CONSTITUTIONAL ASSISTANCE AND THE RULE OF LAW IN POST-CONFLICT TRANSITIONS:

AN OVERVIEW OF KEY TRENDS AND ACTORS

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FOLKE BERNADOTTE ACADEMY

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RESEARCH REPORT

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FOREWORD

THE RULE OF LAW IS AN ESSENTIAL foundation for sustainable peace, security and development and a prerequisite for democracy and human rights. It is in the course of constitution-building processes that the fundamental parameters, which determine to what degree rule of law is applied and respected, are set out.

CONSTITUTION-MAKING IS SIGNIFICANT to stabilizing transitional and post-conflict settings and holds a central role in the promotion of the rule of law. Events in the fall of 2012 in North Africa and the Middle East region illustrate the explosive power of a mismanaged constitutional process. Constitution-making is a process at the heart of national sovereignty and must be nationally owned and led. International and regional actors have however started playing an important role in advising and assisting such processes by providing both normative and technical advice. Constitutional assistance is emerging as a 'field' of international engagement.

THIS STUDY HIGHLIGHTS and discusses the chief trends in constitutional assistance. It discusses constitutional assistance both in the process of making the constitutions, that is, drafting or amending constitutional texts, and the broader societal project of ensuring that such texts fulfill their potential by providing fair, legitimate and effective parameters for democratic governance.

THIS REPORT IS THE RESULT of a project by the Folke Bernadotte Academy (FBA). The initiative is in line with the Swedish government's focus on human rights and democracy and represents an example of the FBA's mandate to contribute to the improvement of the prevention and management of conflicts in practice, in order to promote lasting peace, security and development. It is hoped that this work will inspire further studies, discussion and actions in the areas of rule of law and constitutional assistance.

THE PROJECT TEAM consisted of Maria Nystedt from the FBA's Rule of Law Unit and Rhodri Williams, an independent expert and the author of the report. The FBA is grateful to all the experts on constitutional assistance who agreed to be interviewed or provide comments on this report. Particular thanks are due to Michele Brandt, Winluck Wahiu and Jason Gluck, whose comments were invaluable to its finalization.

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THE PROJECT TEAM

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Any errors or omissions in the report are the sole responsibility of the project team.

EXECUTIVE SUMMARY

THE DRAFTING AND IMPLEMENTATION of constitutions sets key parameters for the promotion and application of the rule of law in countries experiencing political transitions and crises. While such processes should reflect the sovereign nature of national constitutions, as well as the need for local ownership and sensitivity to the local context, it is also important to understand and recognize the increasingly significant role that international and regional actors have played in providing technical and normative advice for such processes in post-conflict settings since the end of the Cold War.

THIS STUDY FOCUSES on the evolving role of international and regional actors in providing 'constitutional assistance' to national actors engaged in both the narrow technical process of drafting or amending constitutional texts (constitution-making) and the broader societal project of ensuring that such texts fulfill their potential by providing fair, legitimate and effective parameters for democratic governance (constitution-building). It begins by discussing the relationship between constitution-building and rule of law and proceeds to identify key trends in constitutional assistance, map the actors in this emerging field, and set out recommendations.

RULE OF LAW PRACTITIONERS have taken a leading role in establishing a community of practice surrounding constitutional assistance that also includes experts in electoral assistance and democratization, human rights, gender equality, transitional justice, support to civil society, peacebuilding and development assistance. Constitutions provide for the basic rules, procedures and institutions that set the conditions for rule of law at the national level. Rule of law is also fundamental to constitutionalism in the sense that rule of law values serve to add legal force and legitimacy to the political agreements crystallized in constitutional texts. There is also a key rule of law nexus with the implementation stage of constitution-building, as well as an important role for regional as well as global organizations in providing assistance.

ONE OF THE MOST IMPORTANT developments related to constitutional assistance is the emergence of this area as a 'field' of international engagement in its own right, united by the efforts of a nascent community of practice to define common criteria and methodologies for providing effective support to constitutional processes. Three trends that have shaped contemporary constitutional assistance are its internationalization, democratization and attention to the needs of vulnerable groups.

- *Internationalization refers to the fact that the expectation that states will give effect to their international and regional obligations via constitution-building has resulted in the assertion of a legitimate role for international actors in supporting these sovereign processes. Post-conflict constitutional assistance is viewed as a means of preventing conflict and building sustainable peace in the context of the UN's peace and security agenda.*
- *Democratization refers in this context to the trend toward ensuring that all stakeholders,*

and not just elites, have the opportunity to play an active and informed role in shaping the substance of constitutions, rather than simply ratifying the outcome of constitution-making processes. This 'new constitutionalism' raises the risk that the outcomes of democratic processes may not in all cases sit comfortably with the norms and standards promoted by the UN and regional organizations.

- *Inclusion of vulnerable groups refers to a trend toward both including such groups directly in constitution-building processes as well as incorporating specific protections for them in the texts of constitutions. Such inclusion is seen not only as a matter of international legal obligations but also as a practical means of conflict prevention.*

The report goes on to map the roles of international and regional actors in constitutional assistance, including the UN, bilateral donors and aid agencies, inter- and non-governmental organizations, academic institutions, and regional organizations. For most of these actors, however, constitutional assistance remains a new frontier rather than a core activity. The further development of this field is likely to be contingent on both a clearer common understanding of the principles of engagement that serve to legitimize international involvement in sovereign processes of constitution-making and a greater commitment of resources and capacity.
The study concludes with a set of recommendations, emphasizing the need for measures including:

- *Recognition of and support to constitutional assistance as a field of activity uniting the expertise and interests of several related areas of international work*
- *Clarification of the international standards that underlie international involvement*
- *Engagement with local and regional understandings of human rights and rule of law*
- *Context-sensitive support for distributive measures and protection to vulnerable groups, particularly where necessary to address root causes of conflict*
- *Development of a better understanding of and support to implementation measures*
- *Support to regional organizations in assisting constitution-building and implementation*

1 INTRODUCTION

In light of recent developments in the rule of law field, the area of constitutions and their implementation has emerged as pivotal for the promotion and application of the rule of law in countries experiencing post-conflict political transitions. Constitutional norms set out fundamental parameters that shape the extent to which rule of law principles are respected across a number of fields including public administration, criminal justice, adjudication of civil disputes and even the outcomes of informal and customary decision-making processes.[1] Constitutional rules and institutions must be capable of containing the tensions arising from political crises that pit branches of government, political parties, economic interests or even the ethnic or sectarian groups comprising the country's population against each other. The extent to which constitutions are able to uphold rule of law at the 'macro' level, along with human rights norms and democratic principles, is tested in the course of such crises.

Understanding the evolving roles of international, regional and national actors in moments of constitution-building as well as constitutional crises can help to give greater insights into the impact that constitutional assistance activities can have on respect for the rule of law, including key rule of law aspects such as legality, transparency, accountability and legal certainty. While such processes should reflect the sovereign nature of national constitutions, as well as the need for local ownership and sensitivity to the local context, it is also important to understand and recognize the increasingly significant role that international and regional organizations have played in providing technical and normative advice for such processes in post-conflict settings since the end of the Cold War.

This study focuses on the evolving role of international and regional actors in providing assistance to national actors engaged in both the narrow technical process of drafting or amending constitutional texts (constitution-making) as well as the broader societal project of ensuring that such texts fulfill their potential by providing fair, legitimate and effective parameters for democratic governance (constitution-building).[2] From a rule of law perspective, a key concern in this study is the identification of means by which the new trends in 'constitutional assistance' can ensure that constitutional texts fulfill their function as supreme regulatory instruments and effective guarantors for rights in post-conflict and transitional settings as well as in subsequent periods of crisis. Achieving rule of law goals through constitutional assistance should be seen as a central part of both the peacebuilding and state-building strategies of international

1 In the case of public administration, for instance, "erosion of the respect for the legitimate constitutional authority" has been identified as a fundamental problem to be addressed in seeking to instill rule of law principles. Per Bergling, et. al., "Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development", *Folke Bernadotte Academy Research Report* (2008) page 28.

2 Various definitions of 'constitution-making' and 'constitution-building' exist, but virtually all have in common the distinction between the short-term and more technical nature of the former, and the longer-term and more transformative aspirations of the latter. See, for instance, International Institute for Democracy and Electoral Assistance (IDEA), "Constitution building after conflict: External support to a sovereign process", *Policy Paper* (May 2011), page 11.

actors in post-conflict settings.[3]

The study begins with an overview of the nexus between the rule of law and constitution-building and implementation in transitional and post-conflict settings. The next section addresses the coalescence of a new rule of law-oriented field of practice under the rubric of constitutional assistance. It also identifies three key trends that have accompanied the emergence of this field, namely (1) the internationalization of constitutional practice, (2) new emphases on 'democratization' through broad-based public participation in constitution-making and (3) measures to insure the inclusion and protection of vulnerable and marginalized groups. The penultimate section consists of a mapping of actors at the global and regional levels that have played important roles both in constitutional assistance and in commenting, advising or intervening in the interpretation and implementation of constitutions. Finally, the study sets out conclusions and recommendations related to the current state of constitutional assistance.

3 While peace-building refers primarily to the achievement of sustainable peace through efforts to address root causes of conflict, state-building aims to support responsive and effective government. Government Offices of Sweden, "Peace and Security for Development: Policy for Security and Development in Swedish Development Cooperation", 2010-2014 (2011), page 15. See also, Department for International Development (DFID), "Building Peaceful States and Societies", *A DFID Practice Paper* (2010).

2 THE RULE OF LAW AND CONSTITUTION-BUILDING

Rule of law emerged as an issue of international concern during the 1990s, a time of increasing international engagement in post-conflict peacebuilding that also saw a surge in human rights practice and the establishment of a number of complementary fields concerned with the protection of human rights and human welfare, such as human security, transitional justice, and international criminal law. The initial emphasis in the rule of law field was on reform of the justice sector, in response to concerns about impunity for acts such as war crimes and economic corruption that threatened the stability of countries recovering from conflict.[4] However, rule of law is meant to safeguard a broad range of interests, and the initial justice sector emphasis on accountability has progressively expanded to take in related areas such as public administration.[5] This has fostered an emphasis on rule of law values such as legal certainty, predictability and transparency that determine the extent to which administrative authorities actively contribute to post-conflict stabilization in their role as "principal interfaces between the individual and the state."[6] The central importance of fostering responsive, accountable state institutions continues to be borne out by experience, most recently in the context of the ongoing political turmoil in the Middle East.[7]

Given that the establishment of rule of law principles in constitutional law is a necessary (but not sufficient) precondition for their application in national practice, a nexus has emerged between broadening conceptions of rule of law and the emerging field of 'constitutional assistance'. Rule of law practitioners have taken a leading role in establishing a community of practice surrounding constitutional assistance that also includes experts in electoral assistance and democratization, human rights, gender equality, transitional justice, support to civil society and development assistance. Experts in these fields, and many more, have frequently seen – and seized – opportunities to promote issues of specific concern in

4 The seminal 2004 report by the UN Secretary General on the rule of law and transitional justice reflected this approach in that it highlighted civil law issues but treated them in effect as a secondary issue in relation to criminal law reform. UN Security Council, The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, UN Doc. S/2004/616 (23 August 2004), paragraph 35 ("Beyond criminal law reform, [strategies for national justice systems] must also ensure effective legal mechanisms for redressing civil claims and disputes ….").

5 Bergling, et. al., page 3-5. The 2011 updated report on rule of law and transitional justice by the UN Secretary General (S/2011/634) represented a clear consolidation of this trend. In the report, the Secretary-General expresses his intention to "further develop agreed policies on access to justice, including anchoring such policies in the promotion of social and economic rights, and in the peaceful resolution of civil disputes, such as those related to housing, land and property rights." (paragraph 80).

6 Bergling, et. al., page 2.

7 See, for instance, Caroline Douilliez-Sabouba, "Supporting women in a difficult security environment: the ICRC's programmes for women-headed households in Iraq", *Humanitarian Exchange* No. 51 (July 2011), page 7-9 (noting that even in the context of humanitarian response, advocacy for identifying and addressing administrative dysfunctions and bottlenecks has been of central concern, in this case for the purpose of ensuring that Iraqi women left without means of support as a result of conflict and displacement are able to access their legal entitlement to a monthly allowance rather than remaining dependent on foreign aid).

the context of constitutional moments, or opportunities that arise in the course of political transitions and peace settlements to alter or renegotiate entirely the fundamental rules set out in constitutional frameworks. By calling attention to the need for these diverse actors to take into account common opportunities and dilemmas that arise during constitutional moments, advocates of a self-conscious field of constitutional assistance have not only contributed to ensuring that these efforts complement (rather than conflict with) each other, but also to the likelihood that national efforts at constitution-building will continue to be informed by – and generate – a coherent body of international and comparative experience and expertise.[8]

The rule of law aspect of constitutional assistance is relatively evident. First, rule of law principles should inform the actual process of constitution-building, particularly given new trends toward broad public consultation. Transparency, availability of information and the accessibility of the process for ordinary citizens and members of vulnerable or marginalized groups have emerged as particularly important considerations in such contexts (see Section 3.2 on the democratization of constitution-building). Second, the regulatory and institutional frameworks envisioned in new or amended constitutions should reflect and reinforce rule of law principles. The importance of restoring 'civic trust' – in the form not only of mutual trust between citizens but also of trust between citizens and institutions – is a central aspect in restoring confidence in basic norms that have been subverted by the effects of conflict and human rights violations.

In this sense, re-establishing civic trust in institutions and laws is an indispensible means of meeting key transitional justice goals that should guide not only national authorities but also international rule of law and peacebuilding practitioners.[9] Rule of law should be seen as fundamental to constitutionalism in the sense that rule of law values such as certainty and accountability are what serve to distinguish a mere political agreement "about sharing the spoils among different political actors" from a legal constitution with the force of supreme law.[10] On the other hand, it is important to bear in mind that new trends involving democratic constitution-making may require some re-evaluation of the emphasis traditionally placed on certainty and finality in constitutionalism. Specifically, because these processes seek to achieve political stability by including all stakeholders in an open-ended constitutional conversation, rather than by committing them to a final act of closure, they may result in a greater degree of constructive ambiguity[11]. Indeed, from a conflict resolution perspective, such ambiguity may be necessary in order to arrive at a consensus that allows for the details of some hotly contested issues to be resolved later.[12]

8 IDEA, "Constitution building after conflict", page 10.

9 Pablo de Greiff, "Transitional Justice, Security and Development", *World Development Report 2011 Background Paper* (29 October 2011).

10 IDEA, *A Practical Guide to Constitution Building: An Introduction* (2011), page 31.

11 Vivien Hart, "Democratic Constitution Making", *United States Institute of Peace (USIP) Special Report 107* (July 2003).

12 Author interview, Winluck Wahiu, Project manager, IDEA Constitution Building Programme, (04 June 2012).

2.1 SUPPORTING THE IMPLEMENTATION OF CONSTITUTIONS

Arguably, the most important rule of law aspect in constitutional assistance relates to the prospective implementation of new or amended constitutional frameworks. Assistance to implementation is included as an activity in most definitions of constitutional assistance or constitution-building, but frequently as an apparent afterthought.[13] Perhaps the most important assertion to have arisen from constitutional assistance practice to date is the notion that broad-based 'ownership' of constitutions, based on inclusive discussions and consensus-seeking between elites, ordinary citizens and vulnerable groups, may be the most important factor in ensuring that all parties continue to comply with the letter and spirit of the resulting text (see Section 3.2 on the democratization of constitution-building). However, beyond this basic insight, many questions remain as to how consistent, transparent and accountable implementation of constitutions can be achieved on a prospective basis.

Support to institutions with constitutional mandates to ensure transparent and accountable government action is clearly crucial. For example, one of the central components of UN-led constitutional assistance activities in recent post-conflict settings has been advocacy for and capacity building of national human rights institutions (NHRIs) with a mandate to monitor respect for rights embedded in new constitutions.[14] The growth of NHRIs may be seen as a part of a broader proliferation of independent supervisory institutions and agencies – the so-called 'fourth branch' of government – in constitution-building practice since the end of the Cold War.[15] The success of established ombudsman-type institutions in ensuring public accountability in countries with strong constitutional traditions like Sweden clearly indicates their potential to support new constitutional building processes.[16]

However, the prospects of institution-driven approaches to ensuring constitutional implementation may often depend on the extent to which any legitimate legal or institutional traditions remain in the wake of conflict and human rights violations.[17] Simply put, reviving a tradition of institutional oversight of government is always likely to be easier than creating one from scratch. This observation applies with particular force to settings such as post-uprising Libya, where the previous regime destroyed many independent institutions and discredited virtually all others by co-opting them.[18]

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13 For instance, the UN Secretary-General's 2009 *Guidance Note on UN Assistance to Constitution making Processes* includes promoting "adequate follow-up" as a principle of UN engagement (page 5). However, when the Note goes on to define concrete UN assistance activities, the examples given of "capacity building and institution development" relate exclusively to the process of negotiation, public consultation and ratification of new constitutions, without mentioning the vital role of institutions in ensuring their consistent and effective application on a prospective basis (page 6).

14 Vijayashri Sripati, "UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989-2011", *International Peacekeeping,* Vol. 19, No. 1 (February 2012), page 95.

15 Author interview with Sujit Choudhry, Director, The Center for Constitutional Transitions at the NYU School of Law (10 April 2012).

16 Bergling, et.al., page 33-4.

17 IDEA, *A Practical Guide to Constitution Building: An Introduction,* page 12.

18 International Legal Assistance Consortium, "Report: Pre-Assessment Mission, Libya" (November 2011).

In any case, even where the mandate of supervisory institutions are anchored in constitutional texts, the rules and procedures directly structuring their actions are usually set out in more detail in ordinary legislation. As a result, as assistance efforts shift over time from supporting the founding of such bodies to supporting their work, the constitution is likely to become an increasingly infrequent reference point. In other words, once such constitutionally-mandated institutions have begun to function in accordance with organic laws and ordinary rules of procedure, international support will increasingly take on the guise of ordinary rule of law assistance, rather than constitutional assistance specifically related to implementation.

As the International Institute for Democracy and Electoral Assistance (IDEA) has observed, even expansively defined constitution-building processes must ultimately be subject to a non-arbitrary 'exit point'.[19] The necessity of a coherent transition from the implementation end of constitutional assistance measures to the initiation of ordinary rule of law support is perhaps most clearly reflected in the tendency of some observers to notionally divide rule of law work into several phases – including an initial period of drafting rules (including both ordinary legislation and constitutions) and a second and separate phase of implementation of these rules by way of institution-building.[20] However, subsequent political crises may take on a constitutional nature when they involve disputes regarding the application or interpretation of constitutional provisions rather than those set out in ordinary legislation.

2.2 REGIONAL ENFORCEMENT OF IMPLEMENTATION COMMITMENTS

In seeking an answer to the implementation question, it is also crucial to move beyond the traditional actors and activities in constitutional assistance and look to the role of regional organizations and networks with mandates, by their member states, to comment on, advise and even intervene in the implementation of national constitutions. The most obvious examples are regional human rights courts and commissions. For instance, the European Court of Human Rights has frequently reinforced rule of law principles through its rulings on issues such as the right to a fair trial, and does not shy away from scrutinizing the constitutional as well as the legislative provisions of respondent states. However, even regional bodies set up for other purposes, such as facilitating economic integration, development cooperation or regional stability, may find themselves in situations in which their member states' constitutional frameworks may come into conflict with the legal or political undertakings they made with regard to their fellow member states upon accession.

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19 IDEA proposes that the definition of such constitution building should be expanded beyond the formal promulgation of a constitutional text to include the subsequent process of "implementing and then 'making work' a substantially new instrument dealing with the fundamentals of governmental power." While emphasizing the importance of context, IDEA suggests that one generalizable 'exit point' indicator may be the accomplishment of a full and democratic transition of power in accordance with the new constitution. IDEA, "Constitution building after conflict", page 11-12.

20 "Rule of Law Symposium: The History of CEELI, the ABA's Rule of Law Initiative, and the Rule of Law Movement Going Forward", *Minnesota Journal of International Law,* vol. 18 (2009), page 316-17 (the discussants suggest the existence of a third phase related to change of culture).

Regional oversight of constitutional frameworks may involve mandatory processes backed by sanctions, as in the case of the EU Commission's infringement proceedings, or voluntary processes aimed at the attainment of standards, such as deliberations by the Venice Commission of the Council of Europe.

However, even where such mechanisms exist and are applied, they do not always guarantee the implementation of constitutional frameworks in a manner consistent with rule of law principles. Bosnia's longstanding failure to implement either a Venice Commission opinion or a subsequent European Court of Human Rights judgment urging constitutional amendments allowing for non-discriminatory electoral rules is just one example. Evidence from the increasingly common instances in which the UN has worked with regional organizations in mediating constitutional crises suggests that the world body's intercession increases the chances of negotiating solutions compatible with constitutional principles as well as international standards.[21]

Ultimately, however, the observance of rule of law principles in constitutional implementation will depend significantly on domestic factors including the legitimacy of constitutional rules, procedures and institutions at the national level. Thus, one of the key findings of this study is that a good deal remains to be done in terms of identifying both generalizable practices that may help to anchor rule of law principles in ongoing constitutional practice and analyzing the dynamics between national, regional and international actors in such processes. Given the connection between the restoration of a viable social contract through a successful constitution-building process and the overarching objectives of rule of law, equitable development and state-building, support to more effective constitutional assistance is clearly a sound investment.[22]

21 Charles T. Call, "UN Mediation and the Politics of Transition after Constitutional Crises", *International Peace Institute Paper* (2012).

22 IDEA notes that while an initial post-Cold War generation of constitution-building processes appears to be winding down, the course of events initiated in last year's Arab Spring are giving rise to a new generation of constitution building processes driven by "poverty and inequality and the demand for self-determination." IDEA, "Constitution building after conflict", page 10.

3 TRENDS IN CONSTITUTIONAL ASSISTANCE

One significant trend related to constitutional assistance is the emergence of this set of practices as a self-conscious 'field' of international engagement in its own right, united by the efforts of a nascent community of practice to define common criteria and methodologies for providing effective support to constitutional processes. In the 1990s, international engagement with constitution-building might best have been characterized as an uncoordinated combination of ad hoc technical advising by constitutional law experts (typically drawn from legal academia) and opportunistic advocacy efforts for the incorporation of particular sectoral concerns (human rights, political party support, gender equality, etc.) in constitutional processes. Now, as will be discussed below, these two functions have essentially merged into a new field of activity that seeks to support effective constitution-making processes through facilitation and expertise while promoting the inclusion of a substantive 'canon' of international norms and best practices purporting to set out minimum standards across a range of key sectors.[23]

The arrival of constitutional assistance as a field can be seen at all levels. At the UN level for instance, it is reflected by the inclusion of 'constitution-making' as a cross-cutting theme in the UN's rule of law work, as well as a recent Guidance Note of the Secretary-General on UN Assistance to Constitution-making Processes, which sets out to standardize and coordinate the work of UN agencies and proposes a "convening mechanism" in order to ensure policy coherence and development.[24] At the level of international NGOs, this development is reflected by the allocation of dedicated capacity and resources to constitutional assistance within organizations otherwise focused on more typically sectoral matters such as rule of law or democratization. Indeed, these actors have in turn sought not only to advance their own organizations' concerns via constitutional assistance activities but also to support the development of a self-conscious community of practice through the development of online resources and practitioner tools.[25]

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23 Inevitably, such a trend raises risks as well as opportunities: "A self-selected community of practice may be a source of poor advice, of more disconnect from actual practice, or of self-promotion. Individuals with actual experience in a constitution building process are quite few and those with experience in a number of different countries (beyond attending thematic seminars in the field) even fewer." Author interview, Winluck Wahiu (04 June 2012).

24 Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes (April 2009). See page 7, ("UN System Arrangements").

25 The Constitution Building programme at IDEA has devoted a good deal of its efforts to the development of a community of practice both through the recent publication of a *Practical Guide to Constitution Building,* trainings and conferences meant to promote South-South dialogue on the topic and the development of a website – http://www.constitutionnet.org/ – featuring resources and tools. The 'Constitution-making for Peace' programme at Interpeace recently published a handbook on 'Constitution-making and Reform: Options for the Process' and made it available, along with selected resources, at http://www.interpeace.org/constitutionmaking/. The Comparative Constitutions Project (CCP) and the US Institute of Peace (USIP) have also collaborated in developing a website: http://constitutionmaking.org/.

Perhaps one of the most interesting developments has come at the regional level, as a range of regional organizations come to grips with their frequently unplanned role in assisting in constitution-building, advocating constitutional reform or even monitoring constitutional implementation or mediating in constitutional crises in member-states that are at risk of contravening political or legal commitments made upon accession. Finally, the most significant actors in the recent development of the constitutional assistance field have been those at the national level. In light of the ongoing 'democratization' of constitutional processes (see Section 3.2 below), international constitutional assistance efforts have focused on consultation, ownership and public participation. In this spirit, national actors are increasingly provided with forms of assistance meant to facilitate their access to information about a broad range of international best practices as well as their integration into regional and international networks and communities of practice.[26]

The emergence of the field of constitutional assistance has been characterized by a high degree of consensus around three approaches to constitution-building, namely the 'internationalization' of the process, its 'democratization' in the sense of ownership by ordinary people as well as elite groups, and the inclusion of vulnerable and marginalized groups.[27] While these trends tend to be portrayed as complementary, this section discusses areas of tension as well as synergy. The tensions that exist tend to closely align with one of the central paradoxes of constitutionalism, namely the fact that contemporary post-conflict constitutions are designed to simultaneously foster transitions to democracy and restrict the exercise of democratic power by insulating some spheres of individual activity – as well as the cultural life of some groups – from the direct effect of majoritarian decision-making.

3.1 INTERNATIONALIZATION OF CONSTITUTION-BUILDING PROCESSES

The idea that inter-governmental organizations such as the UN have a legitimate role in the domestic constitutional processes of member states experiencing political transitions appears to have become relatively well accepted, although systematic analysis of international actors' record in this area remains incomplete (see Section 4.1 below).[28] Constitutional assistance has begun to be routinized through steps such as the issuance

26 In the context of democratization, for instance, the UN Secretary General has recommended that UN assistance should "aim to support legitimate democratic forces [and] connect these forces to global knowledge and expertise, including south-south collaboration…." Guidance Note of the Secretary General on Democracy (2009), page 3.

27 This breakdown of trends represents the author's best attempt to coherently present the subject matter of this study and it should be acknowledged that there are numerous, equally valid ways of parsing and describing the current parallel processes of change and development within the field of constitutional assistance. For instance a leading manual on this topic refers to four "emerging guiding principles" of "participatory constitution-making", namely public participation, inclusiveness, transparency and national ownership. Brandt, et.al., *Constitution-making and Reform: Options for the Process* (Interpeace, 2011), page 9-10.

28 See Sripati, "UN Constitutional Assistance Projects", page 93 (noting that constitutional assistance is now openly discussed as a UN policy theme despite near silence on this topic from the end of the Cold War until 2006.)

and 2009 updating of a Secretary-General's *Guidance Note on United Nations Assistance to Constitution-making Processes*, which accompanies those developed for other rule of law cross-cutting issues as well as rule of law assistance more broadly.

3.1.1. TOWARD AN INTERNATIONAL RULE OF LAW

The matter of fact engagement of the UN and other international actors in constitutional assistance processes belies the fact that constitution-making has been – and still is – a core function of state sovereignty. This is not to say that there has not been considerable diffusion and cross-fertilization of constitutional approaches between countries in the past, and particularly during the process of decolonization, during which newly independent states frequently adopted constitutions based on foreign models.[29] However, until the advent of international human rights law after World War II, minimal formal connections existed between the constitutional law that countries used to order their internal affairs and the international law rules that governed their relations with other states. Because international law was focused on inter-state matters such as trade and warfare, it had little to say about how any individual state treated its own citizens, leaving countries free to define what rights and rule of law standards, if any, would apply in their own constitutional frameworks.

The primary innovation represented by human rights law was the introduction of a mutually agreed minimum standard of treatment across a broad range of civil, political, economic, social and cultural spheres to be accorded to all persons within subscribing states' jurisdiction. These rules (as initially set out in the 1948 *Universal Declaration of Human Rights*) were analogous to constitutional rules in that they represented a clear limitation on the exercise of state power. However, unlike constitutional rules, human rights rules derived their authority from treaty obligations, meaning that their enforcement was contingent on the extent that states took seriously their obligation to incorporate them into their domestic legal order.[30] As international law takes precedence over all rules of domestic law, states could not ignore their human rights undertakings without being held in breach of their international obligations. In practice, however, they faced few consequences for doing so.[31]

In rule of law terms, there has been little accountability for states that failed to implement human rights rules, resulting in a lack of predictability and transparency in their implementation. Logically, an important starting point in remedying this state of affairs would be to ensure that the legislative frameworks of all states – and particularly their constitutions – reflected their human rights obligations. Although it has taken a long time for this principle to be put into practice, the original call in the Universal Declaration of

29 The diffusion of constitutional norms and approaches has been part of a larger trend toward diffusion and interplay of legal norms across borders that is discussed – and debated – under the rubric of 'transnational law'. See, e.g. Gregory Shaffer, "Transnational Legal Process and State Change: Opportunities and Constraints", *International Law and Justice Working Paper* 2010/4 (July 2010).

30 By 1966, the symbolic undertakings set out in the Universal Declaration had been codified as twin International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). These are now among the most widely ratified and authoritative human rights conventions.

31 In this respect, the regional human rights conventions in the Americas and Europe provided unusually strong models, as both were presided over by courts capable of issuing binding decisions.

Human Rights to be protected through the rule of law has been reflected in recent calls for an 'international rule of law' or 'rule of law among nations'.[32] A good deal of scrutiny in this regard has been leveled at the practice of UN organs such as the Security Council.[33] However, a recent Secretary-General Guidance on this topic also urges UN member-states to strive after consistent application of international law and standards in order to achieve global "supremacy of the law, equality before the law and accountability under the law."[34] Indeed, the manner in which the UN Secretary-General has defined and justified the practice of constitutional assistance indicates that these concerns are now being taken seriously within this field of practice as well.

3.1.2 JUSTIFYING INTERNATIONAL INVOLVEMENT

In the 2009 *Guidance Note on UN Assistance to Constitution-making Processes*, the Secretary-General initially strikes a deferential note, recognizing constitution-making as a "sovereign national process" and specifying that assistance will be provided only upon request and in a manner "carefully tailored to the local context".[35] However, he goes on to note the significance of constitution-making to stabilizing transitional and post-conflict settings and the increasing engagement of the UN with these issues, concluding that constitutional assistance now comprises a "core component of the Organization's peacebuilding and state-building strategy…."[36] The centrality of constitution-building is also reflected in the Secretary-General's 2008 Guidance Note on Rule of Law Assistance, which lists constitutional guarantees and restraints on the exercise of power as the starting point in developing frameworks for strengthening the rule of law.[37]

The tension between deference to national control and the assertion of a legitimate international interest in the outcome of constitution-building processes is reflected in the initial post-Cold War tendency to obscure the extent of UN constitutional assistance by subsuming it within less potentially controversial programming such as electoral assistance.[38] However similar tensions continue to be reflected even in the new, more open constitutional assistance discourses connected with the rule of law. For instance, the Secretary General's 2004 Report on the rule of law and transitional justice asserted that "no rule of law reform, justice reconstruction or transitional justice initiative imposed from the outside can hope to be successful or sustainable" and framed the international community's role as "solidarity, not substitution."[39] At the same time, the 2004 Report positioned the UN

32 Hans Corell, "Prospects for the Rule of Law among Nations" (Lecture, 24 February 2004), available at untreaty.un.org/ola/legal_counsel3.aspx.

33 See, e.g. UN Security Council, "Cross-Cutting Report on the Rule of Law", *Security Council Report* No. 3 (29 October 2011).

34 UN Secretary-General, Guidance Note of the Secretary-General: UN Approach to Assistance for Strengthening the Rule of Law at the International Level (May 2011), page 3.

35 Guidance Note of the Secretary-General on Assistance to Constitution-making Processes, page 2 and page 4.

36 Ibid., page 3.

37 Guidance Note of the Secretary General: UN Approach to Rule of Law Assistance (April 2008), page 4-5.

38 Sripati, "UN Constitutional Assistance Projects", page 93-4.

as the guarantor of a set of international legal standards related to rule of law and human rights that were deemed to have acquired universal validity:

> United Nations norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions. As such, these norms and standards bring a legitimacy that cannot be said to attach to exported national models which, all too often, reflect more the individual interests or experience of donors and assistance providers than they do the best interests or legal development needs of host countries. These standards also set the normative boundaries of United Nations engagement... [40]

The application of these standards is set out not only as an obligation undertaken by states but also as a precondition for meeting the fundamental UN aim of international peace and security. As the 2004 Report points out, promotion of justice and the rule of law via respect for these standards is not only central to consolidation of peace in post-conflict countries but also to preventing conflict by addressing its root causes in a legitimate and fair manner. In the latter case, prevention is described as "the first imperative of justice." [41] This statement can be seen as a culmination of a post-Cold War process in which the UN moved beyond its traditional sphere of conflict resolution to embrace a range of measures – including constitutional assistance – that were meant to prevent conflict by preemptively addressing its underlying structural causes. [42]

The resulting implication in the Secretary-General's 2004 Report – that the international community has a legitimate role in demanding the domestic application of international norms in order to prevent conflict or address its effects – was endorsed the following year, when the UN General Assembly adopted the doctrine of 'Responsibility to Protect' (R2P) in the course of the 2005 UN World Summit. International attention has focused on the possibility R2P created for the UN Security Council to authorize armed interventions against governments that carried out egregious crimes against their own populations. However, the actual implementation of R2P has emphasized the less controversial topic of prevention, expressed by the General Assembly as a commitment "to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[43] The link between preventive modes of R2P and efforts to promote democracy and the rule of law were made early on by observers such as former Chilean UN Ambassador Heraldo Muñoz:

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39 UN Secretary General's 2004 Report on the rule of law and transitional justice, paragraph 17.

40 Ibid., paragraph 10. Although this canon of international standards is explicitly rooted in 'hard' international treaty law (and in particular, international human rights, humanitarian, criminal and refugee law frameworks, described as the "four pillars of the international legal system"), it also extends to the "wealth of United Nations human rights and criminal justice standards developed in the last half-century." Ibid., paragraph 9.

41 Ibid., paragraphs 2 and 4.

42 Sripati, "UN Constitutional Assistance Projects", page 94.

43 UN World Summit Outcome Document (2005), paragraph 139.

> A strategy of preventing the occurrence of the R2P crimes should contemplate democracy promotion. Democracy is conducive to rooting out some of the causes of those egregious crimes. Democracies, with all their defects, generally do not commit atrocities such as the four crimes covered in the R2P. Consequently, international mechanisms for the promotion of democracy like the United Nations Democracy Fund (UNDEF), the Rule of Law Coordination and Resource Group, and the UNDP Democratic Governance Program should be strengthened to lend support to countries that so request it. In the long run, the expansion of democracy could be a useful mean to prevent the occurrence of atrocities.[44]

In accordance with these developments, international promotion of the rule of law has been increasingly aligned with the UN 'peace and security agenda'. The 2011 update to the UN Secretary General's Report on the rule of law and transitional justice begins with the recognition that "States marked by ineffective governance, repressive policies, poverty, high rates of violent crime and impunity pose significant threats to international peace and security."[45] Prevention takes an increasingly central role as well with "festering grievances based on violations of economic and social rights" highlighted as a significant risk based on their potential to spark violent conflict.[46] This observation corresponds closely to recent Security Council practice in which prevention has been increasingly thought of in 'structural' terms aimed at addressing "underlying political and/or socioeconomic factors that could lead to … conflict over the long term".[47] In the 2011 rule of law report, the Secretary General notes that the UN's legal reform assistance programming can "ensure that, inter alia, constitutional protections are calibrated to address the right to economic and social development of marginalized groups",[48] and makes the following recommendation:

> I will also ensure that the United Nations will respond promptly and holistically to requests by national authorities to assist with constitution-making and legislative reform processes, and act as a repository of best practices and comparative experiences.[49]

Returning to the Secretary General's Guidance Note on constitutional assistance, a close reading reinforces the idea that the UN remains deferential in many respects to states' sovereign decisions in this area, but that it also considers itself (and by extension its

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44 Heraldo Muñoz, "RtoP: Responsibility to Protect", *Maxims News Network* (21 September 2009), available at http://www.maximsnews.com/news20090921 chileambassadorRto P10909210102.htm (accessed 21 February 2012).

45 UN Security Council, The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General to the Security Council, UN Doc. S/2011/634 (12 October 2011), paragraph 6.

46 Ibid., paragraph 51.

47 Structural prevention stands in contrast to the more familiar activities carried out under the rubric of 'operational' prevention, such as preventive diplomacy and sanctions. Greater focus on structural issues has been accompanied by new 'systemic' prevention efforts, aimed at "global risks" such as climate change and transnational organized crime. Paul Romita, "The UN Security Council and Conflict Prevention: A Primer", *International Peace Institute Policy Paper* (October 2011) page 3.

48 UN Secretary General, 2011 rule of law report, paragraph 52.

49 Ibid., paragraph 82.

international partners) as actors with a legitimate mandate and role. This is reflected first in the assertion of a right on the part of the UN to choose not to engage with constitution-building processes even if requested to do so. Instead, it will assess such engagement "on a case by case basis", taking into account "the national situation and political complexities, as well as the practical and symbolic ramifications of its involvement", and prioritize situations in which UN engagement "will likely strengthen the rule of law and democratic institutions and practices."[50] Moreover, the Note implies that even in situations in which the UN has not been requested or chosen to assist with constitution-building, it enjoys a prerogative to ensure compliance with relevant international standards:

> The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop. Accordingly, the UN should engage national actors in a dialogue over substantive issues, and explain the country's obligations under international law and the ways in which they could be met in the constitution.[51]

The internationalization of constitution-making processes is by no means a zero-sum equation in the sense that international actors are allowed to overrule the decisions of national decision-makers and voters (e.g., in the case of a constitutional referendum). However, international actors are now seen as having a legitimate role in facilitating such processes in cases in which they can contribute relevant expertise and in "speaking out" in cases in which draft constitutional texts are incompatible with the specific international obligations of the country in question, or indeed international standards in general. In this sense, new trends in constitutional assistance have contributed to the further 'constitutionalization' of international human rights norms and rule of law standards, in that the latter increasingly represent a restriction on the exercise of state power not only in theory but also in practice. By more clearly linking the international community's notional commitment to a 'rule of law among nations' with its core peace and security agenda, the UN has asserted a legitimate expectation that national constitutions will reflect and promote international human rights and rule of law standards.

3.2 DEMOCRATIZATION OF CONSTITUTION-BUILDING

A second fundamental change that has accompanied the emergence of constitutional assistance as a field is the principle that the substance of constitutions should directly reflect not only the aspirations of national elites but also the will of the governed themselves. Democratization trends in post-conflict settings have involved a heavy emphasis on the process of constitution-making, rather than solely on the outcome.

50 UN Secretary General, Guidance Note on assistance to constitution-building, page 3.
51 Ibid., page 4.

This is based on the insight that in order to prevent future conflict, constitutional moments in divided societies must constitute the beginning of a more open and accountable political process, rather than the 'act of completion' of such processes posited in traditional models.[52] This model has emerged almost entirely from nationally-owned constitution-making processes with little international involvement.[53] In fact, as noted in a seminal 2005 report on UN constitutional assistance, the past reluctance of international actors to adapt to these approaches has tended to undermine the legitimacy of some internationally supported processes.[54] At the same time, international human rights standards increasingly support the existence of a right to participate in constitution-making processes.[55]

The emergence of democratic constitution-building raises issues at a number of levels. At a broad level of generalization, it invokes the issue of whether constitutions themselves are inherently or necessarily counter-democratic, in the sense of allowing a 'founding' set of political actors to impose rules on society that cannot be altered by ordinary democratic processes. In the specific context of post-conflict peacebuilding, advocacy for democratic constitution-making must also take into account the tension between the short-term need to provide elite groups with incentives to cease and refrain from hostilities and the long-term imperative of ensuring that the ensuing political settlement reflects the needs, rights and aspirations of ordinary people. The effects of democratization have also spurred controversy in that they have included a retreat from the promotion of national models and implied the need to engage with local conceptions of human rights and rule of law that may not always be easily reconcilable with international standards.

3.2.1 THE NEW CONSTITUTIONALISM

Democratic principles are nothing new to constitution-making. However, the democratic aspect of such processes has in the past tended to be limited to the manner of selection of constituent assemblies or the ratification of texts arrived at in otherwise closed drafting sessions. By contrast, the novel element in contemporary "participatory constitution-making" trends takes the form of institutionalized opportunities for ordinary people to affect the actual substance of such documents through extensive consultation processes.[56] The tendency toward democratization in constitution-making is reflected in the increased emphasis on national ownership within this field and rule of law practice more broadly.[57] In post-conflict settings, this tendency has tracked the shift from the type of complex UN peacebuilding missions

52 Vivien Hart, "Democratic Constitution Making", *United States Institute of Peace (USIP) Special Report 107* (July 2003), page 3.

53 Ibid., page 7-10.

54 Brandt, Michele, "Constitutional Assistance in Post-Conflict Countries – The UN Experience: Cambodia, East Timor and Afghanistan" (June 2005).

55 Hart, "Democratic Constitution Making", page 5-6.

56 Brandt, et. al., refer to a "new constitutionalism" (page 3) based on "participatory constitution-making" (*Constitution-making and Reform,* page 9).

57 See, e.g. Annika S. Hansen and Sharon Wiharta, "The Transition to a Just Order – Establishing Local Ownership after Conflict: A Policy Report", *Folke Bernadotte Academy Research Report* (2007).

with executive mandates typical of the late 1990s to lighter footprint missions with a mandate to advise and support nationally-led reconstruction processes in the 2000s.[58]

In the 2008 Guidance Note on Rule of Law Assistance, the Secretary-General urges UN actors to base their support on "national assessments, local needs and aspirations, and broad participation" while facilitating "meaningful ownership" through the "legal empowerment of all segments of society."[59] The corresponding note on constitution-building goes into further detail regarding the rationale for this approach:

> A genuinely inclusive and participatory constitution-making process can be a transformational exercise. It can provide a means for the population to experience the basics of democratic governance and learn about relevant international principles and standards, thus raising expectations for future popular engagement and transparency in governance. Inclusive and participatory processes are more likely to engender consensus around a constitutional framework agreeable to all. The UN must encourage outreach to all groups in society, and support public education and consultation campaigns. Human rights defenders, associations of legal professionals, media and other civil society organizations … should be given a voice in these processes. Consultations with children themselves should also be envisaged.[60]

In rule of law terms, the rationale for engaging in participatory constitution-making relates not only to the legitimacy derived from a process perceived as open, transparent and inclusive, but also the common sense observation that ordinary citizens are more likely to hold public officials accountable for rules that they themselves were involved in writing.[61] However, this approach represents a fundamental departure from past schools of thought that focused on the role of constitutions as a restraint on the exercise of democratic powers and identified some of the counter-democratic aspects of constitutions – their drafting by elite groups and experts, the legislative supermajorities required to amend them, and their aspiration to longevity – as sources of legitimacy. This strain of thought is strongly represented in American constitutional scholarship, and particularly that advocating 'interpretivist' or 'originalist' doctrines that stress the need to apply the US Constitution in accordance with the intention of the 'framers' that drafted it:

> The rule of law is fundamental in our society. To be effective, it cannot be tossed to and fro by each new sociological wind. Because it is rooted in written text, interpretivist review promotes the stability and predictability essential to

58 Brandt, "Constitutional Assistance in Post-Conflict Countries"; see also Bergling, et. al. (page 42-3). This trend is demonstrated by comparing the interventionist approach to rule of law reform advocated in the 2000 'Brahimi Report' with the more nuanced and collaborative approach proposed four years later in the UN Secretary-General's report on rule of law and transitional justice.

59 UN Secretary General, Guidance Note on Rule of Law Assistance, page 2 and page 4.

60 UN Secretary General, Guidance Note on Assistance to Constitution-making Processes, page 4.

61 Brandt, "Constitutional Assistance in Post-Conflict Countries", page 1.

> the rule of law. By contrast, non-interpretivist review presents an infinitely variable array of possibilities. …. One can easily see the fatal vagueness and subjectiveness of this approach: Each judge would apply his or her own separate and diverse personal values in interpreting the same constitutional question. When the anchor is lost, we drift at sea.[62]

Despite the dominance of the US Constitution as a transnational model in past decades, the incongruity between this conservative view of constitutionalism and current, more flexible understandings anchored in human rights law have seen the use of the US Constitution as an international model plummet since the end of the Cold War.[63] Even on the US domestic front, conservative observers have noted that originalism may simply constitute judicial activism in another guise, and have called for the revival of more democratic interpretive approaches focused on deference to the legislator.[64] However, at the international level, earlier emphases on longevity and consistency have clearly yielded ground to a more functional and democratic view of the purpose of constitutional frameworks.

> Longevity of a constitution may be seen as a measure of success of the process that adopted it. But many people assert that constitutions made to assist in the transition from war to peace may succeed in that role at that time, but then need to be changed to meet the needs of more stable times. It may also be difficult to link longevity to procedural or implementation choices. A constitution may be short-lived for reasons little related to the process by which it was made. Moreover, a process that does not result in a constitution may set the stage for future constitutional reform and more democratic institutions and practices.[65]

Constitution-making processes are frequently included as a component of broader peacebuilding efforts in conflict and post-conflict settings. As a result, constitutional assistance actors have been required to acknowledge and seek to address the particular challenges related to fostering democratic, participatory processes in settings in which both state capacity and trust between citizens may be at an all-time low.[66] One of the earliest UN studies on constitutional assistance argued for strict separation of negotiations related to the termination of hostilities (which must necessarily focus on those elite groups with the power to deliver a peace agreement) from the longer term process of constitution-making, where the views of ordinary citizens and marginalized groups must be reflected alongside those of elites if the underlying causes of conflict

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62 J. Clifford Wallace, "Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation" (1987), available at http://discoverexceptionalism.com/wp-content/uploads/2011/05/Whose-Constitution.pdf (accessed 22 March 2012).

63 Adam Liptak, "'We the People' Loses Appeal With People Around the World", *The New York Times* (06 February 2012).

64 Jeffrey Rosen, "Against Interpretation" (book review), *The New York Times* (16 March 2012).

65 Brandt, et. al., *Constitution-making and Reform,* page 3.

66 One observer points out that handling societal conflict is one of the ordinary functions of a constitutional framework, but that when such conflict has taken the form of violence, the challenges to containing it by constitutional means are increased. IDEA, *A Practical Guide to Constitution Building: An Introduction,* page 5.

are to be sustainably addressed.[67] Nearly a decade later, the 'new constitutionalism' has come to dominate the discourse (in the form of manuals and guidelines) but remains controversial within the field. A significant camp of practitioners remain focused on securing consensus among elites, while assistance programming still frequently focuses on the promotion of specific foreign models to the exclusion of encouraging broad-based participation.[68]

Meanwhile, advocates of a participatory approach such as the authors of the Interpeace constitution-making manual caution that a range of risks remain inherent in participatory constitution-making in post-conflict settings, ranging from security issues to elite manipulation.[69]

3.2.2 FROM FOREIGN MODELS TO INTERNATIONAL NORMS

Given the documented obstacles to the direct participation of marginalized groups in peace negotiations, participatory post-conflict constitution-making represents a crucial opportunity to bring in their perspectives in a later process that has the potential to be more deliberative, more transparent, and more comprehensive than ordinary peace negotiations tend to be.[70] As a general matter, constitution-making in post-conflict settings tends to be described as a high risk and high yield enterprise. As the authors of the Interpeace constitution-making manual have observed, societies with high levels of civic trust and shared values hardly need constitutions but can easily agree on them, whereas divided societies have little choice but to try to implant shared values by means of constitutional provisions, and face particular difficulties both negotiating them and implementing them uniformly as a result.[71] Post-conflict societies represent an extreme variant of divided societies in this sense; the outset conditions for constitutional negotiations are extremely unpromising but the viability of the post-conflict state may hang on the extent to which the result reflects the input of all parties as well as all sectors of society.

One of the more obvious implications of democratic and participatory constitution-making is that approaches based on the rote application of prescriptive templates derived from other national contexts are ruled out. *The Secretary-General's Guidance Notes on Rule of Law Assistance and Constitution-making* employs similar language in "eschewing one-size-fits-all formulas and the importation of foreign models".[72] In recognizing that constitution-making should instead be a "sovereign national

67 Jamal Benomar, "Constitution-Making and Peace Building: Lessons Learned From the Constitution-Making Processes of Post-Conflict Countries" (August 2003).

68 Brandt, et. al., *Constitution-making and Reform,* page 177.

69 Ibid., page 12.

70 In a 2007 study, the Brookings-Bern Project on Internal Displacement found significant obstacles to the participation of internally displaced persons (IDPs) in track one, track two and even track three peace negotiations, and recommended alternative strategies such as sensitizing international mediators to the risks faced by IDPs and promoting compliance in peace agreements with human rights standards related to displacement. Brookings-Bern Project on Internal Displacement, Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building (September 2007), page 19-22.

71 Brandt, et. al., *Constitution-making and Reform,* page 14.

72 UN Secretary General, Guidance Note on Rule of Law Assistance, page 2.

process", the latter Guidance Note subtly emphasizes the role of actively exercised popular sovereignty, rather than decisions by societal elites, as the appropriate way to supplant past reliance on foreign models:

> The UN should be particularly sensitive to the need to provide advice and options without causing national actors to fear that UN or other international assistance could lead to a foreign imposed constitution. …. The options and advice provided must be carefully tailored to the local context, recognizing there is no "one size fits all" constitutional model or process, and that national ownership should include official actors, political parties, civil society and the general public.[73]

The relatively straightforward consensus that has emerged against the use of imposed national models has tended to be placed in direct contrast with the universal legitimacy asserted in favor of international standards. For instance, the Secretary-General Guidance on Rule of Law Assistance states that *international* standards "incorporate a legitimacy that cannot be said to attach to exported national models reflecting the values or experience of donors and assistance providers."[74] This approach appears to presume that participatory processes can be guided toward outcomes compatible with international standards, creating a marriage of internal and external legitimacy. For instance, the Guidance Note on constitutional assistance suggests that the UN should "engage national actors in a dialogue over substantive issues, and explain the country's obligations under international law and the ways in which they could be met in the constitution."[75] However, this approach rests on two assumptions that are not beyond question: the first being that the particular standards involved have truly achieved an indisputably universal legitimacy, and the second that they will always be perceived as compatible with deeply ingrained norms and practices espoused by affected communities.

It is important to begin by recalling that the 'internationalization' of fields such as constitutional assistance has been justified largely on the basis of the UN's role in seeking uniform and effective application of relevant international standards (see above).[76] However, from a rule of law perspective, the canon of international standards relied on by the UN may raise some legitimate concerns simply on the basis of a lack of precision. In describing the "normative foundation for our work", the Secretary-General's 2004 report refers primarily to the UN Charter and the "four pillars of the modern international legal system" (namely, international human rights,

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73 UN Secretary General, Guidance Note on Assistance to Constitution-making Processes, page 4.

74 UN Secretary General, Guidance Note on Rule of Law Assistance, page 2.

75 UN Secretary General, Guidance Note on Assistance to Constitution-making Processes, page 4.

76 The confidence with which the UN views this link is anecdotally reflected in the UN Secretary-General's Guidance Note on Democracy, which begins a discussion of possible UN activities by querying "[w]here should the UN, *with its universal legitimacy,* focus its efforts … with a view to the implementation of the universal instruments and declarations adopted by its membership?" UN Secretary-General, Guidance Note on Democracy, page 5 (emphasis added by author).

humanitarian, criminal and refugee law), much of which is undoubtedly universal in the sense of having achieved the status of customary international law.[77] However, the report also includes a far less clearly delimited "wealth of United Nations human rights and criminal justice standards developed in the last half-century" as part of the "universally applicable standards adopted under the auspices of the United Nations [that] must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law."[78]

While there is little doubt that many 'soft law' standards and declarations reflect best practices and emerging rules of international law, they are not universally accepted in the sense that, for instance, the core global human rights conventions are. As a result, even well-intentioned efforts to promote such standards as universally accepted risk backfiring and perhaps even eroding confidence in those legal norms that are undoubtedly binding on the great majority of states. In the worst case, allowing the UN's 'normative parameters' for engagement to be so broadly drawn risks fostering the perception of politicization. For example, assertions that best practice guidelines developed by non-UN international financial institutions (IFIs) have in some cases been presented as binding standards in constitutional assistance contexts, should raise concerns about the current elasticity of this concept.[79] As a matter of both prudence and principle, calls for standard-setting processes that can help to identify those rule of law principles and practices that can indisputably be described as universally applicable should be welcomed.[80]

3.2.3 UNIVERSALISM VERSUS CULTURAL RELATIVISM

A more troubling concern is the issue of whether even core international norms are always perceived as legitimate at the local or even national level in states transitioning to democracy. Recall that the 'democratization' trend in constitutional assistance is based on a new commitment to participatory constitution-making, in which ordinary people are expected to directly contribute to the substance of constitutions. The question that arises is whether such democratically legitimate constitutional provisions should be allowed to prevail over the core international standards that form the normative parameters for international actors' engagement in cases in which the two come into conflict. The implicit answer in the Secretary-General's Guidance Notes is that where local or national values conflict with international norms, the UN engagement should steer even fully democratic, participatory processes toward the 'right' (e.g. international norm-compliant) outcome.

This understanding is arguably embodied in references to participatory constitution-making as "a transformational exercise", which, crucially, not only

77 UN Secretary-General's 2004 Report on the rule of law, paragraph 9.

78 Ibid., paragraph 9.

79 Vijayashri Sripati, "UN Constitutional Assistance: An Emergent Policy Institution", *Osgoode-York Working Paper Series in Policy Research* (October 2009), page 18-19.

80 Bergling, et.al., page 22-26. The authors discuss the circumspect approach to more formal codification of international rule of law principles by international and regional organizations to date.

illuminates "the basics of democratic governance" but also raises familiarity with "relevant international principles and standards".[81] In other words, it is conceded from the outset that ordinary people in states transitioning to democracy may not automatically have an intuitive grasp of either the forms of participatory constitution-making or the normative standards such processes are meant to embed. In response, international actors are faced with a paradox. While constitution-making processes are meant to be "nationally owned and led" with UN advice "tailored to the local context", the same context may need to be overcome if it is not standards-compliant.[82] Specifically, the international community is encouraged to engage in a broad range of advocacy tactics in order to actively promote "the standards it has helped to develop".[83]

In the best case scenario, ensuring that democratic processes reflect international norms is simply a matter of capacity building, through dialogue and the dissemination of information. However, where there is significant resistance, international actors are encouraged to mobilize national reform constituencies in a manner that focuses on the technical aspects of such debates and seeks to respond through emphasizing both national and international comparative expertise.[84] These approaches share the assumption that what is needed is simply more information regarding "the country's obligations under international law and the ways they could be met in the constitution."[85] In the worst case, UN actors are exhorted to engage in condemnation – in the form of an obligation to "speak out when a draft constitution does not comply" with international standards.[86] Here, assuming that such a draft constitution has been arrived at through a participatory process, the UN is placed in the position of condemning the decision not of a narrow elite, but rather the wishes of the majority. The implied message of the Note on constitutional assistance – that international norms act as a counter-majoritarian brake on conflicting expressions of democratic will – is more explicit in the Secretary-General's Note on democracy:

> Local norms and practices must be taken into consideration and weaved into emerging democratic institutions and processes to the extent possible, while at the same time promoting internationally agreed norms and principles.[87]

In a sense, the combined effects of the trends toward 'internationalization' and 'democratization' of constitution-making has been to displace a degree of the counter-majoritarian nature of constitutionalism from the domestic level (where constitutions still restrict the exercise of power but in a manner reflecting broad popular input) to the international level (where international standards constrain the acceptable outcomes

81 UN Secretary-General, Guidance Note on Assistance to Constitution-making Processes, page 4 (point 2).
82 Ibid., page 4 (point 4).
83 Ibid., page 4 (point 2).
84 Ibid., page 4 (point 5, "Mobilize and coordinate a wide range of expertise").
85 Ibid., page 4 (point 2).
86 Ibid., page 4 (point 2).
87 UN Secretary-General, Guidance Note on Democracy, page 3-4.

of domestic participatory processes). The potential for this to cause tensions should be clear. In effect, the international community finds itself supporting transitions to democratic rule of law by advocating peremptory limits on the acceptable outcome of democratic processes that will inevitably be controversial where they do not resonate with local mores.

Such tensions may be exacerbated where human rights and rule of law advocacy has failed in the past to bring tangible improvements. Developed countries have also only recently begun to grapple with the problem of 'neo-patrimonial' regimes – those which superficially espouse democracy, human rights and the rule of law to the extent necessary to avoid international opprobrium and attract international development assistance and investment, while perpetuating their rule through arbitrary, oppressive and corrupt practices.[88] The legacy when such regimes are overthrown – as has been the case in the Arab Spring – may include a degree of popular suspicion of human rights and rule of law discourses, particularly where these have been perceived as self-serving excuses for collusion between foreign donors, investors and authoritarian regimes.

Beyond such political concerns, there may also be genuine philosophical objections to international standards. Human rights and rule of law perspectives, in particular, tend to reflect a liberal political philosophy that is broadly but not universally accepted. For instance, the core human right to freedom of thought, conscience and religion is formulated in a manner that reflects the central liberal tenet that individuals should not only be *free to choose* the manner of living that most closely corresponds to their notion of a good life, but also *free to revise* these choices as and when their conception of the good life changes.[90] Thus, the freedom to change one's religion is inherent to the protection of freedom of religion under both human rights rules and norms that shaped them such as the 'foundation clause' of the US Constitution.[91]

This approach stands in stark philosophical contrast to the communitarian discourse that has shaped conceptions of human rights in many Muslim societies. According to communitarian tenets (which are not by any means limited to the context of Islam), some choices are so fundamentally constitutive of the communities deemed necessary for human self-realization that they cannot be revised. These views are reflected in the work of the Organization of the Islamic Conference (OIC), which has made significant efforts at both the normative and the institutional level to promote

88 See, e.g., Louise Wiuff Moe, "Addressing state fragility in Africa: A need to challenge the established 'wisdom'?", *Finnish Institute of International Affairs Report* 2010 22 (2010).

89 See, e.g., Will Kymlicka, *Multicultural Citizenship* (Oxford, 1995), page 81–2.

90 J. Clifford Wallace, "Challenges and Opportunities Facing Religious Freedom in the Public Square", *Brigham Young University Law Review* Vol. 2005, No. 5 (2005), page 596–7 ("…religious freedom preserves an important opportunity for choice, which is a key component of liberty. When each religious community is free to proclaim its tenets and teach others, there will be a wider landscape of varying religious views and a broader spectrum of choices. As a result, each individual has a greater opportunity to make a choice that best fits his or her personal needs. Religious freedom is therefore both an important end in itself as well as one of the cornerstones of self-determination, individual choice and pluralism.")

91 Ioana Cismos, "Introductory Note to the Statute of the OIC Independent Human Rights Commission", *International Legal Materials,* Vol. 50, No. 6 (2011).

an Islamic conception of human rights. The OIC's 1990 Cairo Declaration, which is meant to provide concrete guidance to member-states in the field of human rights, provides an example of an essentially communitarian vision of religious rights.[92]

The intersection of religious belief and human rights represents a sphere in which international standards cannot always be regarded as enjoying automatic universal legitimacy. Instead, significant proportions of many of the world's major religious communities embrace values that are at odds with the dominant international norms. This tension is laid painfully bare in extreme cases such as Afghanistan, where a constitution adopted with international advice has not served to prevent the threat of capital punishments for Muslims who seek to convert to another religion.[93] It should be emphasized that these issues are often most obvious with regard to human rights but pertain to rule of law standards as well, in both constitutional and non-constitutional settings. In a number of key rule of law areas, debates over the compatibility of essentially illiberal customary and religious norms and practices with international standards continue.[94]

On the positive side, consensus is emerging around the principle that such norms and practices should be granted recognition contingent on their being applied in a manner consonant with international norms. However, given both practical difficulties encountered in putting this principle into practice and the fundamental philosophical differences that can emerge between local and international norms, resolution of these issues continues to pose a significant conceptual and practical challenge to rule of law assistance. Given the high stakes and inherent politicization of constitution-making processes, the challenges inherent in the application of international norms are, if anything, even more pronounced.[95]

3.3 INCLUSION OF VULNERABLE AND MARGINALIZED GROUPS

One of the most prominent examples of the manner in which international norms may limit the democratic nature of constitution-making involves the need to ensure an inclusive approach to those vulnerable and marginalized groups that lack both the political power and the numbers to be able to fully assert their own interests in a democratic system. As reflected in the UN Secretary-General's Note on constitutional

92 Cairo Declaration on Human Rights in Islam (OIC, 05 August 1990), Article 10 ("Islam is the religion of the true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance to force him to change his religion to another religion or to atheism.")

93 Other examples include El Salvador, where constitution building steeped in Catholic sentiment endangered the right to abortion. In Zambia, a declaration in constitutional reforms after 1990 recognizing Christianity as an official religion has been used to criminalize same sex relations. Author interview, Winluck Wahiu (04 June 2012).

94 In the area of land administration and land rights, for instance, see Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (International Development Law Organization, 2011); Siraj Sajt and Hilary Lim, *Land, Law and Islam: Property and Human Rights in the Muslim World* (London: Zed Books, 2006).

95 See, e.g., Anthony Billingsley, "Writing Constitutions in the Wake of the Arab Spring", Foreign Affairs (30 November 2011).

assistance, such inclusion takes two predominant forms. First, such groups should be included in the process of actual constitution-making, in order to ensure that their perspectives are included, along with all other concerned societal groups.[96] Second, there is a substantive aspect of inclusion in the sense that rights granted to such groups under international law should be reflected in the texts of national constitutions:

> The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons.[97]

The UN Secretary-General has directly linked these issues with a conflict-prevention approach, most recently through the recommendation in his 2011 Report on the rule of law that UN constitutional assistance efforts should ensure that "constitutional protections are calibrated to address the right to economic and social development of marginalized groups".[98] Observers have also noted an element of complementarity between procedural and substantive measures of inclusion, in the sense that inclusive participatory processes tend to shift the focus from political jockeying to "social agenda" issues, including "the right to development and a fair distribution of resources."[99]

Post-conflict countries pursuing constitution-building are frequently "divided societies" in the sense that ethnic, linguistic, cultural and religious differences remain "politically salient – that is, they are persistent markers of political identity as well as bases for political mobilization."[100] Other sources of inequality, such as class and gender, may also pose risks to post-conflict stability if left unaddressed.[101] In fact, 'inclusion' is frequently defined broadly in order to encompass any group that is vulnerable in a particular situation, such as the political opposition, combatant groups, or powerful stakeholders such as the media or business elite that have been coopted by the ruling political faction.[102] Nevertheless, many observers have noted the practical importance of prioritizing attention to groups seen as innately vulnerable across post-conflict settings (such as ethnic minorities or displaced persons) as a means of conflict

96 UN Secretary-General Guidance Note on constitutional assistance, page 4 (point 4).

97 Ibid., page 4 (point 2).

98 Secretary-General's 2011 Report on the rule of law, paragraph 52.

99 Brandt, "Constitutional Assistance in Post-Conflict Countries", page 19.

100 Sujit Choudhry, "Constitutionalism in divided societies" (editors note), in *Constitutional Design for Divided Societies* (Oxford University Press, 2008), page 573.

101 See, e.g., Mona Eltahawy, "Why do they hate us? The real war on women is in the Middle East", *Foreign Policy* (May/June 2012) ("First we stop pretending. Call out the hate for what it is. Resist cultural relativism and know that even in countries undergoing revolutions and uprisings, women will remain the cheapest bargaining chips. You -- the outside world -- will be told that it's our "culture" and "religion" to do X, Y, or Z to women. Understand that whoever deemed it as such was never a woman. The Arab uprisings may have been sparked by an Arab man -- Mohamed Bouazizi, the Tunisian street vendor who set himself on fire in desperation -- but they will be finished by Arab women.")

102 Author interview, Winluck Wahiu (04 June 2012).

prevention and state-building.[103]

While conflict prevention rationales provide an important policy argument for adopting substantive constitutional protections of vulnerable groups, human rights law provides a complementary legal argument. However, the dilemmas of democratic constitution-building described above are heightened by the issue of group-differentiated rights: While any individual in mainstream society may eventually benefit from the adoption of classic individual human rights, the recognition of group-specific rights are easier to portray as a uncompensated surrender of democratic choice by those with de facto political power (men, with regard to women's rights) or the numerical majority (with regard to minority rights).[104] Writing on the outcome of the Arab Spring, Charles Kurzman elaborated on this dilemma of 'votes versus rights':

> The largest Islamic parties in the region insist that they stand for both democracy and rights, and these assurances have been sufficient to win a plurality of votes in Tunisia and Egypt, the first countries of the Arab Spring to hold free elections. But political opponents, and many foreign observers, worry that governments led by these parties will suppress the rights of women and minorities, restrict freedom of expression, and potentially abandon democratic accountability altogether. Suppose that these concerns are valid. Should people have the right to vote against rights?[105]

In a 'pure' democracy, in other words, all decisions would be subject to the whim of the majority, including issues that might be vital to the dignity, integrity or even survival of vulnerable individuals or minority groups. Where they are embedded in constitutions, both individual and minority rights represent inherent constraints on democratic decision-making, setting certain issues and values beyond the reach of the majority. In this sense, rights are counter-majoritarian and often contentious in settings where a transition to democracy has just occurred and insistence on human and minority rights appears to impose unwarranted constraints on newly won popular sovereignty. On the other hand, the clear trend during the last decades has been toward 'legal' constitutions that limit political discretion and place greater emphasis on enforceable rights.[106]

3.3.1 HUMAN RIGHTS AND POSITIVE DISCRIMINATION

In human rights practice, 'special measures' or positive discrimination in favor of particular groups can be justified as an anti-discrimination measure in cases in

103 See, e.g. "Democracy for All? Minority Rights and Minorities' Participation and Representation in Democratic Politics", *Background Note for the International IDEA Democracy Forum, Madrid, Spain, 28-29 November 2011* (2011); Clive Baldwin, et. al., "Minority Rights: The Key to Conflict Prevention", *Minority Rights Group International Report* (2007).

104 See IDEA, *A Practical Guide to Constitution Building: An Introduction,* page 30.

105 Charles Kurzman, "Votes versus Rights: The debate that's shaping the outcome of the Arab Spring", *Foreign Affairs* (10 February 2012).

106 IDEA, *A Practical Guide to Constitution Building: An Introduction,* page 22-5.

which the disadvantages posed by their vulnerability justifies it.[107] In the context of constitution-making processes, for instance, some groups may still face systemic physical or structural obstacles to participation. Perhaps the most obvious example is children, whose views are rarely taken seriously. In this case, the Secretary-General's Note itself envisions special measures involving "[c]onsultation with children" in such processes.[108] However, other groups including women, displaced persons or ethnic minorities may face obstacles related to either discrimination, hostility on the part of the majority population, or the physical remoteness of their locations. In such cases, special measures to guarantee such groups' inclusion in constitution-making processes may be necessary to ensure their right to have their voices heard.[109]

In applying this principle, clearer differentiation between the specific needs of various vulnerable groups may increase the chances both of achieving political support for corresponding special measures and ensuring that these measures are appropriate to the actual needs of the concerned groups. In addition, minority rights issues tend to be highly sensitive in countries with little tradition of independent statehood. What is crucial in such contexts is to identify the specific vulnerabilities faced by vulnerable groups and craft limited measures that correspond directly to these vulnerabilities. Thus, while constitutional protections may be framed in broad terms, the actual nature of the measures adopted may vary both in intensity and duration, depending on the nature of the populations involved.

In principle, special measures should be tailored to address the root causes of vulnerability and should cease to operate as soon as this vulnerability has been overcome. Children provide an obvious example, in that the type of measures necessary to mitigate vulnerabilities associated with childhood cease to be necessary upon adulthood. However, while women may in some cases require only temporary positive treatment to overcome the effects of specific forms of past discrimination, treaties like the CEDAW note that the biological childbearing role of women presents an effectively permanent handicap vis-à-vis men in areas such as labor markets and foresees the possibility of corresponding permanent measures.[110] Refugees and displaced persons suffer distinctive but presumptively temporary forms of vulnerability related to having been uprooted from their homes.[111]

While measures to address vulnerabilities associated with age, gender and displacement may in many cases be of an inherently limited scope and duration; this is generally not the case for minorities and indigenous peoples. Such groups tend to

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107 In human rights terms, such measures are called for as an element of the general right to be free from discrimination. The most familiar application of non-discrimination norms involves the right of every person to be free from differential treatment with regard to other similarly situated people. However, in situations in which particular groups experience forms of vulnerability that place them in a different and less favorable position than other people in society, the failure of the authorities to take steps that would restore effective equality between such groups can also constitute discrimination. However, conceptions of equality and non-discrimination also remain contested. For instance, the Convention on the Elimination of all Discrimination Against Women (CEDAW), defines gender equality as entailing strict equality before the law, without differentiation (Articles 3 and 15). By contrast, the Cairo Declaration (Article 6) affirms the equality in worth between men and women but assigns them different roles in society, according each woman "her own rights to enjoy as well as duties to perform" and appointing the husband as "responsible for the maintenance and welfare of the family."

be defined by both their numerically and politically non-dominant position in the societies in which they find themselves. Accordingly, in democratic societies, their vulnerability lies in the fact that they will always face the risk of being outvoted in issues that they consider central to their survival as a group. As a result, special measures such as autonomy or cultural rights for minorities and indigenous people tend to be permanent in recognition that their vulnerability continues as long as they persist as a group.[112]

108 UN Secretary-General, Guidance Note on Assistance to Constitution-making Processes, page 4 (point 4).

109 Brandt, "Constitutional Assistance in Post-Conflict Countries", page 19 (describing efforts by the Afghanistan Constitutional Commission in 2003 not only to hold consultations in every region of the country but also to include focus group meetings with both interest groups and potentially vulnerable groups).

110 See, CEDAW, Articles 4 and 11(2).

111 See, generally, Erin Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly* (2005). Given that refugees are not citizens of states providing them international protection, some degree of distinction between them and citizens is allowed, although the scope of this differentiation is shrinking. However, internally displaced persons (IDPs) are usually citizens of the state within which they find themselves uprooted. The response to internal displacement accordingly comprises a set of special measures specifically related to the types of vulnerabilities typically caused by displacement, which are set out in the 1998 UN *Guiding Principles on Internal Displacement*. The end of internal displacement is defined as the point at which IDPs have become sufficiently reintegrated into society that these displacement-specific vulnerabilities no longer exist. See Brookings-Bern Project on Internal Displacement, *Inter-Agency Standing Committee Framework on Durable Solutions for Internally Displaced Persons* (April 2010).

112 Kymlicka, *Multicultural Citizenship,* page 109.

4 MAPPING CONSTITUTIONAL ASSISTANCE ACTORS

While some terminological confusion appears to persist, constitution-making (negotiation, drafting and adoption of a text) and constitution-building (ensuring that this text becomes an effective basis for governance) are properly seen as nationally owned and implemented processes. By contrast, constitutional assistance involves the intervention of outside actors that can contribute expertise, capacity and prestige to national processes, but may also promote outside agendas. The goals promoted by constitutional assistance actors are frequently based on universal norms but may also reflect donor policies and preferences. In either case, the claims of constitutional assistance actors on constitution-building processes tends to constrain the discretion that national drafters enjoy, both with regard to the process of arriving at a constitution and the content of the resulting text.[113]

Although constitutional assistance can be controversial and raises dilemmas for both national drafters and outside actors, the field has developed considerably in the last decades. A multitude of actors have become engaged with constitutional assistance, including UN agencies, multilateral and bilateral donors, intergovernmental organizations (IGOs) at the global and regional levels, non-governmental organizations (NGOs), and academic institutions. Although the field of constitutional assistance is most clearly aligned with rule of law activities, actors in other fields such as democratization, electoral assistance, transitional justice, human rights, development, conflict prevention, gender equality and minority rights have played important roles in promoting and shaping it. For most of these actors, however, constitutional assistance remains a new frontier rather than a core activity. The further development of this field is likely to be contingent on both a clearer common understanding of the principles of engagement that serve to legitimize international involvement in sovereign processes of constitution-making as well as a greater commitment of resources and capacity.

4.1 THE UNITED NATIONS

The United Nations has both helped to define the field of constitutional assistance and taken on a leading role in terms of actual practice. Sripati suggests that the UN has recently shifted from tacit engagement with constitutional assistance to overt and systematic approaches.[114] However, while this may hold true for non-conflict development settings, Brandt demonstrated, in an important 2005 study, that the UN has not hesitated to engage overtly with 1990s post-conflict processes where it has been mandated to do so.[115] The gaps identified in the report written by Brandt

113 Brandt, et. al., *Constitution-making and Reform,* page 176-7.
114 Sripati, "UN Constitutional Assistance Projects".
115 Brandt, "Constitutional Assistance in Post-Conflict Countries".

were discussed at the high level meeting and as a result the attendees agreed with the report's recommendations to improve constitution-making assistance efforts at the UN.[116] The *UN Secretary-General's Guidance Note on UN Assistance to Constitution-making Processes* which came in 2009 clearly located constitutional assistance within the UN's rule of law activities.

The UN has helped to drive the internationalization of constitutional assistance by linking its engagement in this field to the application of the international standards it has fostered. While the UN's role as guarantor of these norms (and articulator of their relevance to conflict prevention) has primarily served to justify its engagement with domestic constitution-making processes, it also provides a principled basis for the UN to claim a central coordination role among other global and regional actors in the field of constitutional assistance. At a practical level, the UN engagement is associated with an unparalleled level of perceived prestige, expertise and capacity. These factors have arguably contributed to the decisive nature of UN mediation in constitutional crises that have proven to be beyond the capacity of regional organizations to resolve.[117]

Nevertheless, significant questions remain regarding both the institutional arrangements for the UN's engagement in constitutional assistance and the scope and nature of such assistance. The adoption of the Secretary-General's Guidance Note on constitutional assistance in 2009 marked a clear turning point, in the form of both a clarification of the normative basis for overt UN engagement and a set of basic policy guidelines for how UN actors should proceed.[118] However, the Guidance Note also acknowledged the issue of confused UN system arrangements for coordinating constitutional assistance activities. Prior to 2006, the UN Development Programme (UNDP) had dominated constitutional assistance activities in light of their treatment, at the time, as a "component of [UN] development assistance" based on a "long-term conflict prevention strategy".[119] However, by 2006, constitutional assistance had been reframed as a rule of law activity, and one that implicated the mandates and expertise of a wide variety of UN departments and agencies. As a result, the Guidance Note recognizes that constitutional assistance "requires an address within the UN system" and sets out a list of the UN bodies with a stake in the process:

> Constitutional assistance demands a convening mechanism to draw from the various parts of the UN system whenever needed, as well as from external actors. This requires a collaborative effort, and the mobilization and coordination of the requisite expertise, including for the following fields: political facilitation (Department of Political Affairs/Department of Peacekeeping Operations); procedural and substantive advice in peace processes, and electoral systems and processes (DPA); governance (United Nations Development Programme); legal (Office of Legal Affairs); human rights (Office of the High Commissioner

116 Author interview, Michele Brandt, Independent Constitutional Assistance Expert, (05 June 2012) and subsequent email exchanges.

117 Call, "UN Mediation and the Politics of Transition after Constitutional Crises".

118 Brandt, et. al., *Constitution-making and Reform.*

119 Sripati, "UN Constitutional Assistance Projects", page 93.

for Human Rights); women, children, and vulnerable and marginalized groups (United Nations Children's Fund/United Nations Development Fund for Women/OHCHR); refugees, displaced and stateless persons as well as the prevention and reduction of statelessness (United Nations High Commissioner for Refugees); and public information (Department of Public Information).[120]

In order to promote "a consultative process to further develop UN policy on constitutional assistance", the Guidance Note goes on to set up a "convening mechanism" in the form of the Rule of Law Coordination and Resource Group, a pre-existing body chaired by the Deputy Secretary-General and served by a secretariat, the Rule of Law Unit.[121] As noted in a survey of UN constitutional assistance activities, there has been relatively little analysis of more recent cases in which the UN Security Council authorized peace missions to assist post-conflict states in writing new constitutions.[122] Accordingly, a good deal of evaluation remains to be done in light of the UN Secretary-General's 2011 commitment to "act as a repository of best practices and comparative experiences".[123] The UN Rule of Law Unit has initiated a mapping of UN constitutional assistance activities and capacities which will be presented along with recommendations about how to implement the Secretary General's Guidance note on constitution-making. One of the initial conclusions was that few of the recommendations from the Guidance Note had been carried out.[124]

Meanwhile, there appears to be considerable demand for a more decisive UN approach to these issues from other constitutional assistance actors. While none of the interlocutors interviewed for this study questioned the idea that the UN should have the lead in developing the field of constitutional assistance, and the international norms on which it is based, one observer described the organization's current system arrangements as "impenetrable". While clearer allocations of responsibility and guidelines from the UN would be welcome, these may need to be matched with greater commitments from donors in the future in order to see the field of constitutional assistance reach its full potential in post-conflict settings.[125] Barring more consistent attention and greater investment in core capacity, constitutional assistance risks remaining the 'poor cousin' to more established activities such as electoral assistance.

4.2 BILATERAL DONORS AND AID AGENCIES

A number of bi-lateral donors have embraced assistance to constitution-building as a key rule of law activity. This is particularly the case in countries with a tradition of emphasizing rule of law in their foreign and development assistance policies. However, while the involvement of bi-lateral actors in constitutional assistance is crucial in

120 UN Secretary-General, Guidance Note on Assistance to Constitution-making Processes, page 7.
121 Ibid., page 7.
122 Sripati, "UN Constitutional Assistance Projects", page 93 and page 95.
123 UN Secretary-General's 2011 Report on the rule of law, paragraph 82.
124 Author interview, Michele Brandt, (05 June 2012) and subsequent email exchanges.
125 Brandt, et. al., *Constitution-making and Reform,* page 177-80, 323.

practice, it can raise political sensitivities. These relate to the fact that such actors are susceptible to being perceived as providing "supply-driven" assistance, in the sense of promoting their own national models without consulting national actors on what their perceived needs are.[126] Critiques related to insensitivity to local context and needs have dogged some early post-Cold War assistance processes, where long-term constitutional questions such as institutional design were conflated with immediate term ceasefire negotiations in rushed processes largely bereft of public consultations or civic education.[127]

Many bi-lateral actors still engage in assistance that appears to (or actually does) promote their own national interests in other countries' sovereign constitution-building processes.[128] Others may have sought to minimize this risk by funding the work of independent specialized organizations capable of providing broad comparative expertise. For instance, in the wake of the Cold War, considerable US Government funding for constitutional assistance in the former Soviet Bloc was channeled through the American Bar Association (ABA), an independent professional organization that committed itself from the beginning to policy neutrality and the deployment of relevant comparative expertise rather than the promotion of a narrow template based on the US model.[129] Building on such traditions will be important, given that funding and resources constrain the expansion of constitutional assistance activities; while the UN is well-positioned to provide overall leadership and coordination of the field, donors may hold the key to ensuring that individual processes are provided with appropriate assistance from their immediate post-conflict initiation clear through to implementation phases as much as a decade later.[130]

4.3 OTHER INTER- AND NON-GOVERNMENTAL ORGANIZATIONS

Many non-UN inter-governmental organizations (IGOs) and non-governmental organizations (NGOs) that operate at the global level have taken up constitutional assistance issues in their work. However, while virtually all of these organizations recognize the importance of constitutional assistance and many have worked on these issues on at least an ad hoc basis, there are relatively few to date that have invested significant resources in developing dedicated capacity in this area.

The extremely broad range of actors that have touched on this field is exemplified by a mapping exercise undertaken by IDEA.[131] Covering just ten countries that experienced constitution-building processes between 1990 and 2009, the exercise identified 717 relevant projects provided by a plethora of different types of donors.

126 In the words of one expert, the key challenge may often be to "empower national actors to be clear on what they need." Author interview, Michele Brandt (05 June 2012).

127 See, e.g., Benomar.

128 Brandt, et. al., *Constitution-making and Reform,* page 177.

129 "Rule of Law Symposium: The History of CEELI, the ABA's Rule of Law Initiative, and the Rule of Law Movement Going Forward", *Minnesota Journal of International Law*, vol. 18 (2009), page 308-11.

130 Author interview, Gianni La Ferrara, Independent Public Administration Expert (12 May 2012).

These projects related to all phases of constitution-building and could be broken down into eighteen thematic focuses and eleven types of support (such as study visits, election monitoring or civic education). These results underscore both a broad recognition of the importance of supporting constitutional transitions and a need to encourage sufficient policy coherence to ensure that international efforts are neither contradictory nor counterproductive.

Accordingly, this section of the paper provides a survey of some of the more significant actors at the global level and their approaches to and activities in this area. It begins with relatively detailed coverage of the approaches to constitutional assistance pursued by IDEA and Interpeace, both of which in 2011 published highly accessible practitioner handbooks on the topic. In doing so, these organizations have gone much farther than the UN Secretary General's concise and preliminary Guidance Note in attempting to record and analyze practice in this area with a view to extracting generalizable lessons. Although the UN at the time of writing was engaged in a similarly ambitious attempt to update understandings of this field and its role in it, the two handbooks represent the most authoritative practitioner statements on the current direction of constitutional assistance.

IDEA is an intergovernmental organization that administers a set of programmes aiming to support democratic reform by providing knowledge to democracy builders, as well as through policy development and analysis. One of IDEA's four central areas of global expertise is constitution-building processes. A Constitution Building programme, with funding primarily from the Norwegian Ministry of Foreign Affairs, has been in existence since 2006.[132]

The first component of IDEA's global Constitution Building programme's activities focused on knowledge tools, and culminated in the publication of *A Practical Guide to Constitution-Making*, which provides advice on key substantive issues such as the design of various branches of government and forms of decentralization in seven stand-alone chapters. Other knowledge tools produced have included the development of a website, ConstitutionNet.org, which is explicitly meant to assist in the development of a community of practice around the issue of constitution-building.[133] Further knowledge tools include a curriculum on constitution-building, including the development of thematic modules for pilot trainings and a set of thematic regional workshops meant to promote South-South dialogue on constitution-building issues.[134]

The second component of IDEA's constitutional assistance work focused on policy analysis. One key output of this component was the publication of a Policy Paper titled *Constitution building after conflict: External support to a sovereign process*. This paper

131 The database produced in the course of this exercise can be accessed at on IDEA's ConstitutionNet website: http://www.constitutionnet.org/international-support.

132 The information in this subsection is primarily based on the interview with Melanie Allen, Assistant Programme Officer; Tayuh Ngenge, Assistant Programme Officer; Nora Hedling, Assistant Programme Officer; and Rosinah Ismail-Clarke, Accounting and Administrative Officer, IDEA Constitution Building Programme (18 January 2012) and subsequent email exchange with Melanie Allen except in cases where another source is cited.

133 See http://www.constitutionnet.org/start.

134 Author interview Winluck Wahiu (04 June 2012).

has set out some of the key obstacles and possibilities currently facing the new field of constitutional assistance. The Constitution Building programme, which began its third phase in 2013, will focus on the application of knowledge tools in specific regional and national contexts. It will expand the scope of its online platform constitutionnet.org, develop new knowledge resources and tools for practitioners and take advantage of the programme's relocation to The Hague for expanded networking and strategic partnerships.[135]

In terms of approach, the IDEA *Practical Guide* calls for "inclusive and participatory" constitution-building, embracing the trend toward procedural democratization. [136] The Guide also defines the aim of constitution-building relatively specifically as supporting "democratic outcomes" in "polarized and conflict-affected societies".[137] This rationale provides strong support to an inclusive approach to constitution-building. [138] Although the Guide covers issues of both process and substance, it focuses primarily on the latter, with a good deal of information on specific substantive outcomes such as the design of the respective branches of government. This distinguishes it from other handbooks such as that by Interpeace (see below), which focus more on process of arriving at a constitutional text.

The IDEA Practical Guide describes implementation of ratified constitutions as a "critical" part of constitution-building.[139] It further asserts that the implementation of new constitutions tends to be a function not only of institutions but also of leaders and ordinary citizens to "engage as the constitution contemplates" as it is a function of institutions.[140] This observation leads to a recommendation to be cognizant of the tensions that may emerge between long-term objectives and short-term partisan political interests. The Guide suggests that constitution builders should acknowledge the political nature of such processes, and adopt a 'veil of ignorance' vis-à-vis short-term partisan interests. However the Guide acknowledges that from a pragmatic perspective, short-term interests may frame a constitution, and longer-term reforms may have to be approached more incrementally.[141]

The 'veil of ignorance' is not suggested to be applied to objectionable constitutional provisions or national proposals in order to secure implementable texts and the short-term partisan interests should not be conflated with local legal norms that do not conform to international human rights standards. The tensions that might arise

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135 Author interview with Melanie Allen, Assistant Programme Officer; Tayuh Ngenge, Assistant Programme Officer; Nora Hedling, Assistant Programme Officer; and Rosinah Ismail-Clarke, Accounting and Administrative Officer, IDEA Constitution Building Programme (18 January 2012) and subsequent email exchange with Melanie Allen.

136 IDEA; *A Practical Guide to Constitution Building: An Introduction,* page 1.

137 Ibid., page 3.

138 In discussing the importance of recognizing diversity, the Guide states that a "legitimate constitution in a deeply divided and diverse society cannot be made without the full participation and inclusion of the potentially contentious groups in the country." Ibid., page 29.

139 Ibid., page 2.

140 Ibid., page 4. The issue is also discussed in more general terms in Chapter 3 of the *Practical Guide* (page 14).

141 Ibid., page 20.

between international human rights standards and domestic norms and practices must be addressed carefully in order not to result in unimplemented texts.[142]

Interpeace is an independent international peacebuilding organization closely associated with the UN. It works primarily by supporting nationally led initiatives to build lasting peace in numerous post-conflict countries and territories. However, Interpeace has one thematic area of work, namely 'Constitution-making for Peace'. The first major effort by this program was the 2011 release of a Handbook on *Constitution-making and Reform: Options for the Process*. At the time of writing, Interpeace was contemplating further projects in this area and has committed to updating the Handbook as well as the website created with resources on 'Constitution-building for peace'.[143] Interpeace has not, however, staffed a unit on this issue in the manner of IDEA, but has instead contracted with experts for specific projects such as the drafting of the Handbook and its background documents. A related contrast is presented by the manner in which the two organizations describe the aims of constitution-building processes; while IDEA sets out a narrow goal of supporting democratic outcomes, the Interpeace Handbook focuses on how the communities directly involved define their immediate peace- and state-building priorities:

> The variety of contexts in which constitutions have been made shows that the primary purposes a constitution serves vary considerably: nationbuilding as a new state emerges; the consolidation of democracy as the military retires to the barracks or authoritarian presidents are deposed; liberalism and the creation of private markets with the end of communism; peace and cooperation among communities to end internal conflicts. These purposes determine the orientation of the constitution, and often also the process by which it is made.[144]

The approach of the Interpeace Handbook is focused solely on process, as reflected in the title, in contrast to the content-heavy approach of the IDEA Guide. The Handbook aims to show the risks and opportunities of choices by constitution-making actors at every stage of the process, particularly in divided societies. As such, it outlines all the common tasks of constitution-making, as well as all of the options for choices on institutions, providing specific advice not only to drafters but also external actors such as civil society, the media and international advisors.

The Interpeace Handbook strongly promotes democratization of constitution-building processes in the sense described above, through transparent and inclusive participatory mechanisms. It describes the contemporary trend of 'new constitutionalism' as being based on four guiding principles, namely (1) public participation of all sectors of society with a view to achieving "a high degree of popular legitimacy"; (2) inclusiveness through outreach to marginalized groups and guarantees of gender equity; (3) transparency as a means of securing these goals; and (4) national

142 Email exchange with Melanie Allen, 28 March 2013.
143 See http://www.interpeace.org/constitutionmaking/.
144 Brandt, et. al., *Constitution-making and Reform,* page 13.

ownership in the sense that national actors should actively manage outside support and seek to "reduce the influence of competing or foreign agendas that do not support the national objectives for the process."[145]

As a corollary to these trends, the Handbook notes that constitutions (and states) resulting from participatory framing processes are now expected to achieve many more functions than simply providing for a coherently structured governmental apparatus.[146] The authors describe a new 'transformative' mode of constitutionalism that pursues distributive goals related to social justice, as well as associated new demands such as to gender equality, power sharing, financial accountability, or environmental stewardship.[147] This emphasis on ensuring an equitable distribution of resources corresponds closely to the UN Secretary-General's finding in the 2011 rule of law report on how constitution-building can serve conflict prevention ends. [148] However, distributive approaches can also threaten powerful vested interests, creating the risk of renewed insecurity.

The concern that transformative constitutions may provoke a conservative backlash is viewed by the authors of the Interpeace Handbook as the crucial issue in terms of implementation of new constitutions.[149] With this concern in mind, the Handbook both provides a framework for implementation and suggests key activities.[150] Implementation itself is defined narrowly as involving the actual setting up of institutions and passage of legislation necessary to give effect to the constitution. These activities are to be complemented through separate 'promotion' measures such as dedicating capacity and resources in order to ensure that institutions and laws operate as foreseen, as well as 'safeguarding' measures necessary to avert specific risks to the functioning or integrity of constitutional norms.

The authors emphasize that participatory design of constitution-building processes is likely to ensure a sense of popular ownership of the result, increasing the pressure for its implementation. However, they also suggest a number of measures – including both judicial dispute resolution and oversight by independent bodies – that should be engaged after ratification. Given their increasing role in constitutional assistance, international actors are also treated as having an important role to play in supporting implementation.[151] The emphasis in the Handbook is explicitly not prescriptive, but seeks to describe options, good practices and pitfalls. In this context, international norms are described as an important source of principles for constitution-making processes.[152]

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145 Brandt, et. al., *Constitution-making and Reform,* page 9-10. On managing the international community, see ibid., page 175-9.

146 Ibid., page 15.

147 Ibid., page 281-2.

148 The report recommends that UN programming should "ensure that, inter alia, constitutional protections are calibrated to address the right to economic and social development of marginalized groups" UN Secretary-General's 2011 Report on the rule of law, paragraph 52.

149 Brandt, et. al., *Constitution-making and Reform,* page 16.

150 See generally, Ibid., Section 2.7.2, pages 222-8.

151 Ibid., page 228.

152 Ibid., pages 62 and 17, respectively.

The US Institute of Peace (USIP), an independent, nonpartisan conflict management center created by the US Congress, typifies the approach taken by a number of similar organizations, in that it has placed constitutional assistance in a rule of law frame and appointed a focal point responsible for taking the lead on these issues and further mainstreaming them into the organization's work.[153] The programming of USIP, like that of Interpeace, is focused on process rather than the specific content of constitutions. USIP promotes democratic participatory approaches to constitution-building as a means of, increasing legitimacy of the constitution-making process, promoting inter-communal trust and reconciliation, and securing implementation (on the theory that documents resulting from such processes better reflect local needs and aspirations and that an informed and engaged populace constitutes the best means of ensuring accountability). The organization has also sought to capture emerging international practice in this area through a study on lessons learned in nineteen post-conflict and transitional constitution-making processes that was published in 2010.[154]

In practice, the Constitution-Making Program within USIP's Rule of Law Center has focused on workshops and dialogues in support of specific constitution-building processes. Proceeding from the observation that constitution-building processes often bog down over debates regarding political positions rather than political interests, the USIP approach is meant to open planning processes with a discussion of the broad goals to be achieved (such as national unity, reconciliation, or embedding democratic practice), followed by consideration of principles that facilitate these goals (such as inclusiveness, participatory approaches and transparency) and finally concrete design options for constitutions that allow the selected goals and principles to be given clearest expression. At the time of writing USIP was developing a module on this approach in support of a standardized three day dialogue with constitution-making actors in which prepared case-studies from past processes would be on hand in order to allow for an informed and effective discussion.

Another organization invested in constitutional assistance is the Public International Law & Policy Group (PILPG), a non-profit organization that provides free legal assistance to states and governments involved in peace negotiations, post-conflict constitution-building processes, and war crimes prosecutions.[155] Assistance with the drafting of constitutions is one of PILPG's main practice areas, and it has been active in a dozen constitution-building settings to date.[156] The organization's focus on constitutional drafting has come as part of an insight that post-conflict constitutions, rather than peace agreements, tend to set the most important parameters for

153 Author Interview, Jason Gluck, Senior Program Officer in USIP's Rule of Law Center and Director of USIP's Constitution-Making Program (17 January 2012) and subsequent email exchanges.

154 Laurel E. Miller, "Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future", in F*raming the State in Times of Transition: Case Studies in Constitution Making* (US Institute of Peace, 2010).

155 Author interview, Anna Triponel, Senior Counsel and Director of the New York Office, Public International Law & Policy Group, (06 June 2012).

156 See http://publicinternationallawandpolicygroup.org/practice-areas/post-conflict-constitution-drafting/.

peacebuilding and conflict prevention. In concrete settings, PILPG frequently seeks to work with both civil society organizations and government actors, supplying policy briefings and legal memoranda meant to bring to bear both comparative practice and international standards with regard to specific constitution-making questions.[157]

Other organizations have approached constitutional assistance activities and broader rule of law work from the perspective of providing 'pro bono' assistance to national processes. One of the most well-known examples is the work of the American Bar Association, which found itself inundated with requests for constitutional assistance when it began providing rule of law advice to countries emerging from communism in the former Soviet Bloc in the early 1990s.[158] In a similar vein, the Conflict Prevention and Peace Forum (CPPF) was established in October 2000 to support the UN in conflict management, peacemaking, and peacebuilding by providing access to leading experts in these areas.[159] Some organizations, such as the Asia Foundation, have assisted constitution-building processes in specific regions.[160] The National Democratic Institute (NDI) has also recently taken on a prominent role in constitution-making processes in Iraq and South Sudan.

4.4 ACADEMIC INSTITUTIONS

A number of academic institutions have developed programs that indirectly or directly support constitution-building processes. For instance, the School of Law at the University of Richmond has long provided an online searchable database of constitutions for researchers as well as practitioners.[161] The Comparative Constitutions Project (CCP) of the Universities of Texas and Chicago represents another primarily academic actor that analyzes contemporary constitutional issues.[162] Although the main focus of the CCP is on collecting historical data "to investigate the sources and consequences of constitutional choices", it has also partnered with USIP to make its findings available to constitutional designers in a website providing both online resources and updated analysis.[163] However, a number of academic institutions have become even more involved in contemporary constitution-building processes, using clinical research methodologies in an effort to provide more direct and practical

157 The organization has also developed a set of general tools to assist constitution drafters, including negotiation simulations, a handbook on drafting post-conflict constitutions, and a set of quick guides on "a wide variety of legal issues commonly faced by parties participating in peace negotiations or drafting post-conflict constitutions." These are not yet publicly available but are described at the following address: http://publicinternationallawandpolicygroup.org/practice-areas/post-conflict-constitution-drafting/post-conflict-constitution-drafting-toolkit/.

158 "Rule of Law Symposium", page 309-10, 316-17.

159 http://www.ssrc.org/programs/cppf/.

160 For a description of the Asia Foundation's constitutional assistance work in East Timor and Afghanistan, see Brandt, "Constitutional Assistance in Post-Conflict Countries", page 17, 25-7.

161 See http://confinder.richmond.edu/.

162 See http://www.comparativeconstitutionsproject.org/.

163 See http://www.constitutionmaking.org/. The website is "to provide designers with systematic information on design options and constitutional text, drawing on the CCP's comprehensive dataset on the features of national constitutions since 1789. We are motivated by the simple premise that constitutional drafters benefit from a comprehensive set of options when designing governing institutions, with the understanding that any particular draft must be tailored to the local environment."

support to practitioners.

One established academic program dealing more directly with support to constitution-building processes is the Max Planck Institute for Comparative Public Law and International Law (MPI).[164] The Institute's constitutional assistance work began with mediation efforts in support of the 2005 Comprehensive Peace Agreement in Sudan and continued with efforts to support constitution-building processes in Somalia and more recently in states affected by the Arab Spring in the Middle East and North Africa.[165] In the latter case, the Institute has established a monitoring project on 'Constitutional Reform in Arab Countries' (CRAC), with internet-based resources and ongoing assistance projects in Tunisia and Libya.[166] In providing assistance, the Institute is able to draw upon a pool of some 60-70 graduate researchers in residence there.

As an academic institute, the MPI works on the basis of strict neutrality. This affects their approach to constitutional assistance in a number of respects. First, the Institute is prohibited from undertaking advocacy, which means in practice that measures in support of the implementation of constitutions may frequently be beyond their mandate. The assistance provided by the Institute focuses on advance capacity building for stakeholders involved directly in the decision-making process. However, the Institute is careful to limit such activities to providing a forum for discussions and demonstrating various options, based on comparative experience, for resolving constitutional impasses. Providing advice on which option might be most appropriate in specific cases or becoming involved in the drafting process would exceed the MPI mandate. The beneficiaries of this assistance tend to be elite decision-makers, given that public outreach and civic education activities are also viewed as verging on advocacy. Finally, concerns about maintaining neutrality have prevented MPI from partnering with other actors or seeking to develop constitutional assistance as a field. MPI is nevertheless concerned with ensuring that their work enriches the academic discourse on constitutionalism and promotes publication in this area.

Another example of academic approaches to constitutional assistance is the Center for Constitutional Transitions (CCT) at the NYU School of Law.[167] CCT proceeds from the view that political transitions in the form of constitution-building processes have become a pervasive feature of modern political life, but that the field of constitutional assistance suffers as a result of outdated research, knowledge gaps and ineffectively structured international support.[168] The Center proposes to respond by developing

164 The Max Planck Society, comprising over eighty institutes, comprises the largest non-university based research institute worldwide. The Max Planck Institute for Comparative Public Law and International Law is one of five dealing with legal scholarship. See http://www.mpil.de/ww/en/pub/news.cfm.

165 Author interview, Dr. Daniel Heilmann, LL.M., Head of MENA Projects, Max Plack Institute for Comparative Public Law and International Law, (11 April 2012), and subsequent email exchanges.

166 See http://www.mpil.de/ww/en/pub/research/details/know_transfer/constitutional_reform_in_arab_.cfm.

167 See http://constitutionaltransitions.org/

168 Author interview, Sujit Choudhry, (10 April 2012).

a think-tank approach that will allow it to provide analysis of an academic standard that will also be directly applicable for constitutional practitioners. One of the main activities for the CCT will be one- to three-year thematic research projects targeting areas where knowledge gaps persist despite the availability of comparative experience for analysis. CCT intends to proceed through the identification of local academic and civil society partners and develop publications of academic quality that will be available for free public access.[169]

While CCT's thematic research projects will not follow the classic constitutional assistance model of providing targeted advice to a specific process, they are explicitly meant to facilitate future transitions by allowing policy-makers to act upon the results of systematic research rather than ad hoc prescriptions. As with the Max Planck Institute, CCT views its primary target audience as the elite decision-makers in constitutional transitions whose engagement with constitutional-building processes is indispensible. A second major component of CCT's activities will involve education, in the form of a legal clinic in which NYU law students will provide 'back office' research support to international constitutional assistance actors in the field.[170]

4.5 REGIONAL ACTORS

One of the less-studied aspects of the rise of constitutional assistance is the role of inter-governmental organizations at the regional level in both providing benchmarks and standards for constitutional rule of law and mechanisms for ensuring that these are consistently applied at the national level. Such organizations take many forms and pursue many interests, including economic cooperation or integration, human rights promotion, regional security and stabilization, and democratization. However, in virtually all cases, accession to such organizations is associated with prestige and some tangible benefits but is contingent on reforms in areas that may frequently be of a constitutional, rather than a purely legislative nature.

One notable post-Cold War trend among regional organizations has been the adoption of explicitly human rights and rule of law based standards. This trend has been most obvious in Europe, where the 1993 decision of the European Union (EU) to open the prospect of membership to former communist states in Central and Eastern Europe was accompanied by adoption of the 'Copenhagen criteria' for accession. This emphasized democracy, the rule of law, human rights and protection of minorities. Numerous other regional organizations have also taken such standards on board and developed institutional capacities to test and enforce member states' compliance. For instance, the Association of South East Asian Nations (ASEAN) departed from its policy of strict non-interference in member states' internal affairs to adopt a charter

169 The first such project focuses on security sector oversight in post authoritarian contexts (see http://constitutionaltransitions.org/security-sector-oversight/). Other thematic projects under discussion would look at the role of sitting judiciaries in constitutional transitions and the effectiveness of independent constitutional oversight and accountability institutions (the so-called 'fourth branch') that proliferated in Eastern European constitutional transitions after 1989.

170 See http://constitutionaltransitions.org/education/.

stressing democracy, good governance, rule of law and human rights in 2008.[171] Even the Arab League has tentatively embraced human rights discourses in response to the events of the Arab Spring.[172]

In light of the sustained and conscious engagement of European regional organizations with human rights and rule of law issues, their experience may best reflect the possibilities and limitations of constitutional assistance at the regional level. In the wake of the EU's adoption of the Copenhagen Criteria, the Council of Europe, a separate regional body with a longstanding human rights mandate, took on a de facto gatekeeper role for the EU. The Council is home to the European Court of Human Rights, which issues binding decisions on member states' compliance with the 1951 European Convention on Human Rights (ECHR). However, since 1990, the Council of Europe has also hosted the European Commission for Democracy through Law, better known as the Venice Commission, as an advisory body on constitutional matters.[173] Acting on request or referral of issues from the Parliamentary Assembly of the Council of Europe, the Venice Commission advises on compliance not only with human rights standards but also European best practices. In effect, where Council of Europe member-states have passed the scrutiny of both the Court and the Venice Commission, the EU accession process begins to open up.

However, despite this favorable and complementary range of regional institutions, European constitutional transitions and crises continue to present particular challenges. One example relates to Hungary, which acceded to the EU in 2004. Six years later, the current government of Hungary was elected on an overwhelming mandate and proceeded to pass a number of controversial bills by means of 'cardinal laws' that required supermajorities to be amended. The Venice Commission expressed grave concern with these laws in a series of opinions, but had few tools to ensure compliance.[174] The EU Commission on the other hand succeeded in securing more significant concessions related to those laws most directly repugnant to EU membership commitments through the initiation of infringement proceedings.[175] However, Hungary has continued implementing controversial laws by reintroducing them as amendments to the constitution and ending Hungary's Constitutional Courts' mandate to review the substance of such amendments.[176]

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171 John Arendshorst, "The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter", *Northwestern Journal of International Human Rights,* Volume 8, Issue 1 (Fall 2009), page 111.

172 Sean Mann, "How the Arab League Turned Against Syria" *Open Democracy* (09 February 2012).

173 See http://www.venice.coe.int/site/main/Presentation_E.asp.

174 The Venice Commission's opinions related to Hungary can be viewed at: http://www.venice.coe.int/site/dynamics/N_Country_ef.asp?C=17&L=E.

175 European Commission "Hungary – infringements: European Commission satisfied with changes to central bank statue, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary", (press release 25 April 2012) and Court of Justice of the European Union,, ""The radical lowering of the retirement age for Hungarian judges constitutes unjustified discrimination on the grounds of age", (press release, 7 November 2012).

176 European Commission "Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth amendment to the Hungarian Fundamental Law", (press release, 11 March 2013).

While EU action validates the Venice Commission's concerns in some respects, the scope of the EU infringement action takes in a narrower range of concerns than those raised by the Venice Commission, increasing the risk that many of the latter will be left unaddressed.[177] This gap between a narrower set of enforceable core EU values and the broader set of rule of law practices espoused by the Venice Commission may not be without consequences. According to one observer of the crisis in Hungary, the hollowing out of rule of law seen in recent years reflects a broader failure of governance that selective enforcement measures have little chance of remedying:

> Over the course of 2011, the Hungarian Parliament enacted over 200 laws, not counting the many government directives of the same period. With alarming frequency, new laws are completely rewritten within several weeks. No one knows any longer with any clarity what is truly legally valid. …. If no one knows what is legal, then no one can know what is illegal. And when no one knows what is illegal, then anything, essentially, can become illegal. Through this rushed and inconsistent process of lawmaking, what has emerged is the deliberate creation of a climate of absolute legislative uncertainty (and thus of fear). In this context, the ordinary citizen can rely only upon arbitrary mercy by the relevant authorities to avoid being unjustly persecuted.[178]

The Venice Commission is institutionally suited to seeking voluntary compliance with a broad and holistic range of best practice standards. As in the case of Hungary, this can lead to inconsistent approaches with the ostensibly complementary regional institutions that safeguard a narrower range of rules and principles but have more stringent enforcement mechanisms. This is not only the case with regard to the EU but also to the European Court of Human Rights, which polices compliance with the minimum human rights standards set out in the ECHR rather than the best rule of law practices espoused by the Venice Commission.[179]

Nevertheless, even the Court may find itself powerless to secure the implementation of orders that touch on core constitutional issues. This has been the case, for instance with regard to the 'Sejdic and Finci' decision taken by the Grand Chamber against Bosnia.[180] In this case, Bosnia had failed to respect its own voluntary undertakings upon Council of Europe accession to reform the constitution imposed as part of the 1995 Bosnian peace agreement, and the discriminatory result had been confirmed in decisions by the Venice Commission. Nevertheless, the Court's straightforward

177 Author Interview, Johan Hirschfeldt, Former President of the Svea Court of Appeal (24 February 2012).

178 Gabor Schein, "Speaking with double tongues: what's gone wrong in Hungary?", *Open Democracy* (21 February 2012).

179 Iain Cameron, remarks at "The Venice Commission – a presentation", Folke Bernadotte Academy Rule of Law Seminar Series (18 November 2011).

180 European Court of Human Rights, Sejdic and Finci v. Bosnia and Herzegovina, application nos. 27996/06 and 34836/06 (22 December 2009).

finding of a violation has still not resulted in constitutional amendments in Bosnia.[181] In commenting on this case, one observer notes both the inherent difficulties of implementing such decisions and the likelihood that more such cases will arise:

> …compliance is always more difficult and presents more complex political challenges when constitutional instruments have been considered to be in violation of the Convention. Of course, as far as international law is concerned, domestic law, even if constitutional in character, cannot justify noncompliance. More cases like Sejdic … are to come...[182]

Regional organizations have the potential to be pivotal in both supporting constitution-building processes within member states and monitoring the implementation of the results for conformity with regional and international standards and undertakings. However, the example of Europe demonstrates the importance of operating along a broad spectrum of advocacy approaches that include, but are not limited to, the end points of diplomatic persuasion and mandatory enforcement. It is undoubtedly important that states be held to the commitments they agree to be bound by, both at the regional and the global level. However, one of the key insights of the constitutional assistance field is that it is no less crucial that the processes and mechanisms of constitution-building provide an opportunity for all stakeholders in society to engage with these norms and actively seek to accommodate them to their political context. Regional organizations, like the UN, have earned the right to intervene in sovereign constitutional processes, but must exercise this right with caution and finesse in order to foster effective, just and sustainable outcomes.

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181 The Sarajevo region has been the lone administrative unit of Bosnia to attempt to implement the ruling to date. Anes Alic, "Minorities win right to hold office in Sarajevo", Southeast European Times (08 February 2013), available at http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/02/08/feature-01.

182 Marko Milovanovic, "Sejdic and Finci v. Bosnia and Herzegovina" (case note), *American Journal of International Law*, vol. 104, no. 4 (October 2010), page 641.

5 CONCLUSIONS

Constitutional assistance can be considered an emerging and highly significant field of rule of law activity. It has rapidly taken on a central role in response to the contemporary phenomena of post-conflict political transitions, democratization and state-building processes, and reflects the diffusion of global norms such as human rights. It also remains highly dynamic, involving interactions between a broad range of international actors from numerous fields of practice and academic disciplines as well as at all levels, from the global to regional, national and sub-national or community-levels.

This diversity of actors and agendas, as well as the need to overcome tensions between state sovereignty and international norms, can be a source of strength as well as weakness. Early on, these dynamics encouraged an ad hoc approach to constitutional assistance that produced notable successes alongside notorious failures.[183] More recently, they have fostered awareness of the need to analyze the results of constitutional assistance to date and promote approaches that have proven to be effective. Constitutional assistance may remain a relatively decentralized area of activity, but it is certainly not one that is divorced from reality in the field.

In the future, constitutional assistance is likely to remain an area of overlap for a diverse body of practitioners. Although the field is rooted in the rule of law discourse, it has provided an important point of contact with practitioners in related areas such as electoral assistance, public administration, conflict prevention, peacebuilding and human rights. The fact that constitutional assistance appears unlikely to detach itself completely as an entirely separate field from those that nourished it is in all likelihood a useful response to the inherently transitory aspects of constitution-building. In individual cases, constitution-building processes can be seen as transitory in the sense that constitutional moments do end, and that monitoring the implementation of new constitutions assumes the character of 'ordinary' rule of law and human rights monitoring once ordinary politics have resumed (see Section 2.1 above).

At a broader level, constitution-building appears to take place in waves, with earlier upticks occurring in relation to decolonization and post-Cold War conflict resolution efforts.[184] While the current new wave of constitution-building related to political transformations and demands for self-determination looks set to continue for some time, it too may wane or adapt to new circumstances. For rule of law practitioners, this implies that constitution-building processes present infrequent and somewhat unpredictable opportunities to improve the overall parameters for respect for rule of law values. While they should be seized, constitutional assistance responses should also remain embedded within a commitment to and understanding of how rule of law and human rights values can continue to be promoted when the constitutional

183 Benomar, page 2.
184 IDEA, "Constitution building after conflict", page 9-10.

moment has passed.

These observations are not in any sense meant to minimize the significance of constitutional assistance or the impact it can have in individual settings. On the contrary, practitioners are likely to have the maximum impact where they understand that constitutional assistance supplements but does not replace their ordinary work on issues such as rule of law assistance.

In light of its relatively recent emergence as a field, practice in constitutional assistance could be strengthened through the consideration of a number of future steps:

Recognition of and support to constitutional assistance as a field of activity uniting the expertise and interests of several related areas of international work. A number of constitutional assistance actors have begun self-consciously seeking to provide practitioner resources and forums allowing the strengthening of constitutional assistance as a field. The UN has properly claimed a central role in coordinating such assistance and safeguarding applicable international norms. Even academic actors insisting on neutrality are generally committed to publishing their findings in an accessible and practitioner-friendly format. It is time that constitutional assistance is recognized as a particular field of activity, albeit one distinguished by the fact that it is likely to remain an area of sustained joint interest for multiple sectors relevant to peace- and state-building rather than an entirely separate field independent from all of these.[185]

The nature of constitutional assistance also requires consideration of what forms of support may be most helpful. First, as IDEA and others have noted, a key source of legitimacy and sustainability for the field must involve investing in the capacity of local and regional constitution-building actors and more broadly promoting South-South dialogue. Second, while drawing on comparative experience remains important, the emphasis has clearly shifted from importing a single foreign model as a template to seeking broad ranges of examples as a means of considering various options of addressing certain issues. A third important point is that while constitutional assistance efforts will benefit from sustained commitment in individual post-conflict settings, the nature of constitution-building processes is such that they will be less frequent or predictable than other crucial political processes supported by international actors such as elections.

Clarification of the international standards that underlie international involvement. Constitutional assistance is recognized as a legitimate area of international involvement with domestic constitution-building processes. However, the international standards and norms that are a key basis for this involvement remain broadly and somewhat vaguely defined (see Section 3.2.2 above). It is important to

185 In this sense, constitutional assistance can be distinguished from other recently emerged fields that have been recognized as essentially separate from the activities that gave rise to them. For instance, while transitional justice emerged as a field from human rights advocacy, it is now institutionally and philosophically distinct from human rights advocacy. See Paige Arthur, "How 'Transitions' Reshape Human Rights: A Conceptual History of Transitional Justice", *Human Rights Quarterly* 31 (2009).

note that such a process need not involve abandonment of all international norms that are less than definitively established as binding on all states. Soft-law standards and good practice recommendations have their place as well, but they should be clearly presented for what they are.

Engagement with local and regional understandings of human rights and rule of law. It is important to recall that fundamental international law norms, including human rights, are binding precisely because states have voluntarily agreed to be bound by them. From this perspective, states have little ground to object to being held to them, even in the course of political processes as inherently 'sovereign' as constitution-building. On the other hand, such norms do not automatically enjoy local legitimacy, in particular where they sit uncomfortably with traditions strongly held by parts of the local population or have been discredited through their rhetorical embrace by prior 'neo-patrimonial' regimes (see Section 3.2.3 above). While the fundamental normative content of international standards must be respected in such settings, a 'zero-sum' approach presenting a stark choice between local and international norms risks de-legitimizing the latter and should be avoided wherever possible.[186]

On the other hand, some work remains to be done on articulating effective and principled means of engaging with local norms in order to identify and minimize areas of conflict with international norms. Clearly, as suggested by Sajt and Lim in the area of Islamic land law, one first step is developing a clear understanding of the basic rules, policy priorities, trends and tensions characterizing locally legitimate norms.[187] Beyond this, there is less unanimity. Some observers advocate respecting local democratic outcomes so long as they do not result in egregious rights violations.[188] However, where this approach allows the perpetuation of oppressive practices against women and other vulnerable groups, it may neither be morally tenable nor sustainable in practice.

Context-sensitive support for distributive measures and protection to vulnerable groups, particularly where necessary to address root causes of conflict. The recent emphasis on addressing group inequality or vulnerability as a matter of conflict prevention in constitution-building should be welcomed. At a very practical level, this emphasis reflects the interconnectedness of political rights with economic rights, as well as the dependence of both on rule of law principles for implementation. It also reflects a greater understanding of the fact that differential treatment involving positive measures in favor of vulnerable groups may be a necessary response to their

186 In discussing minority rights, Kymlicka suggests that where the traditions embraced by either states or minority groups within states are illiberal – in the sense of restricting the human rights of their own citizens or members – outside actors should nevertheless encourage compliance with international norms through persuasion rather than coercion (page 82 and 94).

187 Sajt and Lim, page 2.

188 Charles Kurzman recommends withdrawing support for democratic outcomes only in the case of egregious violations such as attacks on or forced removal of minority groups. "Votes versus Rights: The debate that's shaping the outcome of the Arab Spring", *Foreign Affairs* (10 February 2012). Kymlicka (page 82 and 94) also concludes that coercive interventions are required in cases where 'illiberal' regimes present threats to fundamental rights such as life and physical integrity.

marginalization. However, the identification of effective constitutional responses to vulnerability will require a more rigorous analysis of various categories of vulnerable people and their specific needs. For instance, while variations on constitutional decentralization and regional autonomy may be an appropriate response to the vulnerabilities of ethnic minority groups, responses of an entirely different duration and nature may be necessary with regard to other vulnerable groups such as women or displaced persons.

Development of a better understanding of and support to implementation measures. A number of interlocutors for this report considered implementation to be a particularly understudied area. Even central tenets of the 'new constitutionalism' such as the idea that participatory approaches will lead to public demand for implementation of new constitutions remain largely untested.[189] It is nevertheless accepted within the field that the nature of constitution-building processes is likely to have an important effect on implementation, and that a separate, post-ratification 'implementation stage' exists. It is also logical that this implementation stage gives way to ordinary rule of law or human rights work at the point at which ordinary politics can be said to resume, but that the latter should actively seek to ensure that constitutional provisions, as well as the laws, are faithfully implemented. This need becomes most evident during subsequent political crises of a sufficiently fundamental nature that constitutional rules are once again placed directly at stake.[190]

Support to regional organizations in assisting constitution-building and implementation. While regional organizations have exercised an important role in many constitution-building and constitutional implementation processes, there has been a great deal of variety in their mandates, institutional machinery, and approaches. Given the historical convergence of such organizations around human rights and rule of law issues, an opportunity exists to study the role that regional bodies have played in the past, as well as what opportunities exist for them to positively influence future constitution-building processes.

189 Brandt, et. al., *Constitution-making and Reform,* page 11.
190 Call, "UN Mediation and the Politics of Transition after Constitutional Crises".

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THE DRAFTING AND IMPLEMENTATION of constitutions sets key parameters for the promotion and application of the rule of law in countries experiencing political transitions and crises. While these processes should reflect the sovereign nature of national constitutions, it is important to understand and recognize the increasingly significant role that international and regional actors have played in providing advice for such processes.

THIS STUDY FOCUSES on the evolving role of international and regional actors in both the narrow technical process of constitution-making as well as the broader societal project of constitution-building. It identifies the emergence of constitutional assistance as a 'field' of international engagement in its own right and defines common criteria and methodologies for providing effective support to constitutional processes.

THIS STUDY ALSO HIGHLIGHTS the main trends that have shaped contemporary constitutional assistance and maps out the roles of international and regional actors in terms of their work in the field of constitutional assistance.

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