation. The inclusive and participatory process appears to have resulted in a high level of public support for the constitution.<sup>64</sup>

In conclusion, Rwanda's Constitution was adopted by way of a referendum after the National Assembly's debate on and adoption of a draft Constitution drawn by a 12-member Legal, Judicial and Constitutional Commission. The Commission, comprising 12 members who were appointed by the National Assembly from a list of 15 candidates, carried out public civic education and public consultation prior to finalizing its draft Constitution.

## 2.11. South Africa

The Republic of South Africa is a professedly unitary state although there are strong indications that it is a *de facto* federal republic. Its system of government has been

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<sup>62</sup> Takele Soboka Bulto, 'The Promises of New Constitutional Engineering in Post-Genocide Rwanda' (2008) 8 African Human Rights Law Journal, pp. 188 and 189. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1285966](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285966)> last accessed on 29 September, 2019.

<sup>63</sup> K Samuels (n 26 above), pp. 18-19.

<sup>64</sup> As above.

referred to as unitary federalism or integrated federalism. South Africa is currently divided into nine provinces, each with its own unicameral legislature and a Premier.

South Africa's current Constitution (the 1996 Constitution) came into force in February 1997, seven years after the end of apartheid in 1990 and three years after the country's first multi-racial elections were held in 1994.

This Constitution was negotiated and drafted in the context of ending apartheid and its associated violence, and ushering South Africa into an era of equality and non-discrimination. It was adopted by the South African Parliament, which had been elected in 1994 under the first multiracial elections and under the interim Constitution of 1993. The interim Constitution was itself adopted by a coalition of the main negotiating parties – under an umbrella known as the Multi-Party Negotiating Process (MPNP) – and it created a transitional government to move South Africa from the apartheid and transitional eras into the new era of unity, peace and non-discrimination.<sup>65</sup>

The MPNP had succeeded a similar umbrella process referred to as the Convention for a Democratic South Africa (CODESA), which had failed because of structural/organisational inefficiencies, brinkmanship, and a lack of compromise-seeking.

As part of the process of making South Africa's 1996 Constitution, the Constituent Assembly was bound by 34 Constitutional Principles, developed by the MPNP and included within the fourth schedule of the interim constitution. The final Constitution was required to conform with these principles. Additionally, the Constitutional Court was given the mandate to certify whether the draft Constitution complied with the principles. Indeed, in its first certification appraisal, the Court determined that the initial draft Constitution did not comply with several of the mandatory principles.

To ensure that the final Constitution was legitimate, credible and accepted by all South Africans, the process of its drafting involved many South Africans in the largest public

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<sup>65</sup> Christina Murray, 'A Constitutional Beginning: Making South Africa's Final Constitution' (2001) 23(3) University of Arkansas at Little Rock Law Review, pp. 813 and 814. <<https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1383&context=lawreview>> last accessed on 15 September 2019.

participation programme ever carried out in the country. After nearly two years of intensive consultations, the Constitutional Assembly negotiated a draft which was a representative integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly.<sup>66</sup> The South African Constitution therefore broadly represented the collective wisdom of the South African people, arrived at by general agreement.<sup>67</sup>

Conclusively therefore, the South African Constitution was drafted and adopted by the South African Parliament of 1994, in accordance with guidance provided under the interim Constitution of 1993. It was a result of a broadly inclusive and participatory process with extensive public consultation; and which included a role for the Constitutional Court in ensuring that the final draft complied with the mandatory constitutional principles set out in the interim constitution.

## 2.12. Iraq

In March 2003, Iraq was invaded by a coalition of forces led by the United States, which succeeded in deposing the Ba'athist government (led by Saddam Hussein) in favour of a Coalition Provisional Authority and later an interim and finally a permanent government. The military occupation of Iraq came to an end in 2011.

The current constitution of Iraq was approved by referendum and came into force in 2005 while the country was still under occupation.<sup>68</sup> This constitution divides Iraq into 19 provinces (governorates).<sup>69</sup> The country currently has one autonomous region—Iraqi Kurdistan (comprising the governorates of Duhok, Hawler, Silemani and Halabja).<sup>70</sup>

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<sup>66</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).

<sup>67</sup> The Drafting and Acceptance of the Constitution. Available at: <<https://www.sahistory.org.za/article/drafting-and-acceptance-constitution>> (Last accessed 15 August 2019).

<sup>68</sup> As above.

<sup>69</sup> D O'Driscoll (2015) 'Autonomy Impaired: Centralisation, Authoritarianism and the Failing Iraqi State, Ethnopolitics' available at: <<http://dx.doi.org/10.1080/17449057.2015.1086126>> last accessed on 18 August 2019.

<sup>70</sup> For a general political-constitutional analysis of the place of Kurdistan in Iraq, see: Michael J. Kelly, 'The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause' 114(3) Penn State Law Review. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1608334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1608334)> last accessed on 18 September 2019.

With the exception of its Kurdistan region,<sup>71</sup> most of Iraq was governed under a unitary government before 2003.<sup>72</sup> The 2005 Constitution thus recognised Kurdistan as a federal region, and its government as the valid sub-national authority there. Outside Kurdistan, a decentralisation system of governorates was recognised and the potential for different governorates to combine and form a region was also included.<sup>73</sup> In 2017, the Kurdistan Regional Government (KRG) organised an independence referendum in which approximately 93.25% of votes cast were cast in favour of independence from Iraq. The federal government of Iraq, however, rejected the referendum's legality.<sup>74</sup>

In 2014, ISIS gained control of over one third of Iraqi territory, raising some questions regarding the effectiveness of the Iraq federal government.<sup>75</sup>

The United States regarded the establishment of a new Constitution for Iraq, founded on democratic principles, as essential to the end of its occupation and therefore the restoration of Iraq's independence. Establishing such a new Constitution was also the UN's objective, and had the endorsement of the UN Security Council. The adoption of Iraq's new Constitution, therefore, became the focus of diplomatic negotiations.<sup>76</sup>

The UN, through a Special Representative, Lakhdar Brahimi, mediated between the United States administration and the most influential Shia leader, Grand Ayatollah Al-Sistani, concerning the constitution-making process. While the United States had proposed two alternative methods of making the Constitution, Al-Sistani opposed both and insisted on the constitution being made by an elected Assembly.<sup>77</sup> The Ayatollah finally agreed that after a period of interim constitutional arrangements, an elected assembly would draft the Constitution before its adoption by way of a referendum.

Between 2004 and 2006, during the transitional period, Iraq was governed under the Transitional Administrative Law (TAL) of Iraq. The TAL was a fairly comprehensive

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<sup>71</sup> Granted autonomy by Iraq's 1970 Constitution.

<sup>72</sup> O'Driscoll (n 69 above).

<sup>73</sup> As above.

<sup>74</sup> BBC, "Iraqi Kurds Decisively Back Independence in Referendum," <<https://www.bbc.com/news/world-middle-east-41419633>> last accessed 5 October 2019.

<sup>75</sup> <<https://www.forumfed.org/countries/iraq>> last accessed on 2 October 2019.

<sup>76</sup> Brandt, Cottrell, Ghai and Regan (n 14 above). See, also Iraq's Constitutional Process: Shaping a vision for the country's future. United States Institute of Peace, Special Report (February 2005). Available at: <<https://www.usip.org/sites/default/files/resources/sr132.pdf>> last accessed on 3 October 2019. (last accessed 15 August 2019).

<sup>77</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).

document, which addressed most aspects of state governance. Elections were scheduled for January 2005, and the assembly was expected to serve both as an ordinary legislature and as the Constituent Assembly.

The TAL required the national assembly to draft the constitution ‘by encouraging debate on the constitution through regular general meetings in all parts of Iraq and through the media, and receiving proposals from the citizens while writing the constitution.’<sup>78</sup>

Furthermore, the draft constitution was to be published and publicly distributed, to encourage public debate on it.<sup>79</sup> In the event, however, there was little public participation and the time given for the drafting was also limited.

The Commission’s discussions took long to commence, starting in June 2005 and leaving less than six weeks for the drafting process. Some of this time was also taken up by presentations given by experts on a variety of topics. However, the Commission made considerable progress after that, working through its subcommittees, although consensus was hard to establish since top party leaders were not part of the Commission.<sup>80</sup>

The commission requested for a one-time extension of up to six months but soon retracted this request after resistance from the United States’ ambassador.<sup>81</sup> In September, 2005, the draft Constitution was taken to the Assembly for approval. The late submission and rigid timeline left little time for comprehensive analysis and discussion of the draft before the holding of the referendum at which it was approved.<sup>82</sup>

Thus, the draft Constitution became law under rather difficult circumstances; and following a problematic process.<sup>83</sup>

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<sup>78</sup> Article 60 of the Transitional Administrative Law.

<sup>79</sup> Article 61 of the Transitional Administrative Law.

<sup>80</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).

<sup>81</sup> As above.

<sup>82</sup> As above.

<sup>83</sup> As above.

### 2.13. India

India's Constitution was adopted by a constituent assembly in November 1949 and entered into force in January 1950. The drafting and finalising of this Constitution took 2 years and 11 months.

Election of members of the Constituent Assembly was done from provincial legislatures and certain princely states. The Assembly often enlisted the help of prominent public figures who were non-members, as members of created committees for specific deliberations.

Agitation for independence and the creation of a constituent assembly had been going on in India for many years and finally succeeded with the Assembly's creation in 1946. When the constituent assembly was planned, a partition was not envisaged. The partition of the country into India and Pakistan as two separate states, however, happened in the middle of the constitution-making process, and had an effect on the Constituent Assembly in so far as delegates whose seats were founded in constituencies now part of Pakistan lost their seats.<sup>84</sup> By August 1947, Pakistan's cessation had been decided and all princely states apart from Kashmir joined the Indian federation.

The constituent assembly was mainly indirectly elected by provincial assemblies. The constituent assembly began its substantive work by adopting an 'Objectives Resolution' which articulated basic principles such as freedom of speech, equality, protections for minorities and the people as the source of all power and authority.

The constitutional advisor to the Constituent Assembly relied on comparative analyses of the constitutions of the Ireland, the USA, the UK, Australia, South Africa, Canada and others. The constituent assembly had various administrative committees, including a steering committee, which set the agenda for debates. It also had substantive committees such as those on provincial constitutions and union powers.<sup>85</sup>

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<sup>84</sup> As above. Also see, Arvin Elangovan, 'The Making of the Indian Constitution: A Case for a Non-nationalist Approach' (2014) 12(1) History Compass, p. 7. <[www.academia.edu/download/37869670/ElangovanHistoryCompass.pdf](http://www.academia.edu/download/37869670/ElangovanHistoryCompass.pdf)> last accessed on 5 October 2019. Most of the Muslim League members had excluded themselves from the Assembly right from the start of the functioning of the Assembly

<sup>85</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).

There was also an advisory committee on fundamental rights, minorities, and tribal and excluded areas.

The drafting committee analysed the draft constitution which had been made by the constitutional advisor on the basis of various committee reports. The constitutional advisor's draft was prepared in October 1947, and was presented to the Constituent Assembly in February 1948.<sup>86</sup>

The draft was widely circulated to legislatures, courts, and ministries. Comments were made by several persons and institutions. A general debate on major principles lasted five days, with a more detailed debate being conducted from November 1948 to October 1949.<sup>87</sup>

The Constituent Assembly adopted the final Constitution, and it came into force on January 26 (Republic Day in India).

In sum, the Indian Constitution was drafted by a Constitutional Advisor, reviewed by a drafting committee of an indirectly elected Constituent Assembly, and then debated and adopted by that Constituent Assembly. The process took close to three years and involved consultation of prominent public figures, use of comparative analyses and reliance on an 'Objectives Resolution' to guide the Constituent Assembly in the execution of its functions.

#### 2.14. Kenya

Kenya has a unitary government and is governed according to its 2010 Constitution. Following the presidential elections of 2007, Kenya erupted into ethnically charged violence – the Kenyan crisis of 2007-2008 – leading to over 1000 deaths and the displacement of hundreds of thousands of people.<sup>88</sup>

In the end, a coalition government was formed with, among others, Mwai Kibaki as President and Raila Odinga as Prime Minister. One of the terms of this agreement was

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<sup>86</sup> As above.

<sup>87</sup> As above.

<sup>88</sup> L Smith (2009) 'Explaining violence after recent elections in Ethiopia and Kenya' *Democratization*, 16:5, 867-897

the issue of enacting a new Constitution for Kenya, which eventually was realized with the 2010 Constitution.

The making of Kenya's 2010 Constitution began with national conferences; in which it was agreed that the independence constitution be comprehensively reviewed. It was also decided to have a Constitutional Assembly, to be called the National Constitutional Conference. A Review Commission was created to prepare a draft which would be submitted to the National Constitutional Conference (the Conference).<sup>89</sup> The Commission had twenty-nine members, most of whom were chosen because of their association with the key political parties.

While the Commission created its own educational materials, it also co-opted NGOs to undertake civic education. The Commission held meetings in all parliamentary constituencies, where it collected the views of the public. At such meetings, the use of language interpreters (oral and sign language) was critical for effective communication and participation. The Commission received thirty-six thousand written submissions, and analyzed all of them across several months. The results from this analysis were made widely available.<sup>90</sup> The commission produced a draft constitution and also authored a report, paving way for further public consultation.

The next stage of the process — the engagement of the National Constitutional Conference — delayed for months due to parliamentary elections. The Conference had 629 members. All 222 Members of Parliament were members of the Conference and each district elected three members while civil society elected about a third of the members.

The conference's proceedings were dynamic and highly political, featuring both manipulation and bribery. Issues such as the system of government to adopt were controversial. Decisions were reached by consensus and in its absence, by at least two thirds of the delegates voting. There was also a possibility for using a referendum to resolve an impasse on any highly disputed issue, although no such referendum was

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<sup>89</sup> Brandt, Cottrell, Ghai and Regan (n 14 above). See, also, Samuels (n 26 above) 10.

<sup>90</sup> Brandt, Cottrell, Ghai and Regan (n 14 above).



needed. As the Conference was concluding its work, a Court held that a referendum was necessary.

The Kenyan Government, however, persuaded Parliament to endorse a draft constitution which differed, in significant ways, from the draft that had been adopted by the Conference. This prompted the public to reject this revised draft in the referendum that followed.

A subsequent law mandated the creation of a Committee of Experts (CoE) – composed of three foreigners and six Kenyans – which would be tasked with analyzing the existing drafts, and resolving the contentious issues arising therefrom. The draft eventually prepared by the CoE drew significantly from that adopted by the National Constitutional Conference. The CoE draft was revised upon public consultation and then submitted to a parliamentary committee. Eventually, the draft was then sent to Parliament as a whole.

The existing constitution indicated that Parliament could, by a 65% majority, propose changes, but was not mandated to adopt the draft. Actual adoption was to be done by way of a referendum in which a majority vote in favour of adoption was needed. Additionally, there would have to be at least 25 percent affirmative votes in at least five of eight provinces. The envisaged referendum was held in August 2010 and more than 67% of the voters approved the new Constitution. It came into force upon its promulgation on 27 August 2010.<sup>91</sup>

In conclusion, Kenya's Constitution-making process commenced with the holding of national conferences, and eventually culminated into the creation of a draft Constitution by a Review Commission, adoption by a Constituent Assembly called the National Constitutional Review Conference, further review by a committee of experts, and eventual adoption by way of a referendum. There was widespread public consultation, and the Constituent Assembly comprised 629 members, 222 of whom

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<sup>91</sup> Christina Murray, 'Political Elites and the People: Kenya's Decade Long Constitution-Making Process' (March 2018) p. 11. < [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3147154](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3147154)> last accessed on 30 September 2019.

were existing Members of Parliament and a third of whom were chosen by the civil society.

### 2.15. Uganda

Uganda is a unitary republic governed under its Constitution of 1995. After the National Resistance Movement/Army (NRM/A) led by Yoweri Kaguta Museveni came to power in Uganda in 1986, it established a Ministry of Constitutional Affairs to develop a participatory constitution-making process.

In 1988 a twenty-one-member Constitutional Commission—the Uganda Constitutional Commission (UCC)—was established and tasked with developing a new draft constitution for Uganda.<sup>92</sup> The UCC was to seek the views of the people of Uganda and to stimulate public discussions and awareness of constitutional matters in order to formulate a national consensus on constitutional matters.

The Commission did its work in a phased manner. Firstly, in 1989, it developed an agenda of constitutional issues by consulting widely, holding or attending about 140 seminars all over the country. These seminars were attended by close to seventy thousand people. This process identified twenty-nine main constitutional topics and many lesser issues.

Secondly, in 1990, the Commission developed educational materials on the agenda of issues and also published copies of past constitutions. It prepared a 111-page book called ‘Guidelines on Constitutional Issues’; a pamphlet containing 253 ‘guiding questions’; a pamphlet on how to make written submissions; and educational posters. Commissioners were also divided into teams to present the educational materials at seminars held in all of Uganda’s 890 sub-counties.

Thirdly, in 1991, the Commission focused on receiving the views of the people in the form of written submissions and oral presentations, and held more public meetings across the country to receive these views. The level of public participation and

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<sup>92</sup> Constitution Making for Peace, ‘Uganda,’ < <https://constitutionmakingforpeace.org/case-studies-items/a-12-uganda-1995/>> last accessed on 1 October 2019.

engagement exhibited was therefore high.<sup>93</sup> From late 1991 to early 1992, the Commission analysed all views received, translated submissions presented in local languages and summarised all submissions thematically into twenty-nine agenda issues. In the process, it was argued that consensus emerged on most issues.<sup>94</sup> In the latter part of 1992, the Commission's final report and a draft Constitution were prepared and presented to the government. These were edited published in 1993.<sup>95</sup>

The Uganda Constitutional Commission also prepared an interim report, in 1991, on the adoption of the new Constitution. It featured an analysis of the people's views, showing opposition to giving the national legislature the task of making a new Constitution, and favouring the formation of a Constituent Assembly. The government accepted this advice, and, in March 1994, elections for the Constituent Assembly were held.

The Constituent Assembly comprised 214 directly elected constituency members; 39 indirectly elected women's representatives; and 31 interest-group representatives.

The Constituent Assembly commenced its work in May 1994 and undertook its tasks in through the following procedure. First, there were two months of general debates in which all members of the Assembly expressed their views on the draft Constitution as a whole. Secondly, select committees examined particular parts of the draft constitution, and third, select committee recommendations for amendments were debated.<sup>96</sup>

The Assembly's rules of procedure required decisions to be made by consensus, unless a motion supported by more than fifty members required a division. Proposals to amend the draft Constitution required the support of two thirds of the members voting, and an amendment supported by a majority that was less than two thirds was classified as 'contentious' and re-voted upon after a recess for public consultation. If, in the re-vote, the contentious proposed amendment still failed to receive the support of two

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<sup>93</sup> AM Tripp, 'The Politics of Constitution Making in Uganda' in Laurel E. Miller 'Framing the State in Times of Transition: Case Studies in Constitution Making' (2010) US Institute of Peace Press, p. 163. < [https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6\\_Framing.pdf](https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6_Framing.pdf)> last accessed on 29 September 2019.

<sup>94</sup> Constitution Making for Peace (n 92 above).

<sup>95</sup> As above.

<sup>96</sup> As above.

thirds of the members voting, a referendum on the issue was required. However, no need for such a referendum arose.

Finally, there were several weeks of consideration of the whole draft to remove inconsistencies and to improve the precision of the language on many issues.<sup>97</sup>

On 22 September 1995, the Constituent Assembly adopted the amended draft constitution and the final Constitution was signed by the President and promulgated on 8 October 1995. Although the President was entitled to call a referendum on any issue within the final draft Constitution prior to its promulgation, he never did so.

Thus, Uganda's 1995 Constitution was drafted by a Constitutional Commission after extensive public consultations and education. It was debated and adopted by a Constituent Assembly, which was mostly directly elected before its final promulgation. The whole process lasted about 7 years.

## 2.16. Nigeria

Nigeria's current Constitution is that of 1999, which was basically imposed by the military.

The then military government appointed a committee of 25 men to draft the constitution; and the Constitution so drafted was signed into law in May 1999. Even when it did canvass public opinion, the Government largely ignored the public's recommendations.

This Constitution is perceived as the product of the military fiat rather than popular will. To take but one example, its text fails to ensure greater inclusion within the governance framework, for women, Muslims and marginalized ethnic groups.<sup>98</sup>

The Constitution also gives the Executive branch significant control over the Judiciary, thus undermining the doctrine of checks and balances.

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<sup>97</sup> As above.

<sup>98</sup> Samuels (n 26) 20-21.

There is widespread public demand for meaningful constitutional reform based on public consultation. For instance, the Citizens' Forum for Constitutional Reform, a coalition formed of over 100 civil society associations, undertook a guided a dialogue and public participation process, which resulted in the drafting of a model constitution in 2002. Presently however, the 1999 Constitution remains supreme.

### **2.17. Bosnia & Herzegovina (B&H)**

Bosnia and Herzegovina (B&H) is a federal republic located in South-Eastern Europe. It was one of the six republics that once collectively comprised the Federal People's Republic of Yugoslavia (the former Yugoslavia).<sup>99</sup> The former Yugoslavia was home to a number of ethnicities during its existence; Serbs, Croats, Muslims, Slovenes, Albanians, Macedonians, Montenegrins and Hungarians.

As the former Yugoslavia started to break up in the early 1990's, a declaration of independence by B&H sparked off a brutal civil war – the Bosnian war (1992-95) – between ethnic Bosnians, Serbs, and Croats.<sup>100</sup> This civil war was fought in B&H and also involved the countries of Serbia and Croatia.

This civil war came to an end with the signing of a peace agreement in Dayton (Ohio, USA) between B&H, Serbia and Bosnia. The Agreement is also often referred to as 'the Dayton Accords'.<sup>101</sup> Annex 4 of the Dayton Accords functions as B&H's Constitution and it effectively established B&H as a sovereign state comprising two parts; the Republic of Srpska (populated primarily by Serbian ethnic groups) and the Federation of Bosnia and Herzegovina (also known as the Bosniak-Croat Federation and primarily populated by the Bosnian Muslim and Croatian ethnic groups). B&H also has a district, known as Brcko, that is jointly managed by Srpska and the Federation of Bosnia and Herzegovina.

The Bosnian war was characterised by ethnic cleansing and in fact involved a genocide of Bosniaks (Muslim Bosnians). The Dayton Accords therefore sought to create a

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<sup>99</sup> <<https://forumfed.org/countries/bosnia>> last accessed on 22 September 2019.

<sup>100</sup> As above.

<sup>101</sup> As above.

permanent peace. In this regard, the creation of a federal government, which consciously shared power amongst the different ethnic groups, was critical.<sup>102</sup>

The ethnic feature underlying the government of B&H is unmistakable. For example, the Presidency of B&H comprises three persons; a Serb, a Bosniak and a Croat—and the Chair of this presidency rotates amongst them every 8 months within their 4 year term.<sup>103</sup> Additionally, the Council of Ministers, members of which are selected by the majority parties on the basis of strictly defined ethnic representation rules, has executive responsibility for foreign and economic policy amongst other areas.<sup>104</sup>

Each entity has its own government which deals with internal matters not overseen by the Council of Ministers, and their own Supreme Courts and lower courts.<sup>105</sup> The supreme final court within the country, however, is the Constitutional Court of Bosnia and Herzegovina, which has jurisdiction over decisions made in constitutional disputes between the entities.<sup>106</sup>

The Bosnian constitution-making process is instructive. It demonstrates that, for a constitution crafted in a peace agreement, implementation requires ongoing negotiation and effort, just as the peace agreement does overall. The Dayton negotiations did not produce a clear mandate or plan to address lingering obstacles to implementation. An arbitrarily short and unrealistic deadline to implement the peace agreement fully, imposed by the international community, prevented the international community from engaging on implementation as creatively and strategically as it could have. This failure meant that each step toward implementation required continual renegotiation, both within the international community and Bosnian actors. Implementation was thus awkward, compromised, and hesitant.<sup>107</sup>

The Dayton Constitution also set up an ongoing political struggle between central and Entity control over Bosnia's economic and political life. It did not dictate strict rules

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<sup>102</sup> S Keil (2013) *Multinational Federalism in Bosnia and Herzegovina*, Southeast European Studies, Ashgate.

<sup>103</sup> <<https://forumfed.org/countries/bosnia>> last accessed on 23 September 2019.

<sup>104</sup> As above.

<sup>105</sup> As above,

<sup>106</sup> As above.

<sup>107</sup> JC O'Brien 'The Dayton Constitution of Bosnia and Herzegovina' p. 332, available at <[https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter12\\_Framing.pdf](https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter12_Framing.pdf)> last accessed 20 August 2019.

on these matters, but it did set individual rights and international security issues outside Entity control and it restricted the possibility of amendment. Moreover, today the constitution remains as Bosnia's founding document. Bosnians themselves accept it as the basis for the country's political system, even those who want to see it amended.

Accordingly, B&H's constitution-making process was and remains inextricably linked with the negotiation of a peace agreement (the Dayton Accords) to end the Bosnian war, and was created in that context.

## **2.18. The Democratic Republic of the Congo (DRC)**

Since independence, the DRC has experienced over 21 armed conflicts – including the Congo Wars, three genocides, one secession attempt and three coups. Endowed with significant natural resources, it is home to over 250 ethnic groups speaking over 700 languages and dialects, and approximately four active rebel groups. It is also host to the UN's largest peace keeping force in the world.

Its current Constitution came into force in 2006, and is its sixth constitution since independence in 1960. This Constitution divides DRC into 25 provinces and the capital, Kinshasa.<sup>108</sup>

The 2006 Constitution was adopted in a referendum held on 18 and 19 December, 2005 with an 84% result in favour of adoption. It replaced the interim Constitution of 2003, which had been made pursuant to the Agreement of Sun City, that ended the Second Congo War.

This Constitution was drafted and finalised, in 2004, by a Constitutional Commission which mainly comprised representatives of the major political parties in DRC. There was little public discussion in relation to this draft Constitution, and therefore limited public participation.<sup>109</sup> The draft Constitution was further presented to and adopted by

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<sup>108</sup> T Turner (2007) 'Congo-Kinshasa leans Towards Federalism' Forum federation, available at [http://www.forumfed.org/libdocs/Federations/V7N1e\\_cd\\_Turner.pdf](http://www.forumfed.org/libdocs/Federations/V7N1e_cd_Turner.pdf) last accessed on 21 August 2019.

<sup>109</sup> James Thuo Gathii, 'Popular Authorship and Constitution Making: Comparing and Contrasting DRC and Kenya' (2008) 49(4) William and Mary Law Review, 1113-1115.

the National Assembly (the Transitional Parliament) before the holding of the referendum.<sup>110</sup>

The 2006 Constitution of the DRC creates a quasi-federal system and recognises four national languages that are commonly spoken across the different regions.<sup>111</sup> Its quasi-federal status is a compromise between the federalists and the centralists.<sup>112</sup> Federalism is controversial in the context of DRC because it is prone to secessionist movements (historically, Katanga and contemporarily, the Kongo people in the West and the Hutu and Tutsi of the East) and civil wars.<sup>113</sup> Provinces can keep up to 40% of their revenues including revenues from mineral resources – an incentive against secession by large and mineral rich provinces like Katanga.<sup>114</sup>

In sum, DRC's Constitution was drafted by a Constitutional Commission, which mainly comprised the major political parties in DRC. The constitution-making process did not involve broad public consultation, although the Constitution was ultimately adopted through a national referendum.

## 2.19. Pakistan

Pakistan is a demographically diverse and geographically expansive federal republic. Its current constitution was promulgated in 1973, and amended in 2010 to give more autonomy to its provinces and reduce presidential power.<sup>115</sup>

The Constitution of 1973 was the first Pakistani Constitution to be made by elected representatives of the people. It was enacted by an elected Constituent Assembly, whose members were elected in 1970. No fresh elections were made even after Bangladesh (East Pakistan) seceded in 1971.

At a time when the Assembly had approved only a third of the provisions of the draft Constitution, the National Awami Party (NAP) boycotted the process due to the

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<sup>110</sup> As above, p. 1115.

<sup>111</sup> As above.

<sup>112</sup> The 1964 Luluabourg constitution, which was expressly federalist, sparked off conflict between the federalists and the Lumumbists.

<sup>113</sup> Turner (n 108 above).

<sup>114</sup> As above.

<sup>115</sup> <<http://www.forumfed.org/countries/pakistan>> last accessed 25 September 2019.



rejection of its demands (including the recognition of the multi-ethnic Pakistani society and equality for all four ethno-national groupings in Pakistan). The Islamic character of the Pakistani State and the issue of federalism were the most contentious issues in the process of making Pakistan's 1973 Constitution.<sup>116</sup>

Some commentary on the issue of federalism in Pakistan is in order, given its antecedents in the politico-legal history of the State. Pakistan has four provinces (Punjab, Sindh, Khyber Pakhtunkhwa and Baluchistan), one federal capital (Islamabad), two self-governing administrative territories (Azad Kashmir and Gilgit Baltistan) and a unit of semi-autonomous federally administered tribal areas.

Pakistan became an independent state in 1947 upon the partition of British India into the predominantly Muslim nation of Pakistan and the predominantly Hindu Republic of India.<sup>117</sup> The two states fought a series of wars between 1947 and 1948 and in 1968 over the Kashmir region which they both claimed as sovereign territory and continue to do so to this day.<sup>118</sup> In 1971, Pakistan's Eastern Provincial wing fought a war of liberation against the central government of Pakistan, resulting in victory for the Eastern Province and its breakaway to form the independent state of Bangladesh.

The first Pakistani constitution was adopted in 1956, and abrogated by the military in 1958. The second constitution was adopted in 1962, and also abrogated by the military in 1969. Pakistan's third and current constitution was adopted in 1973. It was immediately preceded by an interim Constitution, which came into force in April 1972.<sup>119</sup>

The 1973 Constitution was drafted by a 25-member committee, appointed by the National Assembly in 1972. The draft was introduced as a bill in the National Assembly, and was overwhelmingly passed before being approved by the President and entering into force in 1973. Prior to the drafting and eventual passing of this Constitution, a convention and agreement of the leaders of Pakistan's main parties had

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<sup>116</sup> As above.

<sup>117</sup> As above.

<sup>118</sup> As above.

<sup>119</sup> Craig Baxter, 'Constitution Making: The Development of Federalism in Pakistan' 14(12) Asian Survey, p. 1079. < <http://pgil.pk/wp-content/uploads/2014/12/The-Development-of-Federalism-in-Pakistan1.pdf>> last accessed on 3 October 2019.

been arranged and reached, respectively, at the instance of Zulfikar Ali Bhutto, resulting in the ‘constitutional accord’ of 1972.

Thus, the process of making Pakistan’s 1973 Constitution involved a predominant role for the National Assembly rather than a separate Constituent Assembly, and was preceded by a successful convention of the leaders of major parties.

## 2.20. Sudan

On 11 April, 2019, Sudan’s Omar al Bashir was removed from the presidency by the Sudanese military amidst public protests against his 30-year rule. His Vice President and Defence Minister, Lt. Gen. Ahmed Awad Ibn Auf declared himself *de facto* Head of State and suspended the Constitution of 2005.

Sudan’s 2005 Interim National Constitution – now suspended – outlined a decentralised and broadly federal structure of government for the country.<sup>120</sup> At the time, it also encompassed South Sudan, which subsequently became an independent and sovereign State in its own right.<sup>121</sup> Sudan currently has 18 States, each with its own governor and council of ministers.<sup>122</sup>

Shortly after Sudan attained self-government from colonial rule, the First Sudanese Civil War broke out. Its primary cause was the 1946 merger of the Northern and South Sudanese regions into a single administrative unit.<sup>123</sup> The decision to merge the two was taken without consultation of the South Sudanese leaders who, occupying the predominantly Christian, culturally sub-Saharan and politically weaker although mineral-rich South, feared that the Arab-led Khartoum government would dominate and politically persecute them.<sup>124</sup>

This war ended in 1955 when the Northern government promised to implement a federal system of governance. This promise was reneged on, thereby sparking off a

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<sup>120</sup> <<http://www.forumfed.org/countries/sudan>> last accessed on 27 September 2019.

<sup>121</sup> As above.

<sup>122</sup> As above.

<sup>123</sup> See, generally, Eghosa E. Osaghae, ‘Federalism and the Management of Diversity in Africa’ (2004) 5(1) Identity, Culture and Politics, pp. 162-178. <<https://www.codesria.org/IMG/pdf/eghosa.pdf>> last accessed 2 October 2019.

<sup>124</sup> <<http://www.forumfed.org/countries/sudan>> last accessed 26 September 2019.

long civil war. The second civil war began in 1983 and was largely a continuation of the first coupled with attempts by the Khartoum government to impose Sharia law on the South.<sup>125</sup> It formally ended with the signature of the Comprehensive Peace Agreement (CPA) in 2005, which provided for the status of South Sudan as an autonomous region for a six year period followed by the 2011 referendum in which 98% of the votes cast were in favour of South Sudan's secession.<sup>126</sup>

Pursuant to the 1972 Addis Ababa Agreement, Sudan's Col. Jaafar Nimeiri had also created a federal structure in Sudan and granted South Sudan regional autonomy for about 11 years<sup>127</sup> before breaching its terms himself by, among other things, attempting to redraw boundaries and grant the North the agriculturally and mineral rich areas of the South. The South's autonomy was eventually rescinded by Col. Nimeiri and Sharia law introduced throughout Sudan, thus provoking renewed fighting.

Sudan's Interim National Constitution (now suspended) incorporated the 2005 Comprehensive Peace Agreement and explicitly created a federation under which South Sudan was an autonomous region right up to the point of its secession.<sup>128</sup> With regard to the making of Sudan's Interim National Constitution, it is evident that the peace talks were used as a direct constitution-making process.<sup>129</sup> In Sudan's 2005 Constitution was thus created in the context of a peace Agreement — the 2005 Comprehensive Peace Agreement — and is a direct product of those peace talks.

## 2.21. Poland

The role of constitution-making in Poland has historically been a Parliamentary one. Two constitutions that briefly applied between the First and Second World Wars were made by the Polish Parliament. When the Second World War ended, the USSR took control of Poland and imposed a 'Soviet-style' constitution in 1952.<sup>130</sup>

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<sup>125</sup> As above.

<sup>126</sup> As above.

<sup>127</sup> This arrangement had also been incorporated into Sudan's 1973 Constitution.

<sup>128</sup> <<http://www.forumfed.org/countries/sudan>> last accessed 26 September 2019.

<sup>129</sup> P Dann and Z Al-Ali, 'The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor' (2006) *Max Planck UNYB* 10, at 448, available at: <<http://www.ssrn.com/abstract=1799308>> (last accessed on 30 August 2019).

<sup>130</sup> Lech Garlicki and Zofia A. Garlicka, 'Constitution Making, Peace Building, and National Reconciliation: The Experience of Poland' in Laurel E. Miller, *FRAMING THE STATE IN TIMES OF TRANSITION* (2010) US Institute for Peace Press, pp. 391-416.

The Soviet-imposed Constitution of 1952 was to apply until the eventual adoption of the Polish Constitution of 1997. The 1997 Constitution was developed by a parliamentary committee, adopted by Parliament, and approved by way of a referendum in 1997.<sup>131</sup>

Between 1988 and 1989, Poland used roundtable arrangements as a model for constitution-making, bringing the term into popular use and influencing the use of the same approach in Eastern Europe, Latin America, and other places. With the impending fall of the communist system in Eastern Europe, members of the Polish Communist Party saw the strategic importance of negotiating with the opposition as a way of obtaining a favourable future, especially since the Communist Party did not have the clout to create acceptable changes in the country's Constitution on its own.

Initially, the main parties (the Communist Government and a Solidarity trade union movement) had over six months of clandestine negotiations about a roundtable, under the mediation of the Catholic Church. The main roundtable was convened thereafter in February 1989 and only met occasionally as most of its work was accomplished by committees and working groups. In April of 1989, a 'Roundtable Agreement' was completed.<sup>132</sup>

The Polish Parliament mostly made moderate amendments to the Constitution, many of which were intended to protect the Communists in some respects while enabling the participation of the opposition in competitive politics. These amendments were made just days after the completion of the Roundtable Agreement referred to above.

Constitutional changes made through the Roundtable process paved the way for further changes, which could be made through more broadly representative entities and processes. There were initial attempts to wholly replace the 1952 constitution and the two chambers of the Polish Parliament – the Sejm and Senate – separately established different committees in this respect between 1989 and 1991. Each committee developed its own draft Constitution without cooperation. This slowed

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<sup>131</sup> Ewa Poplawska, 'Constitution-making in Poland: Some Reflections on Popular Involvement' (2008) 45 *Zbornik radova Pravnog fakulteta u Splitu*, pp. 280-282.

<sup>132</sup> As above.

down the process of Constitutional change but continued the amendments to the 1952 Constitution.

In April 1992, the Polish Parliament adopted the Constitutional Law on the Procedure for Preparing and Enacting the Constitution.<sup>133</sup> This law provided for a Constitutional Committee comprising members of both the Sejm and the Senate; and non-voting representatives of the President, the Cabinet and the Constitutional Court. The envisaged process involved the receipt and consideration of proposals, the creation of a draft Constitution and deliberations on it by a National Assembly consisting of both chambers of Parliament; the further consideration of amendments proposed by the President; and ultimate approval by way of a referendum.

Although there were delays in implementing the envisaged process due to parliamentary and presidential elections in 1993 and 1995 respectively, and political opposition; a final draft constitution was approved by the National Assembly in 1997. It was also approved by a referendum in the same year. The public turn out in the referendum was just 43%, and just over 50% of those who voted were in support of the Constitution. The referendum did not have a pegged minimum participation requirement.

Thus, Poland's 1997 Constitution was developed deliberated upon, and adopted by the Polish Parliament, and approved by way of a referendum, albeit with a modest turn out.

**Table A: Key Highlights of the Constitution-Making Processes within the Case-Studies**

Country	Key Highlights of Constitution-Making Process
1. BENIN	<p><u>1990 Constitution</u></p> <ul style="list-style-type: none"> <li>• Substantively commenced with the convening of a broadly representative National Conference;</li> <li>• Drafted by a Commission of Constitutional Affairs (a committee of the National Conference) and submitted to a 'High Council' designated by the National Conference;</li> <li>• National Conference organized by a broadly representative committee of ministers, including members of the opposition;</li> <li>• Final Constitution adopted in a referendum;</li> </ul>

<sup>133</sup> Garlicki and Garlicka, (n 130 above) p. 394.

Country	Key Highlights of Constitution-Making Process
	<ul style="list-style-type: none"> <li>• Constitution-making process was broadly inclusive and participatory;</li> <li>• The Constitution-making process lasted a year.</li> </ul>
<b>2. EAST TIMOR</b>	<p><u>2002 Constitution</u></p> <ul style="list-style-type: none"> <li>• Drafted by an elected, 88-member Constituent Assembly within 180 days;<sup>134</sup></li> <li>• Process organized by a UN Administration—the United Nations Transitional Administration in East Timor (UNTAET);</li> <li>• Process was expedited, not satisfactorily participatory, and involved limited consultations;</li> <li>• No referendum held on the adoption of the Constitution;</li> <li>• Elections to the Constituent Assembly were conducted in a multiparty environment;</li> <li>• The makers of the Constitution were not categorically required to consult with the public;</li> <li>• Civic education and public consultation were conducted simultaneously;</li> <li>• The people's views were not properly analyzed due to time constraints;</li> <li>• Largely followed a draft constitution which had been prepared by FRETILIN, the dominant party in East Timor.</li> </ul>
<b>3. AFGHANISTAN</b>	<p><u>2004 Constitution</u></p> <ul style="list-style-type: none"> <li>• Process preceded by the signing of an Agreement—the Bonn Agreement—by the representatives of a few political factions, under UN sponsorship;</li> <li>• Draft constitution drawn by a nine-member drafting committee;</li> <li>• Civic education and public consultations conducted by a 32-member Constitutional Commission;</li> <li>• Constitutional commission also conducted consultation of Afghans in the Diaspora (mainly Iran and Pakistan);</li> <li>• Constitutional Assembly (the 'Loya Jirga') had 502 delegates comprising experts, refugees and other representatives;</li> <li>• Expansive Secretariat set up to assist with the numerous tasks;</li> <li>• Secretariat remained operational for three months after the Constitution was made, in order to conduct civic education on the new Constitution and its applicability;</li> <li>• Constitution approved by the Constitutional Assembly and then signed and promulgated by the President of Afghanistan;</li> <li>• Process was not truly independent, and the President and Cabinet unilaterally decided the Constitution's final content;</li> <li>• Influence of Afghan 'war lords' was present despite procedural attempts to exclude it.</li> </ul>
<b>4. CAR</b>	<p><u>2016 Constitution</u></p> <ul style="list-style-type: none"> <li>• Constitution approved in a referendum;</li> <li>• Main Constitution-making process preceded by a national reconciliation conference—the Bangui Forum—in which an agenda for reconstruction was agreed to.</li> </ul>
<b>5. COLOMBIA</b>	<p><u>1991 Constitution</u></p>

<sup>134</sup> At first, 90 days were allocated, but later, a further 90 were granted.

Country	Key Highlights of Constitution-Making Process
	<ul style="list-style-type: none"> <li>• Two referenda held on the question of whether a new Constitution ought to be made;</li> <li>• A Constitutional Assembly, comprising 70 members elected by popular vote along party lines, was set up;</li> <li>• Constitutional Assembly had some, non-elective membership slots for demobilized guerillas;</li> <li>• Considerable constitutional litigation conducted before Colombia's Supreme Court of Justice in respect of the constitution-making process before and during the said process;</li> <li>• Members of the Constitutional Assembly not allowed to be members of the Congress established immediately after the coming into force of the new Constitution;</li> <li>• Election of members of the Constitutional Assembly done simultaneously with the voting on the second referendum on whether a new Constitution ought to be made.</li> </ul>
<b>6. ERITREA</b>	<p><u>1997 Constitution</u></p> <ul style="list-style-type: none"> <li>• Drafted by a Constitutional Commission which was accountable to the National Assembly and also charged with conducting public consultation and public civic education on constitutionalism;</li> <li>• Constitutional Commission's draft reviewed and approved by the National Assembly before submitting it to the Constitutional Assembly for ultimate ratification;</li> <li>• Constitutional Commission comprised a fifty-member Council and a ten-member Executive Committee;</li> <li>• Public consultation took two years, and the entire constitution-making process lasted four years;</li> <li>• Constitution has never been implemented.</li> </ul>
<b>7. BURUNDI</b>	<p><u>2005 Constitution</u></p> <ul style="list-style-type: none"> <li>• Adopted by referendum in 2005;</li> <li>• Preceded by transitional and interim Constitutions;</li> <li>• Created by the transitional National Assembly for Burundi and the traditional senate, with the Constitutional Court being tasked with certifying its compliance with the Arusha Peace Agreement.</li> </ul>
<b>8. ETHIOPIA</b>	<p><u>1995 Constitution</u></p> <ul style="list-style-type: none"> <li>• Adopted by a Constituent Assembly;</li> <li>• Constitutional Commission set up by a Council of Representatives (which in turn derived power from a 'Transitional Period Charter') to draw a draft constitution and present it to the Council of Representatives for adoption before final adoption by a Constituent Assembly elected in accordance with the approved draft Constitution;</li> <li>• Foreign and local experts consulted;</li> <li>• Little meaningful public consultation conducted;</li> <li>• Dominance of EPRDF to the detriment of other groups.</li> </ul>
<b>9. SOMALIA</b>	<p><u>2012 (Provisional) Constitution</u></p> <ul style="list-style-type: none"> <li>• Debated and adopted by a Constituent Assembly comprising 825 delegates;</li> </ul>

Country	Key Highlights of Constitution-Making Process
	<ul style="list-style-type: none"> <li>• Not approved by way of a referendum although such had been the initial intention;</li> <li>• Significantly influenced by international actors;</li> <li>• Preceded by the signature of Agreements such as the Djibouti and Kampala Accords to unite conflicting factions;</li> <li>• Currently an ongoing constitutional review process aimed at the adoption of a permanent constitution.</li> </ul>
<b>10. RWANDA</b>	<p><u>2003 Constitution</u></p> <ul style="list-style-type: none"> <li>• Adopted by way of a referendum;</li> <li>• A 12-member Legal, Judicial and Constitutional Commission (LJCC) established to consult the public and formulate a draft Constitution;</li> <li>• Members of the LJCC elected by the National Assembly from a list of 15 candidates;</li> <li>• Draft Constitution debated and adopted by the National Assembly;</li> <li>• Public consultations preceded by an educational campaign on the nature and role of the Constitution;</li> <li>• Created in an environment of restricted political freedom.</li> </ul>
<b>11. SOUTH AFRICA</b>	<p><u>1996 Constitution</u></p> <ul style="list-style-type: none"> <li>• Preceded by an interim Constitution—the Interim Constitution of 1993;</li> <li>• Drafted and adopted by the Parliament of South Africa which had been elected in 1994;</li> <li>• Process guided and bound by 34 constitutional principles included within the Interim Constitution of 1993 (which had itself been made by an umbrella organization of different major negotiating parties – the Multi-Party Negotiating Process);</li> <li>• Constitutional Court mandated to certify that the draft Constitution complied with all 34 Constitutional principles stipulated in the 1993 Interim Constitution;</li> <li>• Extensive public consultation and participation;</li> </ul>
<b>12. IRAQ</b>	<p><u>2005 Constitution</u></p> <ul style="list-style-type: none"> <li>• Approved by way of a referendum;</li> <li>• Extensive US and UN involvement;</li> <li>• Very limited public participation;</li> <li>• Limited time for drafting;</li> <li>• Draft constitution drawn by a Constitutional Commission and submitted to the National Assembly;</li> <li>• Limited time for a comprehensive analysis and debate on the draft Constitution due to a rigid timeline.</li> </ul>
<b>13. INDIA</b>	<p><u>1949 Constitution</u></p> <ul style="list-style-type: none"> <li>• Constitution-making process lasted three years;</li> <li>• Members of the Constituent Assembly indirectly elected, mostly from existing provincial legislatures;</li> <li>• Constituent Assembly enlisted the help of prominent public figures who were not members of the Assembly;</li> <li>• Process partially disrupted by the India-Pakistan partition;</li> <li>• Constituent Assembly adopted, at the outset, an ‘Objectives Resolution’ setting out basic constitutional principles to guide the process;</li> </ul>



Country	Key Highlights of Constitution-Making Process
	<ul style="list-style-type: none"> <li>• First draft developed by Constitutional advisor; and scrutinized by the drafting committee of the Constituent Assembly who then it presented to the whole Assembly;</li> <li>• Final Constitution adopted by the Constituent Assembly.</li> </ul>
<b>14. KENYA</b>	<p><u>2010 Constitution</u></p> <ul style="list-style-type: none"> <li>• Process commenced with the holding of national conferences; <ul style="list-style-type: none"> <li>• Drafted by a 29-member Review Commission which also submitted a report;</li> <li>• Reviewed and debated by a 629-member National Constitutional Conference;</li> <li>• A draft constitution – different in major respects from the one adopted by the National Constitutional Conference – endorsed by Parliament but rejected by the people in a referendum;</li> <li>• Committee of Experts appointed to review existing drafts and address existing contentious issues;</li> <li>• Final 2010 Constitution approved by the people in a referendum.</li> </ul> </li> </ul>
<b>15. UGANDA</b>	<p><u>1995 Constitution</u></p> <ul style="list-style-type: none"> <li>• Drafted by a Constitutional Commission after extensive public consultations;</li> <li>• Debated and adopted by a Constituent Assembly;</li> <li>• Civic education carried out, especially through dissemination of educational material (publications);</li> <li>• Entire constitution-making process lasted over 7 years;</li> </ul>
<b>16. NIGERIA</b>	<p><u>1999 Constitution</u></p> <ul style="list-style-type: none"> <li>• Imposed by the military;</li> <li>• Neither negotiated nor debated;</li> <li>• Drafted by a 25-member committee appointed by the military, and adopted in 1999;</li> <li>• Public opinion disregarded in the process of its creation.</li> </ul>
<b>17. BOSNIA &amp; HERZEGOVINA</b>	<p><u>1995 Constitution</u></p> <ul style="list-style-type: none"> <li>• Annex 4 of the Dayton Accords functions as the Constitution of B&amp;H;</li> <li>• Featured significant international involvement;</li> <li>• Negotiated and finalized in the context of a peace agreement to end the Bosnian War.</li> </ul>
<b>18. DRC</b>	<p><u>2006 Constitution</u></p> <ul style="list-style-type: none"> <li>• Preceded by an interim constitution, which was made in the context of a peace agreement to end the Second Congo War;</li> <li>• Drafted by a Constitutional Commission that was representative of the major political parties in DRC;</li> <li>• Presented to, and adopted by, the National Assembly at the time (a transitional Parliament);</li> <li>• Eventually adopted in a referendum;</li> <li>• Limited public participation.</li> </ul>

Country	Key Highlights of Constitution-Making Process
<b>19. PAKISTAN</b>	<p><u>1973 Constitution</u></p> <ul style="list-style-type: none"> <li>• Enacted by an elected National Assembly;</li> <li>• Drafted by a 25-member committee, which had been appointed by that National Assembly;</li> <li>• Formal enactment process preceded by the holding of a convention of the leaders of major parties in Pakistan.</li> </ul>
<b>20. SUDAN</b>	<p><u>2005 Constitution (Suspended)</u></p> <ul style="list-style-type: none"> <li>• Was an Interim National Constitution;</li> <li>• Incorporated a Peace Agreement — the 2005 Comprehensive Peace Agreement;</li> <li>• Peace talks used as a direct constitution-making process;</li> <li>• Created in the context of the 2005 Comprehensive Peace Agreement with South Sudanese liberation forces.</li> </ul>
<b>21. POLAND</b>	<p><u>1997 Constitution</u></p> <ul style="list-style-type: none"> <li>• The Polish process popularized the use of ‘round table’ meetings;</li> <li>• Developed by Parliamentary Committees;</li> <li>• Adopted by a vote of Parliament;</li> <li>• Approved in a referendum in 1997;</li> <li>• Low turnout for the referendum, and Constitution approved by a narrow majority of the people that voted.</li> </ul>

### 3.0. EMERGING ISSUES, TRENDS AND BEST PRACTICES

This section identifies key issues, trends and best practices which are apparent from the experiences of constitution-making examined above.

Societies emerging from conflict often find it difficult to channel future political contestation through institutional paths in so far as attempts at constitutional (re)construction take place in the context of weak or even collapsed state institutions; little political will for reconciliation; and distrust amongst key stakeholders.

It is desirable for societies to build political systems which are based on democratic and constitutional principles. Democracy promotes equitable power-sharing; while constitutionalism defines the limits within which certain dominant groups may exercise power, in order to protect the rights and freedoms of individuals – and minority groups. The constitution-making process attempts to channel the will of the people; to achieve a consensus on the future of the State, and to ensure respect for

universal principles such as respect for human rights and democratic governance.<sup>135</sup> Constitution-making is, therefore, a vital component of conflict resolution and national reconciliation.

However, not all disputes can directly be resolved through the process of constitution-making. In particular, certain military and security-related issues may need to be addressed separately, and before the substantive constitution-making process. Past experiences demonstrate the advantage of separating the negotiations around a peace agreement – in the aftermath of armed conflict – from the drafting of a post-conflict constitution. The negotiations leading to a peace agreement are concerned with the short-term issue of conflict termination; while constitutions are concerned with more long-term arrangements for sustainable peace and justice. Therefore, termination of armed hostilities and the signing of a peace agreement should only be pre-conditions to the substantive constitution-making process; which should, ideally, in turn create long-term rather than short-term peace.<sup>136</sup>

The following subsections discuss salient features of the constitution-making processes identified in the foregoing part of this report.

### 3.1. Structure of Implementing Organs

In most States, where the drafting of a new constitution is assigned to an elected Constituent Assembly, a central element of the process is the early establishment of a smaller, technical body charged with organizing the constitution-making effort and ensuring adequate linkages between the public and the drafting exercise. This body is usually a Constitutional Commission.

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<sup>135</sup> J Benomar 'Constitution-making & peacebuilding; Lessons learned from the constitution-making processes of post-conflict countries', available at <[https://www.un.org/ruleoflaw/files/Constitution%20making%20and%20peace%20building%20Report\\_Jamal%20Benomar.doc](https://www.un.org/ruleoflaw/files/Constitution%20making%20and%20peace%20building%20Report_Jamal%20Benomar.doc)> (last accessed 30 August 2019).

<sup>136</sup> As above. See, also, S Tierney, 'Constitutional referendums: a theoretical enquiry' *The Modern Law Review* 72/3 (2009) 360–83.

For a general discussion on sequencing of peace building and constitution-making, see Christine Bell and Kimana Zulueta-Fülscher, 'Sequencing Peace Agreements and Constitutions in the Political Settlement Process' (2016) IDEA. <<https://www.idea.int/sites/default/files/publications/sequencing-peace-agreements-and-constitutions-in-the-political-settlement-process.pdf>> last accessed on 9 October 2019.

Constitutional language and options are typically prepared in smaller group settings for eventual consideration and decision making by the larger body. It is also useful for this smaller body to serve the Constituent Assembly as a repository and clearing house for input from the public, and for information on comparative models and options from the constitutional systems of other countries.<sup>137</sup>

Constitutional Commissions have been used in various contexts, including; Eritrea, Ethiopia, Uganda, Kenya, and Rwanda. These Commissions have usually been appointed by the executive or chosen by an elected Constituent Assembly.

Typically, the Constitutional Commission has three functions (although the delineation of those functions has not always been clear):

- a) to conduct civic education in connection with the constitution-making process;
- b) to consult the population and key groups – such as political parties, civil society and other stakeholders – on key constitutional questions; and
- c) to compile and create a draft of the new constitution, taking the views received from the public consultation into account.<sup>138</sup>

Constitutional Commissions can therefore serve as an efficient tool in a constitution-making process.

### **3.2. Judicial Review of Draft Constitutions**

A few countries have, in periods of constitutional transition, chosen to provide for judicial oversight of the constitution-making process. In South Africa and Poland, for instance, Constitutional Courts played this kind of role.

This was particularly important in the South African case where the interim constitution—in the form of an ‘Interim Agreement’ — also gave the Constitutional Court the authority to determine whether the final draft of the permanent Constitution

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<sup>137</sup> Iraq’s Constitutional Process: Shaping a vision for the country’s future. United States Institute of Peace, Special Report (February 2005), 5. Available at: <<https://www.usip.org/sites/default/files/resources/sr132.pdf>> last accessed 1 October 2019.

<sup>138</sup> As above.

complied with the principles set out in that Agreement. In fact, pursuant to this authority, the Constitutional Court returned one draft to the Constituent Assembly for revision of certain sections found to be inconsistent with the constitutional principles which had been pre-established.<sup>139</sup>

### 3.3. Negotiations and Transparency

Open negotiations and transparency are important when debating and adopting permanent constitutions.

Interim constitutions usually reflect agreements formed among broadly representative elites and have typically not involved participation of the public at large. Even in cases where the said elites have been elected — and are therefore accountable, in principle, to public constituencies — transparency has not generally characterized the talks founding interim arrangements. In the South African case, for instance, the negotiations and settlement of the issues surrounding this initial stage of the process were relatively closed, apparently because of concern over the high risk of violence at the time. Indeed, the constitution-making process has generally tended to be more closed and elite-driven in those cases where the risk of violence is high; Cambodia serves as another example of this phenomenon, as does the Transitional Administrative Law of Iraq (2004-06). There is a place for such delicate, confidential negotiations – often leading to interim or transitional constitutions.

As the constitutional process moves forward to the preparation of a permanent constitution, however, the process should be more open and transparent, with oversight from, and input by, the people of the State.<sup>140</sup> A permanent constitution should be the product of a robust and inclusive dialogue, which protects the rights and interests of all groups in the country.

In the past few decades, those cases in which the entire constitution-making process remained secretive and closed have permitted deal-making among elites but have

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<sup>139</sup> In re: Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96). <<http://www.saflii.org/za/cases/ZACC/1996/26.pdf>> last accessed on 3 October 2019.

<sup>140</sup> See JA Widner 'Constitution drafting in post-conflict states symposium' *William and Mary Law Review* 49 (2008) 1513–41.

neither produced the most vibrant of constitutional democracies nor the most stable governments over the long term.<sup>141</sup>

### 3.4. Public Participation and ownership

There is a clear trend toward providing for more direct and far-reaching popular participation in the constitution-making process, not only through the election of a constituent assembly or voting in a referendum on the proposed constitutional text, but also in the form of civic education and popular consultation during the development of the constitution.

Aspects of this approach have been employed around the world in recent years, including in Europe, Africa, Latin America, and Asia. This model enables the broader public to be actively engaged throughout the process, not merely at the polling centre to decide on a constitution that has been crafted completely behind closed doors by a small group of elites.<sup>142</sup>

In the context of a divided society, especially, the emphasis on public participation in the development of the constitution can provide the best possibility for vulnerable groups, or even those who view themselves as politically disenfranchised, to engage in an open national dialogue regarding decisions that are vital to the future direction of the country.

This approach can be crucial to forging a common vision for the nation's future, resulting in a new constitution in which all these diverse groups may not have the immediate satisfaction of all their demands, but in which they have a stake and a sense of ownership. At its core, broad public participation and consultation is most important in developing an authentic sense that the new constitution is not irrelevant and abstract, or a tool to be used or abused by those in power but, rather, is the possession of all the people, who will insist on its implementation.<sup>143</sup>

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<sup>141</sup> United States Institute for Peace (n 137 above). See, also, D Brancati, and JL Snyder 'Time to kill: The impact of election timing on post-conflict stability', *Journal of Conflict Resolution*, 57/5 (2013) 822–53.

<sup>142</sup> United States Institute for Peace (n 137 above). See, also, Z Elkins, T Ginsburg and J Blount, 'The citizen as founder: public participation in constitutional approval', *Temple Law Review*, 81 (2008) 361–82.

<sup>143</sup> United States Institute for Peace (n 137 above) 5.

### 3.5. Public Education and Consultation

The first challenge in ensuring that members of the public have an adequate connection to the making of their constitution is an effective program of public education. This public education phase provides an important vehicle to broadly disseminate information on the constitution and the constitutional process, and information on the basic themes that should inform the new constitutional framework. In some countries, the public education campaign has served as a stimulus for civil society groups to organize public discussions.<sup>144</sup>

Generally, such campaigns involve providing information to the public through television and radio advertisements and programs; newspapers; posters; and the dissemination of informational materials through schools, and the use of other media forms. In certain countries, a great deal has also been learned about how to conduct these campaigns with a largely illiterate population through the use of radio, cartoons, and traveling theatrical presentations.

In some cases, constitutional commissions have tried to conduct civic education and popular consultation all in one phase, but experience suggests that they should be treated as two distinct phases of the process.<sup>145</sup> In East Timor, for instance, the public education and consultation phases were conflated, arguably weakening the effectiveness of each. South Africa, Eritrea, and Rwanda are more successful examples of this aspect of the process, whereby a carefully planned program of civic education was conducted to educate the population on the role of a constitution in society generally and their role in constitution making. Albania also provides a very useful model of a robust and well-organized public education and consultation process, which has arguably strengthened the drive toward democratization in that country.<sup>146</sup>

During the public consultation phase, the constitutional commission should present to the populace a series of specific key questions and issues regarding the constitution. An adequate budget and resources would be required to enable the commission to hold sessions throughout the country, elicit the views of the public, and gather responses. In

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<sup>144</sup> As above.

<sup>145</sup> As above.

<sup>146</sup> As above.



the Albanian case, for example, the Administrative Centre organized separate public sessions focused on individual issues, including legislative power, executive power, judicial power, human rights, and local government. One major symposium, which was broadcast as a three-part program on Albanian state television, brought together members of the parliamentary constitution-drafting group with Albanian and foreign experts to discuss constitutional issues identified by the various public consultation sessions. The Administrative Centre indexed and organized all the public comments to assist the parliamentary constitutional commission and its technical staff. Of the hundreds of suggestions from the public regarding changes to the draft constitution, more than fifty proposed changes affecting forty-five articles were accepted by the drafters and incorporated into a revised draft of the constitution, which was ultimately submitted to a public referendum.<sup>147</sup>

### **3.6. Linking Consultation to Drafting**

The synthesis of the results of popular consultation into the constitutional draft requires proper planning, which has been a challenge in certain cases. In East Timor, for example, the Constituent Assembly focused on a draft prepared by the dominant political party, which apparently ignored the results of the popular consultation.

Brazil is another example where the popular consultation was not entirely satisfactory. The popular consultation had been a massive effort but was poorly organized. The task of synthesizing the results was then assigned to one key entity, who was ultimately unable to absorb and synthesize the results of the popular contribution in the development of the final draft.

### **3.7. Timing of the process**

Constitution making is a deliberative task and requires adequate time, especially when integrating a serious effort in public education and popular consultation.

In some countries, domestic and international pressures have rushed the process, with disappointing results. This was the case in East Timor, where the effort at public consultation took only one month. A year later, when the consultation was seen to

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<sup>147</sup> As above.



have been inadequate, the Constituent Assembly launched a second, belated effort at public consultation but, again, allocated too little time for the exercise. In the Cambodian case, also, it appears that the rushed 1993 constitution-making process contributed to the weakness of the country's government.<sup>148</sup>

An effective public education and consultation process will generally take at least a year; and some countries have allocated as many as three years to public engagement. A compressed schedule for constitution making necessarily obliges constitution drafters to carry out their task without the benefit of meaningful public consultation and input, risking a public that is less familiar with, and invested in, the resulting new constitutional order. Recognizing that more time was needed to maximize public engagement and the legitimacy of the process, various countries found it necessary, during their constitution-making efforts, to revise previously established deadlines for the completion of constitution drafting or for the holding of a public referendum on the final constitution.<sup>149</sup>

### 3.8. Democratic Representation

In addition to public participation, an important factor for the legitimacy of the constitution and the stability of the system it establishes is democratic representation in the constitutional commission, which may take the lead on drafting; and in the larger body that ultimately debates, revises, and adopts a draft constitution.<sup>150</sup>

Constitutional commissions, while relatively small in size, should be fairly representative of the various political parties and ethno-religious groups in the society. In those countries where the constitution-making process has been sufficiently deliberative and has entailed broad public consultation, an intriguing result repeatedly has been the transformation of the members of a constitutional commission from a group of individuals serving primarily as advocates for their respective interest groups into a more cohesive collegial body with a broader focus on the needs of the whole

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<sup>148</sup> As above. See, also, V.C Jackson, 'What's in a name? Reflections on timing, naming and constitution-making', *William and Mary Law Review*, 49 (2008), pp. 1249–305.

<sup>149</sup> United States Institute for Peace (n 137 above).

<sup>150</sup> As above. See, also, generally, AK Jarstad and TD Sisk (eds), *From War to Democracy: Dilemmas of Peacebuilding* (Cambridge: Cambridge University Press, 2008)

society. In the best-case scenario, this transformation is precisely the kind of unifying effect that development of the new constitution would have on the country as a whole.<sup>151</sup>

The Albanian experience may be useful in this regard. A boycott of the constitutional process by the major opposition faction (including a refusal to appoint members to the parliamentary constitutional commission) produced a dilemma regarding the legitimacy of the process and produced two important decisions by the commission. First, the boycott increased the need to reach out to the affected sections of the public and directly engage them in the constitutional discussion to ensure popular legitimacy. Second, while the boycott was not permitted to delay work on the new constitution, the parliamentary drafters decided that final decisions would be deferred until later, by which time it was hoped the boycotting group would have joined the drafting body.<sup>152</sup>

### 3.9. Party Drafting versus Consensus Drafting

In many cases, the tabling of a constitutional draft early in the process, particularly by a powerful party, becomes the focus of most debate and discussion. In East Timor, for example, the FRETILIN party circulated a proposed draft even before the constitution-making process was formally initiated. In Cambodia, King Norodom Sihanouk commissioned a French expert to prepare his draft of the constitution very early in the process. From the moment that draft was prepared, it became more difficult for other participants to make their views heard or to propose alternatives, because there was a tendency to reduce all issues to the question of whether the alternatives were consistent with the King's draft.<sup>153</sup>

The disadvantage that stems from the early establishment of drafts by powerful parties or individuals is that the approach of the particular draft tends to frame and skew what

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<sup>151</sup> United States Institute for Peace (n 137 above). See, also, KS Gleditsch and MD Ward 'War and peace in space and time: the role of democratization' *International Studies Quarterly*, 44 (2000) 1–29.

<sup>152</sup> Iraq's Constitutional Process: Shaping a vision for the country's future. United States Institute of Peace, Special Report (February 2005). Available at: <<https://www.usip.org/sites/default/files/resources/sr132.pdf>> last accessed 24 September 2019. See, also, K Höglund, AK Jarstad and M Söderberg Kovacs 'The predicament of elections in war-torn societies', *Democratization* 16/3 (2009), pp. 530–57.

<sup>153</sup> United States Institute for Peace (n 137 above).

would otherwise be a more open-minded consultation and drafting effort.<sup>154</sup> One way to minimize this negative effect is to establish a constitutional commission with broad political support to explore each constitutional question anew, and to ensure that the public has the opportunity to be heard on all constitutional issues — not merely those raised in particular drafts or proposed by dominant groups.<sup>155</sup>

In these circumstances, the constitutional commission can serve as the repository of all drafts and other submissions from all parties and individuals. The commission can then take those drafts and submissions into consideration, along with the results of the popular consultation; and synthesize all those elements in a consolidated draft, or a set of options, which can then be prepared for submission to the National Assembly for debate. This approach can avoid the focus on individual ready-made drafts and the power associated with any particular faction, and provide a greater opportunity to all groups in the society to express their views on constitutional issues.<sup>156</sup>

### **3.10. The Role of the International Community and Experts**

The international community can play a beneficial role in the constitution-making process and, in some cases, can be crucial to its success. For example, a number of the programmes of civic education and popular consultation described in the selected case studies could not have been conducted without the financial support of the international community. In addition, international constitutional experts can serve as a valuable human resource developing and drafting constitutions.<sup>157</sup>

On the other hand, international involvement can be problematic. For instance, members of the international community have in some cases favoured a political party to serve their own pragmatic interests, either viewing it as expedient to develop good working relations with the party that will obviously hold power once the process is completed, or favouring parties that are most sympathetic to a particular foreign power's own interests. This may enable that party to dominate the constitutional

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<sup>154</sup> As above.

<sup>155</sup> As above.

<sup>156</sup> United States Institute for Peace (n 137 above) 5.

<sup>157</sup> United States Institute for Peace (n 137 above). See, also, U Schneckener 'State-building or new modes of governance? The effects of international involvement in areas of limited statehood', in T Risse (ed) (2011) *Governance without a State? Policies and Politics in Areas of Limited Statehood* (New York: Columbia University Press).

process to the exclusion of others; or can have the effect of alienating or radicalizing significant segments of the local population.<sup>158</sup>

In other cases, private international experts have been engaged as hired advocates for a political faction, providing advice and draft constitutional language designed to favour that faction. This support can also have the effect of reducing the degree to which local views and opinions are heard and reflected in the constitution-making process. It is important for any such expertise to be channelled into the public deliberations, including those of a constitutional commission in particular. It would appear that support by external experts is most useful when provided as a neutral resource – as a guide to local processes - elucidating the pros and cons of particular substantive issues; frequently through comparative analysis of how constitutional issues have been handled in other countries.<sup>159</sup>

This kind of role facilitates informed debate of issues among local actors, who will ultimately make the substantive choices. In Eritrea, an advisory body composed of foreign experts was created to assist the Eritrean Constitutional Commission in this way. In Albania, foreign expert advice and comparative information was provided to the National Assembly drafters in a coordinated and neutral fashion.<sup>160</sup>

#### **4.0. OBSERVATIONS AND CONCLUSIONS**

This Section reiterates key findings of the study, especially those trends and best practices evident from the selected constitution-making processes, some of which, may be useful considerations for the South Sudan process.

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<sup>158</sup> United States Institute for Peace (n 137 above).

<sup>159</sup> United States Institute for Peace (n 137 above).

<sup>160</sup> As above. See, also, TD Sisk (2009) *International Mediation in Civil Wars: Bargaining with Bullets* (London: Routledge).

## **4.1. Trends and best practices**

### **4.1.1. Guiding principles**

The adoption of broad guiding principles by which an elected Constituent Assembly must abide in the making of a new Constitution, followed in the Central African Republic and South Africa, is an emerging best practice.<sup>161</sup>

Although this model raises questions regarding the extent to which the constituent power of the people and the authority of the Constituent Assembly may be limited; it is one which is critical for the framing of accepted parameters within which the makers of the constitution may efficiently and diligently execute their duties. This is especially critical where the constitution-making process is conducted in the shadow of a recently concluded conflict.

### **4.1.2. Constitution-making bodies**

The assignment of the Constitution-making process to a democratically elected Constituent Assembly rather than the ordinary legislature, is a strong feature of emerging practice.

In addition, the case studies show that the use of national conferences and fora, such as those used in Benin, Kenya and the Central African Republic, are a useful way of commencing the process of constitution-making in an inclusive environment.

Further, the presentation of final constitutional drafts to the public for approval in a referendum is important. Where the draft constitution is made by a national legislature rather than a Constituent Assembly, the holding of a referendum is almost a necessity.

In most cases, the constitution-making process involves two main entities: i) a Constitutional Commission, whose role it is to conduct public education and consultation and to develop the first draft of the new Constitution; and ii) an elected

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<sup>161</sup> For the South African case, see the decision of the Constitutional Court in which it was held that the initial draft Constitution created was not compliant with several of the mandatory constitutional principles. In re: Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96). < <http://www.saflii.org/za/cases/ZACC/1996/26.pdf> > last accessed on 3 October 2019.

Constituent Assembly whose role is to deliberate on and revise the draft Constitution created by the Constitutional Commission and finally adopt a final Constitution. The appointment of a Constitutional Commission by a national conference – as was the case in Benin and in Kenya – rather than by the President or other single executive leader; is a best practice, which makes the constitution-making process an act of broad-based consensus building rather than executive dictate.

#### **4.1.3. Public education and popular participation**

Civic education is critical in order to enable and enhance public participation during the constitution-making process.

Broad public participation in the constitution-making process (through public discussions, democratic elections, referenda etc) is important for consensus-building and legitimacy.

A specific emerging trend in this area is the use of modern technology such as the internet as a medium to reach out to the public and collect views. In addition, the Afghanistan case provides another best practice – that of post-adoption civic education – in which education of the public does not end with the final adoption of the Constitution, but continues for some time thereafter to acquaint people with the new dispensation.

#### **4.1.4. Judicial oversight over the Constitution-Making Process**

This is an emerging trend, evident in the cases of South Africa and, to an extent, Burundi. The South African Interim Constitution of 1993 mandated the Constitutional Court to examine and certify that the draft permanent Constitution created by the Constituent Assembly was compliant with the 34 constitutional principles set out within that Interim Constitution. Indeed, the Court found that the initial draft formulated was non-compliant in this regard.<sup>162</sup>

Colombia is another good example as to how independent Courts can be important arbiters for conflicts arising in connection with the constitution-making process.

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<sup>162</sup> As above.

During the making of Colombia's 1991 Constitution, extensive litigation before the Supreme Court of Justice resolved key legal controversies. For example, the Court ruled in 1990 that the restrictions placed on the enactment scope of the constitutional assembly were unlawful since, in exercising the primary constituent power of the people as ultimate popular sovereigns, the constitutional assembly could not be so limited.<sup>163</sup>

The possibility of judicial oversight over a constitution-making process achieves two unique purposes: i) it incorporates, at an early stage, a crucial role for the judicial arm of government in restraining extra-constitutional acts; and ii) it enables a draft constitution to be checked for legal inconsistencies which might otherwise have become entrenched if the draft Constitution were to be passed without such scrutiny.

#### **4.1.5. Adoption of final draft constitution by referendum**

In some cases, the final draft approved by the Constituent Assembly is immediately enacted as the new Constitution. In others, it still has to be adopted by the public in a referendum. The latter approach appears to be a more useful means of building legitimacy for a new Constitution.

#### **4.1.6. Timing and transition contexts**

Most constitution-making processes take 2-4 years to complete (Kenya, Eritrea, South Africa, India, and others). Where the process is rushed by the authorities (such as the East Timorese process), proper consultation and education of the public are sacrificed – thereby risking the national acceptance and longevity of the adopted Constitution.

In addition, in cases where constitution-building occurs in the immediate aftermath of an armed conflict, it is important to separate, as much as possible, the conclusion of the peace agreement from the making of a final or permanent constitution. The emerging trend is to have interim or transitional constitutions which apply immediately after the conclusion of an armed conflict and long enough for the country to organise a constitution-making process for the adoption of a permanent

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<sup>163</sup> Sentence 138 of 1990 of the Supreme Court of Justice of Colombia.



constitution. Burundi, the DRC, Somalia, Iraq, South Sudan and other countries demonstrate this pattern.

It is imperative for the permanent constitution to be created in a calm environment uninhibited by the same difficulties that led to the interim or transitional constitutions. Otherwise, the process of making a permanent constitution might be tied to, and complicated by, the tensions arising from the armed conflict. This would greatly limit universal consensus building and inclusivity; instead concentrating the process on (re)negotiations between the major parties to the concluded conflict.

#### **4.1.7. Involvement of external actors**

As much as possible, the constitution-making process should be home-grown and organic, rather than driven by external influences, however well-meaning these are.

This is difficult, especially where the country is under foreign occupation (Afghanistan and Iraq) or where the constitution-making process relies significantly on external financial or technical support. Nonetheless, it is evident that a process which is not sufficiently owned by the people themselves is doomed to fail.

#### **4.1.8. Involvement of particular domestic constituencies**

Related to the foregoing, a constitution-making process should include as many domestic constituencies as possible. In the Afghanistan case, for instance, refugees, émigrés and other diaspora communities were deliberately consulted and involved in the process. This is even more critical where a country's violent past is responsible for a refugee crisis or for mass migration.

The granting of membership slots within the Constituent Assembly to demobilised rebels, as was done in the Colombian process, is another interesting example of inclusion and reconciliation. Additionally, it is helpful to the creation of a unified national army because it facilitates the amalgamation of different fighting forces in a new dispensation. Of course, as noted earlier, care has to be taken to avoid transforming the constitution-making process into a (re)negotiation of a peace agreement.



#### 4.1.9. Post-adoption safeguards

Constitution-building does not end with the adoption of the constitution. Rather it is a continuous process, which requires post-adoption effort and vigilance.

The case of Eritrea, for example, shows that a proper constitution-making process may still be thwarted if the wielders of executive power do not yield to the final constitution adopted and place themselves under its supremacy. Eritrea's constitution, passed in 1997 after a four-year process, has never been implemented.

To this end, the Afghanistan case, where civic education was conducted even after the constitution was adopted, is an important best practice.

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## APPENDIX: MATRIX OF SELECTED CASE STUDIES

Country	Region	Year of Constn	Conflict /Fragile	Military	Ethnicity	Federalism	Significant Natural Resource	Religion	Int'l/Experts
1. Nigeria	Africa	1999	Y	Y	Y	Y	Y	Y	-
2. Uganda	Africa	1995	Y	Y	Y	-	-	Y	-
3. Rwanda	Africa	2003	Y	Y	Y	-	-	Y	-
4. South Africa	Africa	1997	Y	-	Y	.*	-	-	Y
5. Kenya	Africa	2010	Y	-	Y	-	-	Y	Y
6. Bosnia and Herzegovina	Europe (Eastern)	1995	Y	Y	Y	Y	-	Y	Y
7. Iraq	Middle-East	2005	Y	Y	Y	Y	Y	Y	Y
8. Ethiopia	Africa	1995	Y	Y	Y	Y	-	-	-
9. Eritrea	Africa	1997	Y	Y	Y	-	-	-	-
10. Pakistan	Asia (South)	1973	Y	Y	Y	Y	-	Y	-
11. India	Asia (South)	1950	Y	-	Y	.*	-	Y	-
12. Benin	Africa	1990	-	Y	Y	-	-	Y	-
13. Sudan	Africa	2005	Y	Y	Y	Y	Y	Y	-
14. Somalia	Africa	2012	Y	Y	Y	Y	-	Y	Y
15. Poland	Europe (Central)	1997	-	-	Y	-	-	Y	-
16. Timor-Leste (East Timor)	Asia (South East)	2002	Y	Y	Y	-	-	Y	Y
17. DRC	Africa	2006	Y	Y	Y	.*	-	Y	Y
18. Central African Republic	Africa	2016	Y	Y	Y	-	-	Y	-
19. Afghanistan	Asia (South Central)	2004	Y	Y	Y	.*	Y	Y	Y
20. Colombia	South America	1991	Y	Y	N	-	Y	-	-
21. Burundi	Africa	2005	Y	Y	Y	-	-	Y	

NB: An asterisk denotes instances of apparently *de facto*, rather than *de jure*, federalism.