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Post Conflict Participatory Constitution-Making Processes

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Abstract:

During the 1990s and the first few years of the new millennium we have seen the international community become more interested in tackling the rising number of conflicts around the globe. Efforts to reduce the occurrence of violent conflict over the past few years have enabled the international community to refine their approach to conflict resolution with respect to violent conflict; however, recent experience suggests they have yet to master the skill of steering post conflict societies through the difficult years immediately after the cessation of violence to a stable peace. The importance of peacebuilding strategies in the post conflict stage cannot be underestimated. One of the most promising tools at the disposal of those who seek to overcome the mistrust that represents post conflict societies and to build relationships between groups who, until recently, were bitter enemies, are participatory constitution-making processes. Aside from their contribution to peacebuilding, such processes are more likely to build a democracy that the entire community owns and supports. This policy paper examines how best to implement new constitutionalism in a post conflict scenario with the aim of legitimizing a democratic outcome and to aid in the peacebuilding process.

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Institutional Design for a Post Conflict Participatory

Constitution-Making Process

1. BACKGROUND TO THE POLICY PROBLEM

We live in an increasingly volatile world with the incidence of conflict growing across the globe. As a result of this changing environment the international community has turned its attention to what it can do to resolve the many protracted conflicts presently raging.

Whilst the international community has been justifiably concerned with ending violent conflict in many parts of the world, not as much attention has been paid to tackling conflict in the other stages of the conflict cycle, in particular the post conflict stage. The post conflict stage is where the conflict has been “resolved in a way that leads to an ending of any violent confrontation, to a decrease in tensions, and to more normal relationships between parties.”¹ This stage of the conflict cycle may not grab the news headlines as much as armed conflict but it is, nonetheless, just as critical. Although major violence may have ceased, the interests of the parties that incited the violence in the first place may not have been fully addressed in the arrangements that led to the cessation of violence. Accordingly, there is an ever present potential for the post conflict stage to revert to violent conflict rather than transforming into a stable peace.

¹ Fisher, Simon, et al (2000) *Working with Conflict: Skills and Strategies for Action*. Zed Books, London at 19

The threat of a return to violent conflict underscores the importance of peacebuilding during the post conflict stage. The United Nations defines post conflict peacebuilding as “actions to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”² Peacebuilding seeks to address the structural issues and long term relationship between the parties to the conflict³ in order to overcome the contradictions that lie at the root of the conflict.⁴ The aim of this form of conflict resolution is to transform potentially violent conflict into a non-violent process of social and political change⁵ that results in stable peace.

The drafting of a constitution after the cessation of intrastate or interstate violence, particularly where it has led to the dissolution of a state, is common practice. This can be attributed to the fact constitutions traditionally seek to “delineate the internal power structures of a state, and its internal, external and reciprocal power relationships with individuals, groups, society, and economy.”⁶ Hence constitution-making “is inherently concerned with the exercise of power and creation of institutions, limitations and guarantees.”⁷ In this way constitution-making conducted during the post conflict stage can be viewed as part of a broader attempt to transform conflict, thereby contributing to the peacebuilding process.⁸

This policy paper examines the potential of the constitution-making process as a tool for peacebuilding and for forging the foundations of a peaceful democratic state. An institutional design for a post conflict participatory constitution-making process is proposed in order to meet these lofty objectives. The constitution-making process can only contribute to conflict transformation if it addresses the wider social and political sources of conflict with the purpose of transforming the negative perspective of conflicting parties into positive change.⁹

² Boutros-Ghali, B. (1992) *An Agenda for Peace*, New York, United Nations at 11

³ Miall, H., Ramsbotham, O. & Woodhouse, T. (2003) *Contemporary Conflict Resolution: The prevention, management and transformation of deadly conflicts*, Polity, Cambridge at 22

⁴ Galtung, J. (1996) *Peace by Peaceful Means: Peace and Conflict, Development and Civilization*, Sage, London at 112

⁵ Miall, H., Ramsbotham, O. & Woodhouse, T.: supra note 3

⁶ Ivo D. Duchacek, (1973) *Power Maps: Comparative Politics of Constitutions*, ABC Clio, California in Hart, Vivian “Constitution-making and the Transformation of Conflict” *Peace and Change* Vol.26 No.2, 2001 at 158

⁷ Hart, Vivian “Constitution-making and the Transformation of Conflict” *Peace and Change* Vol.26 No.2, 2001 at 156

⁸ *Id* at 154

⁹ Fisher, Simon: supra note 1 at 7

2. ASSESSMENT OF PAST POLICY PERFORMANCE

Traditionally constitution-making has been concerned primarily with structuring and legitimizing institutions of limited power designed to govern a particular nation.¹⁰ This process of constitutional engineering was usually conducted behind closed doors by elites and has been characterized as *old constitutionalism*.¹¹

Critique of Old Constitutionalism

The rights of minorities and questions of identity seem to be a component of most modern conflicts. However, the emphasis on constitutional engineering under old constitutionalism has been criticized for failing to take into account that constitutions are also designed to “recognize, include, give voice to, equalize, or advantage, and to exclude, silence, or stigmatize people and peoples.”¹²

Furthermore, the very nature of many modern conflicts means that it is difficult to reach a final resolution concerning the underlying issues that acted as a catalyst for the conflict, even though the parties may have already agreed to desist from violence. Traditional constitution making views the conclusion of the conflict as being marked by the creation of the constitution, negotiated between elites, with the content of the constitution codifying the terms of the settlement. However, the permanence and purported stability of such arrangements can be threatening to parties to a conflict rather than reassuring.¹³

Advocates of old constitutionalism contend that it is the most appropriate process for drafting a constitution as it is elites who possess the “moderation, technical expertise, negotiating skills, ability to maintain confidentiality, and above all rational incentives to compromise so as to maintain power.”¹⁴ However, this argument is hard to reconcile with one of the fundamental tenants of democracy, namely participation by the people. A constitution engineered by elites behind closed doors will lack legitimacy because the process of adopting a constitution is as important as its substance.¹⁵ Without a sense of ownership that stems from being part of the

¹⁰ Hart, Vivian: *supra* note 7 at 155

¹¹ *ibid*

¹² Hart, Vivian: *supra* note 7

¹³ Hart, Vivian (2003) “Democratic Constitution Making” *United States Institute of Peace Special Report*, SR 107, Washington D.C. at 3

¹⁴ *ibid*

¹⁵ Ndulo, Muna. “Constitution Making in Africa” *Africa Notes*, December 1996

process the community will “not understand, respect, support, and live within the constraints of constitutional government.”¹⁶

New Constitutionalism

Allowing elites to craft a constitution in isolation runs contrary to recent practice. Viewing constitution-making as a “continuing conversation, or a forum for negotiation amid conflict and division more accurately represents recent history than does the older tradition of Western liberal constitutionalism.”¹⁷ This recent trend has been coined *new constitutionalism* and is built on the premise that constitution-making conceived of as an ongoing amicable negotiation, rather than concluding a contract, is a “more realistic approach to constitution making, especially in multi-cultural societies, as well as a better articulation of the conditions of democratic legitimacy in the late twentieth century.”¹⁸ Furthermore, such an approach is more likely to deter a renewed conflict.

New constitutionalism and old constitutionalism fall at either end of the spectrum and there is a tension between the allure that comes with the security of old constitutionalism and the dynamism and flexibility of new constitutionalism. A constitution-making process that is permanently open will not achieve the result of producing a document that can be owned by the people; therefore a compromise needs to be reached between these two approaches. New constitutionalism must strive for a “workable formula that will be sustainable rather than assuredly stable.”¹⁹

Recent efforts

The United Nations, regional security organizations, and members of the international community have gained a great deal of experience in constitution-making in post conflict societies over the last five years. However, these recent experiences in post conflict constitution-making suggest those who are designing and managing the process have yet to devise a workable participatory formula.

In Iraq, the twenty-five member Constitutional Preparatory Committee, tasked with making recommendations to the Interim Governing Council on how it should go about drafting a new

¹⁶ Hart, Vivian: supra note 13 at 4

¹⁷ Hart, Vivian: supra note 7 at 154

¹⁸ Simone Chambers, “Contract or Conversation?” Theoretical Lessons from the Canadian Constitutional Crisis,” *Politics and Society* 26 (March 1998): 143-44 in 3 at 157

¹⁹ Hart, Vivian: supra note 13

constitution has been criticized for producing a confidential report on the matter, rather than making the recommendations public so that the community could debate the issues.²⁰ Meanwhile, the Constitutional Commission in Afghanistan has been criticized for its lack of transparency and for failing to undertake a real public education campaign or consultation process.²¹ In East Timor, civil society recognized the constitution-making process as legitimate, but criticized it for having a seriously insufficient process. In particular, the process' timetable was singled out as being too short to allow for sufficient participation from a broad spectrum of East Timorese society.²²

3. NEED FOR ANALYSIS

Over recent years the international community has been involved in an increasing number of post conflict reconstruction scenarios. It is becoming standard practice that a constitution-making process is undertaken in such circumstances. A closer examination of the process of constitution-making in post conflict societies is justified for a number of reasons.

Post Conflict Peacebuilding

The United Nations definition of peacebuilding dictates that structures need to be strengthened and relationships fostered to avoid a relapse into violence and to strengthen the potential for peace.²³ One of the most prominent tools that help turn a potentially violent conflict into a non-violent process of social and political change²⁴ is the constitution-making process. As highlighted above, critiques of past and ongoing efforts indicate that more work needs to be done if this tool is to meet its potential.

²⁰ *Iraq's Constitutional Challenge*, International Crisis Group Middle East Report No.19, 13 November 2003 at 26

²¹ *Afghanistan's Flawed Constitutional Process*, International Crisis Group Asia Report No.56, 12 June 2003 at p.i; The UNDP Afghanistan Programmes Update on "The Constitution-Making Process of Afghanistan" September 2003 specifically highlighted the need for a civic education and consultation process to be conducted: <http://mirror.undp.org/afghanistan/projects/Update-Sep-03/The-Constitution-Making-Process-of-Afghanistan.html>

²² The East Timor National NGO Forum, *The Constitutional Process in East Timor: Briefing Paper to International Donors Conference*, Canberra June 2001: <http://www.pcug.org.au/~wildwood/01junconstitution.htm>

²³ Boutros-Ghali, B: supra note 2 at 11

²⁴ Miall, H., Ramsbotham, O. & Woodhouse, T: supra note 3

Process should be imbued by the same principles as the product

The conventional liberal democratic model refers to the “practices of people in a national society that strive to provide free and fair elections, with respect for the civil and political rights of individuals, protected under the rule of law.”²⁵ Underlying this definition are three characteristics that are the cornerstones of democracy; namely participation, transparency and accountability. Over recent decades these norms, which are expected to apply to everyday political decision-making, are now being demanded of the constitutional deliberations that lead to the creation of the democratic system.²⁶ This growing expectation requires a closer analysis of constitution-making processes to ensure the process is imbued with the same characteristics as the democracy it intends to create.

Adherence to international obligations

It is a generally accepted that people have a right to participate in the political processes and public affairs of their country.²⁷ The Office of the High Commissioner for Human Rights has clarified the ambit of this right, determining that people have “a right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.”²⁸ Furthermore, when people “choose or change their constitution or decide public issues through a referendum” they are engaging in public affairs,²⁹ therefore should be able to participate in these processes as of right. It is clear states have an obligation to engage in participatory constitution-making; failure to do so would result in the breach of the human rights of the citizens of the state and non-adherence to an international norm.

²⁵ Joyner, Christopher. “The United Nations and Democracy” *Global Governance* Vol.5 Issue.3, 1999 at 2

²⁶ Hart, Vivian: supra note 13 at 3

²⁷ Article 21: United Nations Declaration of Human Rights; Article 25: *International Covenant on Civil and Political Rights*; Article 13.1: African Charter on Human and People’s Rights; Article 4: The Commonwealth Harare Declaration; Article 5.2: Asian Charter of Rights; and the Inter-American Democratic Charter

²⁸ “The right to participate in public affairs, voting rights and the right of equal access to public service,” *General Comment*, Office of the High Commissioner for Human Rights, No.25, 1996 at Para.2

²⁹ *id* at Para.6

4. PARAMETERS OF ANALYSIS

Policy Problem

New **constitutionalism** outlines a **fresh approach** to an age-old endeavor, namely constitution-making. However, it is **unclear how best to implement** this new approach **in a post conflict enabling environment**. The policy problem facing the international community is **how best to implement new constitutionalism in post conflict scenarios** in the hope that the process can help legitimize a democratic outcome and to aid in the peacebuilding process.

Major stakeholders

The main stakeholders will differ depending on the post-conflict scenario; however the **main stakeholders** in a post-conflict constitution making process will **generally be drawn from the following non-exhaustive list**:

External

- The United Nations
- International donors
- Regional organizations/ powers
- Neighboring states
- International civil society
- Refugees

Internal

- The interim administration
- Political parties
- Parties to the conflict
- Citizens of the country -
(Including, but not limited to: the poor, illiterate, rural communities, women, people with disabilities, sexual minorities, ethnic minorities, indigenous groups and other minority groups)
- Civil society
- Established religious and power institutions
- Media
- Security forces

The Enabling Environment

For the purpose of designing an institutional process the following **assumptions** are made **regarding** the characteristics of a **post conflict environment**:

- The constitution making process is commencing in a post-conflict environment after the **peacemaking process has come to a satisfactory outcome**
- The boundaries of the conflict remain within a single state or the **parties** have agreed through the peacemaking process that they will **co-exist within the bounds of the same nation-state** or territory
- An **interim administration** has been **formed** or the region is governed by the United Nations as a protectorate
- **Immediate tasks** of providing essential services, such as food and shelter, have been **completed**; and
- There is an **appropriate degree of security**, whilst acknowledging that it is almost impossible to obtain complete security in a post-conflict scenario
- **Legitimacy** is **conferred on the interim administration**, either before or after the commencement of the constitution-making process, **to undertake the functions of government** in accordance with the interim arrangements **until** the successful **completion of the constitution-making process**

Institutional Design Methodology

As a preliminary step examples of **recent constitution-making processes** have been **analyzed using the AIC methodology**.³⁰ A graphical representation of a “Public Sector Agency’s Relation to its Institutional Environment” and the “AIC Institutional Design Framework” is included in **Appendix ‘A’** and **Appendix ‘B’** to aid the reader’s understanding of the methodology.

³⁰ "The AIC framework approaches institutional design in terms of both structures and processes. The structural design framework considers: (i) the institution’s appreciative (or enabling) environment which is comprised of factors such as physical, socio-cultural, political, economic, and institutional; (ii) its influenceable environment which refers to those external elements such as its clients, financiers, and suppliers whose support is essential; and (iii) its controlled (or internal) institutional environment. In terms of institutional design process, the AIC framework similarly provides for 3 steps: (i) the establishment of agreed upon common goals among key stakeholders; (ii) the design of the relationships among these stakeholders; and (iii) the preparation of operational plans, creation of internal organizational relationships and incentives, and establishment of feedback mechanisms”: Bayda, Inna, “Establishment of Agricultural Services in a Transition Country” – available at www.odii.com (For a detailed methodology, see Smith, W. Lethem , F. & Thoolen, B. (1980) *The Design of Organizations for Rural Development*, World Bank, SWP #375 also available at www.odii.com)

The constitution-making processes studied were selected using the following criteria:

- Constitution-making processes premised on new constitutionalism; and/ or
- Constitution-making processes implemented in post conflict societies

The **AIC methodology** was then **used to create an institutional design** for a participatory constitution-making process tailored to a post conflict enabling environment.

Measures of effectiveness

The **objective** of the institutional design **was to produce a process that:**

- **Leads to** the creation of a constitution that forms the basis for **a sustainable democracy** supported by the people; and
- **Contributes to peacebuilding** efforts

The following **criteria/ indicators** should be used **for assessing** whether the **institutional design** achieves the stated objectives:

- Sustainable democracy has been achieved
- The community supports and feels a sense of ownership toward the constitution
- Relationships were fostered between individuals/ groups who were previously antagonistic toward each other
- The constitution-making process was non-violent and led to social and political change; and
- There was no relapse into violence conflict during or after the completion of the process

5. INSTITUTIONAL DESIGN OF A POST CONFLICT PARTICIPATORY CONSTITUTION-MAKING PROCESS

PRELIMINARY ISSUES: POLITICAL WILL

In recent years the international community has become increasingly involved in the resolution of internal conflicts, for instance in Cambodia, Bosnia and Herzegovina, Kosovo, East Timor, and now Afghanistan. Recent trends suggest that when the international community becomes involved in the resolution of conflict it goes on to play a role in post conflict reconstruction, including constitution-making processes. However, the aims and expectations of the international intervenors and local communities with respect to the constitution-making process do not always coincide.³¹

Ultimately constitution-making is a domestic prerogative, although nations are bound by universally accepted or internationally mandated norms. However, often in post conflict situations the United Nations or regional institutions exert a great deal of influence over fledgling interim administrations and seek to impose short timetables for drafting constitutions in order to facilitate an early exit and to avoid donor fatigue.³² In order to ensure adherence to a swift timetable the international community will often advocate a “simple procedure involving a comparatively small number of stake-holders and a narrow agenda” rather than a procedure that includes a large number of individuals and groups discussing a wide agenda.³³

Elites will always play a major role in constitution-making processes; however, if the objective of the process is to produce a living document owned by the people rather than a constitution that “simply reflects the division of the spoils between” powerful elite factions, then the elites must be restricted from monopolizing the process.³⁴ One means to do this is for the interim administration to allocate an appropriate amount of time for the constitution-making process so that there is time

³¹ Ghai, Yash, Lattimer, M. & Said, & Y. “Building Democracy in Iraq,” *Minority Rights Group International Report*, United Kingdom, 2003 at 27

³² *ibid*

³³ Ghai, Yash et al: *supra* note 31

³⁴ Neil Kritz, “Testimony before a joint hearing of the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Property Rights; and the Senate Committee on Foreign Relations, Subcommittee on Near Eastern and South Asian Affairs by Director of the Rule of Law Program at the U.S. Institute of Peace”, 25 June, 2003

[http://www.usip.org/aboutus/congress/testimony/2003/0625_kritz.html] at 3

for greater input from the community.³⁵ As the interim administration will, more likely than not, be made up by elites there is little incentive for them to move from the status quo which, as it presently stands, benefits them. Accordingly, before the constitution-making process begins the United Nations and regional institutions must assess what is a greater priority – a longer commitment but a more inclusive democracy supported by everyone irrespective of their ideological differences or an elite driven constitution and an early exit.

RECOMMENDATION 1: POLITICAL WILL

It is the long-term interest of the international community to build stable democracies. Accordingly, they should support participatory constitution-making processes initiated by interim administrations/ authorities in post conflict countries.

In the event the interim administration seeks to implement a constitution-making process limited to elites the international community and donors should exercise their influence to reform the process and then provide adequate resources to implement a participatory constitution-making process.

PHASE 1: ESTABLISHING THE CONSTITUTIONAL COMMISSION (“CC”)

The CC is a generic term used to define the commission/ committee assembled by the interim administration, the United Nations or regional institutions to steer the constitution making process and prepare a draft constitution. The new constitutionalism model “has typically involved the establishment of a constitutional commission, as it did in Eritrea, Ethiopia, Uganda, Rwanda, Nicaragua, Brazil and Fiji.”³⁶

Selection of members

In the spirit of an open and participatory process it would be preferable for members of the CC to be elected rather than appointed, as they were in Uganda where the CC consisted of elected members as well as Presidential appointees. Unfortunately this is not feasible in a post conflict

³⁵ *ibid*

³⁶ Kritz, Neil: supra note 34; Even if a constitution-making model is not based on true participatory principles the first step is usually the establishment of a Constitutional Commission – see further Bougainville Constitutional Commission (2003). *Making a Constitution for the Autonomous Region of Bougainville*, Transitional Consultative Council, Papua New Guinea

enabling environment; free and fair elections require the formation of an independent electoral authority and a comprehensive voter registration campaign, which in itself is resource and time intensive.³⁷ For this reason “constitutional commissions have usually been appointed by the executive or elected or appointed by a Constituent Assembly.”³⁸ Irrespective of the process for appointment, the criteria for selection and the process should be transparent and accountable so as to imbue the CC with the legitimacy required to achieve its mission. Furthermore, members should possess the requisite integrity and expertise to fulfill the CC’s mission and the CC should be supported by a small secretariat.

Representative membership

Despite the fact the CC is usually relatively small in size, it should be representative of the different political parties, religious, racial, and ethnic groups within the society. Ensuring the CC is representative of the diverse interests in society provides stakeholder ‘buy-in,’ which will reduce the likelihood of parties undermining the process. Accordingly, prior to the appointment of the CC the interim administration should undertake a stakeholder analysis to ensure the CC’s membership includes representatives of stakeholder groups in the appreciative environment.

Peacebuilding through the CC

Special regard should also be had to the make-up of the CC because of its potential to contribute to the peacebuilding process. Where the constitution-making process has “entailed broad public consultation, an intriguing result has repeatedly been the transformation of the members of a constitutional commission from serving primarily as advocates for their respective interest group into a more cohesive group with a greater focus on the needs of the whole society.”³⁹ Accordingly, members of the CC should not only be representative of diverse interests, but also be strategic actors from those representative groups. The CC is the perfect forum in which to bring these strategic actors together so that they can bridge their differences and build relationships. To this end the CC is an important tool in the peacebuilding process and appropriate facilitative techniques need to be employed to bring about a psychological/ behavioral transformation amongst the members.

³⁷ “Voter Registration,” Administration and Cost of Elections Project (Joint project of IDEA; UNDP; IFES, IFE & Elections Canada) - <http://www.aceproject.org/main/english/vr/vr.htm>

³⁸Kritz, Neil: supra note 34

³⁹Kritz, Neil: supra note 34

Independence

In order to ensure the CC is viewed by the community as being above politics it must be independent of the interim administration, the United Nations and donors. Its independence can only be assured if the CC is guaranteed an adequate and ongoing budget, which cannot be withdrawn or reduced by the interim administration, United Nations or donors.

Generally speaking, participatory constitution-making processes are funded from domestic sources. The independence of the process will often be called into question if the CC is funded from a foreign source as it could be criticized for being a puppet of a foreign interest. However, in post conflict scenarios interim administrations have to meet a number of competing policy priorities with the scarce resources at their disposal. The domestic economy is usually stagnant and newly devised taxation systems are unable to collect the revenue necessary to provide for essential services and infrastructure. As such the interim administration is often reliant on donors anyway. Nevertheless, the independence of the CC can still be guaranteed if it is provided unconditional funding by foreign donors. Alternatively, the interim administration may be able to turn to its diaspora as a source of funding, as was done in Eritrea.

Terms of Reference

The CC's terms of reference should be broad and include steering the constitution-making process, preparing a draft constitution, and implementation of the constitution on ratification. The CC should be given the latitude necessary to ensure the process remains flexible and is not burdened by unreasonable timelines. As its first task the CC should be required to:

- Establish internal decision-making procedures and protocols
- Develop internal conflict resolution mechanisms; and
- Define its terms of reference more closely and establish the thematic framework for discussion

Requiring the CC to flesh out its terms of reference more closely transforms the initial meetings of the CC into a Search Conference,⁴⁰ thereby allowing members to create a common vision and

⁴⁰ For full elaboration of this methodology see: Baburoglu, O.N. & Garr, A. "Search Conference Methodology for Practitioners" in Weisbord, M.R. (1992). *Discovering Common Ground: How future search conferences bring people together to achieve breakthrough innovation, empowerment, shared vision, and collaborative action*, Berrett-Koehler, San Francisco

purpose. The fact the CC is representative of divergent interests will result in an inclusive vision. Furthermore, the establishment of conflict resolution mechanisms and clear decision-making protocols, whether it be consensus decision-making or the inclusion of veto rights, enables members to overcome differences and build relationships.

Despite the fact the power to make these decisions resides with the CC, the terms of reference should obligate them to publish all procedures and protocols and require all decision-making be transparent, while members should be held accountable for their actions.

RECOMMENDATION 2: CONSTITUTIONAL COMMISSION

The selection criteria and appointment process for members of the Constitutional Commission should be transparent and accountable.

The Constitutional Commission should be representative of all major groups in the community.

The independence of the Constitutional Commission must be ensured through adequate and guaranteed resourcing.

The terms of reference should be broad and the Constitutional Commission should not be burdened by strict timelines. The Constitutional Commission should be tasked with establishing the thematic framework for discussion.

PHASE 2: EDUCATION

The ability of citizens to participate in the constitution-making process cannot be taken for granted. Consultation and participation would be empty without education of the populace. The education phase is when the CC first casts its gaze beyond its controlled environment in order to engage its influenceable and appreciative environments directly.

Education campaigns should be designed to provide information to the community about democracy, the constitution and constitution-making process. Furthermore, civic education campaigns need to be allocated sufficient time or their effectiveness will be undermined. Some

commentators suggest this stage should take anywhere between one and three years.⁴¹ As part of their mandate to guide the constitution-making process the CC should devise basic themes that can be used as the framework for education campaigns and discussion; for instance themes centering around issues such as good governance, the separation of powers, the rule of law, political pluralism, the role of religion in government, civilian control of the military, human rights protection, accountability institutions and access to information.

The CC should adopt a two pronged strategy: (a) an official education campaign targeting the entire country; and (b) capacity building and promotion of civil society initiated education efforts. Although this is a common strategy it is made all the more difficult by the special conditions present in the post conflict enabling environment.

Civic education campaign

Planning a civic education campaign is part of the appreciative stage of the design. The CC needs to assess which stakeholders exist in the appreciated environment and develop strategies to deliver information to those stakeholders, irrespective of their location within or outside the country. South Africa, Eritrea, and Rwanda are good examples where carefully planned civic education programs were conducted with the purpose of educating the population on the role of a constitution in society generally and their personal role in the process.⁴² In Rwanda the civic education campaign targeted all levels of the community, from the national level, to the provincial level and the local level, and made specific provision for informational material to be made available to Rwandans in refugee camps and in the diaspora.⁴³ Some techniques that have been successfully used during planned civic education programs include:

- Dissemination of documents needed to understand the context of constitutional debate, such as Guidelines on Constitutional Issues and frameworks for debate. This technique was successfully used in Uganda, Eritrea and South Africa
- Translation of all relevant documents into vernacular and local languages, as was done in Eritrea, so that information is accessible to everyone
- Utilize existing educational institutions, such as schools and religious institutions to disseminate information

⁴¹Kritz, Neil: supra note 34

⁴²Kritz, Neil: supra note 34

⁴³ Legal and Constitutional Commission, *Towards a Constitution for Rwanda: Action Plan 2002-2003* – www.cjcr.gov.rw

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- Actively engage the media to disseminate information and stimulate debate and utilize the internet
 - Train educators to go out into the community, and in particular to rural areas, to educate the public, using methods such as public addresses and question and answer sessions, similar to how it was done in South Africa and Rwanda.⁴⁴ Such an approach facilitates information flows to communities that may not have access to the media and illiterate people who are unable to read printed material; and
 - Miscellaneous and culturally specific techniques such as the use of essay competitions in Uganda, or using artistic and musical methods to deliver information, such as the use of drama troupes in Eritrea or painting competitions in South Africa

Promotion of Civil Society education efforts

A participatory process implies the involvement of civil society. Empowering civil society to participate in the constitution-making process will invigorate the education campaign as often civil society will want to become active partners in the process. For this reason the CC should utilize naturally occurring civil society structures and networks for two-way communication.

Partnering with different civil society groups will provide access to sectors of the community those groups claim to represent, which the CC may otherwise not be able to connect with. In addition, the CC will be able to draw upon the advocacy and strong education delivery expertise that exists within civil society and involving them in the process ensures stakeholders in the appreciative environment have ‘buy-in’.

Post conflict environment

The education phase of the process will take longer than it would in a participatory process conducted in a stable environment. When devising an institutional design for a constitution-making process in a post conflict situation the CC must identify the limitations the environment places on the process and adopt strategies to overcome these limitations.

⁴⁴ *ibid*

Limitations that the enabling environment will place on the process include:

- Limited free/ fair media and freedom of expression/ association: The media is a vital partner in the education phase and freedom of expression is a precondition for education and consultation. Unfortunately post conflict countries often lack the infrastructure required for electronic media (i.e. transmission towers, broadcast facilities, lack of receivers such as TVs and radios) and distribution obstacles hamper national print media (i.e. lack of road infrastructure to transport printed material). Legal and cultural impediments to free speech and freedom of association must also be addressed.
- Security: Unless security can be provided, whether through a nationalized military force or a civilian police force, then the process will not be able to proceed. The CC will not be able move throughout the country to conduct the education campaign, people will not be able to participate freely and safely in the process and civil society will not be able to operate effectively. As a precursor to attaining a secure environment the combatants need to be demobilized and disarmed and demining needs to occur.⁴⁵
- Economic development: In order for combatants to put down their weapons and be reintegrated into the community there needs to be economic development. Soldiers need to know that they have another way of earning an income. As such, economic development needs to focus on job creation. Also, despite the importance of the constitution to the long-term goal of building democracy, people will not be ready or willing to engage in a lengthy process if their immediate needs, such as food and shelter, are not yet met. Accordingly, there will need to be humanitarian relief and distributional justice.⁴⁶
- Peacebuilding: Although constitution-making is part of the peacebuilding process, other peace building tools such as reconciliation processes/ trust building activities need to be implemented to overcome the initial mistrust that exists between parties who, until recently, considered each other enemies.

In order to overcome these limitations and move forward with the education phase of the constitution-making process the CC needs to turn to the influenceable environment and establish inter-agency linkages, in particular with the interim administration, United Nations and donors, to highlight the importance of tackling these barriers so that the constitution-making process can proceed.

⁴⁵ Miall, H., Ramsbotham, O. & Woodhouse, T: supra note 3 at 203

⁴⁶ See further: Miall, H., Ramsbotham, O. & Woodhouse, T: supra note 3 at 205 -06

The CC could achieve this by:

- Designating certain members of the CC to act as liaisons between the CC and these particular stakeholders
- Inviting these stakeholders to appoint a liaison officer who can join the CC secretariat; or
- Seconding representatives from the CC secretariat to the respective stakeholders

These options would create cross-institutional linkages and ensure the respective institutions were, at very least, aware of the priorities and needs of the CC when prioritizing their policy choices. In this way the CC may be able to co-opt the assistance of stakeholders in the influenceable environment to overcome the special limitations posed by the enabling environment.

Peacebuilding

The very process of bringing people together, disseminating information and educating people about issues that are equally relevant, irrespective which group you belong to, contributes to building relationships in the community, opening lines of communication and overcoming mistrust. In this sense the education phase contributes to peacebuilding.

RECOMMENDATION 3: EDUCATION

The Constitutional Commission needs to implement an official civic education campaign in order to educate the community about democracy, the constitutional themes set by the Constitutional Commission, and the constitution-making process.

Special strategies need to be developed to deliver education to stakeholders in the appreciative environment.

The Constitutional Commission should partner with and empower civil society organizations to take an active role in civic education.

The education phase will take longer and be more difficult in a post conflict situation because of the limitations placed on the process by the environment. The Constitutional Commission needs to develop cross-institutional linkages to ensure actors in the influenceable environment are aware of the Constitutional Commission's needs.

The education phase should last anywhere between 1 and 3 years.

PHASE 3: CONSULTATION

The consultation phase provides the public with a sense of ownership because it allows them to participate and provides the CC with ideas and insights that could be valuable to the subsequent drafting phase.⁴⁷ However, wide public participation tends to broaden the agenda of reform, especially in relation to social policies, thereby requiring an extended timetable not only for the education phase but also for the consultation phase.⁴⁸

Avoid conflation of phases

In order to reduce the time needed to undertake this process there is a tendency to try and short circuit the process by condensing the education and consultation phases into one stage. These phases, by their very nature, are sequentially related; the community cannot be consulted unless they are aware of the issues and have had time to formulate opinions. Experience suggests that the education and consultation stages should be treated as two distinct stages of the process. In “East Timor and Fiji, the public education and consultation phases were essentially conflated, weakening the effectiveness of each.”⁴⁹ In the case of East Timor civil society recommended the consultation phase should last at least nine months and that the constitution be considered only an interim constitution if any less time was devoted to the process.⁵⁰

Post conflict environment

The claim that the consultation phase should be afforded sufficient time is even more important in the post conflict context, such as in East Timor. This is because the environment limitations present during the education phase will persist throughout the consultation phase as well. The interagency linkages and other institutional design recommendations in the education phase should be maintained during the consultation phase in order to assist the CC overcome the challenges generated by the post conflict environment.

⁴⁷ Kritz, Neil: supra note 34

⁴⁸ Ghai, Yash: supra note 31 at 28

⁴⁹ Kritz, Neil: supra note 34

⁵⁰ The East Timor National NGO Forum: supra note 22

Consultations as Search Conferences

The CC should hold consultation sessions throughout the country and ensure the voices of all stakeholders in the appreciative environment, including the poor, illiterate, rural communities, women, the disabled, sexual minorities, ethnic minorities, indigenous groups and refugees are heard. The inclusion of the views of refugees, internally displaced people and nomads in the constitution-making process in Afghanistan was facilitated by the appointment of representatives to the interim Loya Jirga, which subsequently approved the new Afghan constitution in December 2003.⁵¹ Meanwhile, consultation of Rwandan refugees and diaspora was explicitly included in the Rwandan CC's Action Plan⁵² and the Government of Rwanda invited symbolically invited all exiled Rwandans to "participate in the transition to democracy."⁵³

In order to ensure participation by these stakeholders the CC should enlist civil society's assistance and use different techniques to access different groups. For example in June 2001 the Intern-Parliamentary Union conducted a seminar on the Process of Engendering a New Constitution for Rwanda that brought together women parliamentarians, representatives from women's associations, and delegations from different government offices and international bodies to generate strategies on how to ensure the new constitution was gender-sensitive.⁵⁴

Another method to draw stakeholders into the process is to hold national conferences. These public forums are usually highly visible and inclusive events at which representatives from key groups are invited to speak. The benefit of large-scale search conferences such as these, and smaller events such as the IPU seminar, is that they bring stakeholders together with the purpose of developing a consensus, or a common vision. Such events greatly contribute to the consultation phase. Once again the process of bringing people together in the spirit of overcoming differences and finding common ground contributes to the peacebuilding process.

⁵¹ Article 7 "Procedures for the Elections of the Members of the Emergency Loya Jirga" - http://www.eurasianet.org/loya_jirga/election.shtml

⁵² Legal and Constitutional Commission: supra note 42 at 10

⁵³ "Last Rwandan refugees returned from Tanzania," *afrol News*, 6 January 2003 - http://www.afrol.com/News2003/rwa001_tan_repatriation.htm

⁵⁴ *The Process of Engendering a New Constitution for Rwanda*, Report by Inter-Parliamentary Union Secretariat on the proceedings and guidelines deriving from a seminar of the same name organized in Kigali in 2001 in cooperation with the UNDP - <http://www.ipu.org/english/surveys.htm#Kigali>

RECOMMENDATION 4: CONSULTATION

The civic education campaign must not be conflated with the consultation stage.

Adequate time should be afforded to the process due to the limitations placed on the process by the post conflict environment.

The Constitutional Commission should hold consultation sessions throughout the country and ensure the voices of stakeholders in the appreciative environment, such as the poor, illiterate, rural communities, women, the disabled, sexual minorities, ethnic minorities, indigenous groups and refugees are heard.

Civil society should be engaged in the process because of their expertise and capacity to access groups that the Constitutional Commission cannot.

The Constitutional Commission should use consultations, whether small special interest meetings or national conferences, as Search Conferences that help forge a common vision amongst stakeholders.

PHASE 4: DRAFTING

The drafting phase is when the CC brings the process back into the controlled environment and seeks to synthesize the results of the consultations into a draft document. This is a challenging task, as many stakeholders will have conflicting positions and competing interests. The conflict resolution mechanisms built into the institutional design in Phase One should assist the CC overcome any difficulties that may stem from divergent opinions within the CC as to what should be included and excluded. However, it is likely that the members of the CC, working closely together over a period of more than a year would have moved toward an unofficial consensus position simply by discussing the issues amongst themselves throughout the earlier phases, and with the population at large as a result of the consultation process. These discussions and consultations should have helped identify areas of common ground and areas of disagreement.

For the sake of accountability and in order to avert claims that the CC is imposing its own agenda on the drafting of the document, rather than heeding feedback from the consultations, all submissions made to the CC should be published and records of discussions should be transparent.

Experts

The CC may need to draw upon experts during the drafting phase. A careful balance needs to be drawn between infusing the drafting process with the knowledge and experience that can be gained from engaging experts and ensuring those same experts and academics do not hijack the process so that the end product does not adequately reflect the outcome of the consultation process. The CC are mandated with preparing a draft constitution and should be held accountable for the product they produce, therefore experts should only play an advisory role. In particular experts can advise on lessons that have been drawn from experiences elsewhere. As with all CC decisions, the names and backgrounds of the experts who advise the CC should be made public.

There is a general reluctance to utilize international experts due to suspicion that foreign experts will seek to thrust a foreign model of democracy on a newly developing society.⁵⁵ In order to foster a homegrown solution to the question of what kind of democracy it may be prudent to rely on domestic experts. However, in post conflict societies, particularly those that have witnessed violent conflict for an extended period, there may only be a limited pool of domestic experts to call upon. In such a situation the CC may attempt to harness the social capital of their own country's diaspora in order to overcome reliance on international experts. However, the CC should be careful as groups within a country may still view members of the diaspora as outsiders, therefore would be antagonistic to their involvement in such processes, as in the case of Iraq and Rwanda.⁵⁶

Experts and conflict resolution

Conflict resolution mechanisms should be developed and implemented with the help of process consultants. In turn process consultants could be engaged as internal experts to help the parties work through the points of contention. Furthermore, experts, whether domestic or international, could be used in the internal conflict resolution procedures fashioned by the CC with help of process consultants in Phase One. As part of those procedures the CC may like to refer internally contentious issues to a panel of experts in order to overcome an impasse.⁵⁷

⁵⁵ Aucoin, Louis. "The Role of International Experts in Constitution-Making: Myth and Reality," *Peace, Politics, Prosperity*, Vol.5 No.1 2004, Winter/ Spring

⁵⁶ *Iraq's Constitutional Challenge*: supra note 20 at 8; see further: Gourevitch, Philip (1998). *We Wish to Inform You that Tomorrow We Will be Killed With Our Families: Stories from Rwanda*, Picador, New York

⁵⁷ This is a conflict resolution method that has been successfully used in the settlement of international conflicts, for example the *Algiers Agreement* which ended the conflict between Eritrea and Ethiopia

Continuing consultation

Depending on the degree of consensus that occurred during the initial consultation phase and the extent to which the CC deems it appropriate to include contentious points in the draft constitution, it may be wise to undertake a second education and consultation process on specific points of contention. Such a process should specifically target stakeholders whose interests are affected. This is why the interim administration, United Nations and donors need to give the CC the latitude necessary to ensure the process remains flexible and is not burdened by unreasonable timelines.

RECOMMENDATION 5: DRAFTING

All submissions made to the Constitutional Commission should be published and internal deliberations should be transparent to ensure accountability.

Internal conflict resolutions mechanism should be utilized to overcome internal differences and develop a consensus view on what should be included in the draft constitution.

Conflict resolution mechanism should be developed and implemented with the help of process consultants. In addition, internally contentious issues may be referred to a panel of experts to overcome impasses.

The Constitutional Commission should be held accountable for the document they produce, therefore should only engage experts as advisors.

In order to produce a homegrown product the Constitutional Commission should first turn to domestic experts. If domestic experts are unavailable the Constitutional Commission may wish to search their diaspora, however, they should be conscious of domestic sensitivities to this option.

If contentious provisions are included in the draft it may be prudent for the Constitutional Commission to undertake a secondary education and consultation phase, except limited to the contentious issues.

foreshadowed the establishment of a Boundary Commission to make a determination as to the border between the countries. Such a model could be easily incorporated into the institutional design of a constitution-making process

PHASE 5: APPROVAL

The draft constitution needs to be approved by the people; however, there is no consistent method for ratifying the document. The options that have been used to date can be characterized as either *direct* or *indirect* ratification. Indirect ratification usually refers to instances where constitutions have been ratified by constituent assemblies, either by a two-thirds majority, as was the case in South Africa and East Timor, or by a simple majority, as in the case of Fiji. In contrast direct ratification is usually via referendum, which was used to ratify the draft constitution in Rwanda and is the method proposed for the Iraqi process.⁵⁸ There is no evidence to suggest that either method is better than the other or confers greater legitimacy on the outcome. Irrespective which strategy is used Phase Five moves the process beyond the controlled environment again into its influenceable environment as the CC releases the draft for external approval.

Direct approval

Referenda are a tool of direct democracy that entails the electorate being involved in decision-making with respect to a specific issue. This is the most obvious method for conferring legitimacy on the constitution as people have a direct say in whether the document represents their wishes and whether they support the sentiment of the document.

However, there are a number of drawbacks to this method; aside from the enormous cost, there is concern that voters do not make their decision concerning the referendum in isolation. Some argue that external factors can influence the public's vote as the debate surrounding the referendum can become "entangled with other short-term political factors, above and beyond the issue presented on the referendum ballot."⁵⁹ In this way, the referendum may begin to look more like a 'second order' election on unrelated issues,⁶⁰ with the outcome reflecting the popularity or unpopularity of ancillary political issues. This underscores the importance of the CC and the constitution-making process remaining independent and above politics so as to avoid the process being entangled with secondary issues.

⁵⁸ *Final Transitional Agreement* - http://www.cpa-iraq.org/audio/20031115_Nov-15-GC-CPA-Final_Agreement-post.htm

⁵⁹ Leduc, Lawrence, "Opinion Change and voting behaviour in referendums" *European Journal of Political Research* Vol.41, 2002 at 712

⁶⁰ See further: Van der Eijk, C. Franklin, M. & Marsh, M. What voters teach us about Europe-wide elections: What Europe-wide elections teach us about voters. *Electoral Studies* Vol.14, 1995 at 149-166; and Reif, K. & Schmitt, H. "Nine second-order elections: A conceptual framework for the analysis of European election results" *European Journal of Political Research* Vol.8, 1980 at 3-44 – cited in *supra* note 59

Indirect approval

Alternatively, the constituent assembly can debate, revise and adopt the constitution. With the process of indirect approval an important factor for the “ultimate legitimacy of the constitution and the stability of the system it establishes is [that there is] democratic representation in the body that receives the commission draft.”⁶¹

Peacebuilding

Approval of the draft constitution, whether directly or indirectly, by the people makes it more difficult for parties to the conflict to step back from the process. Accordingly they will have to respect the new power sharing institutions and relationships. In this way the constitution-making process cements efforts at peacebuilding.

RECOMMENDATION 6: RATIFICATION

The Constitutional Commission must remain independent and above politics, particularly if the draft constitution is to be approved via direct ratification. If the process and Constitutional Commission are viewed as being political the referendum could degenerate into a second order election, which undermines the outcome of the process.

If the draft constitution is to be approved via indirect ratification the constituent assembly must be democratic or else the legitimacy of the outcome will be undermined.

PHASE 6: CONTINUING EDUCATION/ EVALUATION & REVIEW

As with any policy process there needs to be ongoing community education and review and evaluation of the process to determine whether the desired outcome has been attained.

Continuing civic education

The civic education campaign proposed in Phase Two concentrates on educating the community on the constitution-making process and themes that need to be debated prior to the Phase Three consultation. An additional civic education campaign is required after ratification to teach people

⁶¹Kritz, Neil: supra note 34

what became of all the deliberation, namely what is included in the ratified document. Furthermore, people need to be educated about how to enforce the provisions of the constitution. In this way the public will be taught how to bring the document to life. Once again this strategy requires the CC to engage with its influenceable environment.

Evaluation and Review

This stage of the constitution-making process is particularly relevant when undertaking the process in a post-conflict environment. In post-conflict situations more attention will be paid to those ideological issues that divided the parties originally; failure to address these issues of concern during the process would undermine the legitimacy of the outcome. This means that the issues most important to people at the time of drafting may become less so in the future, thereby enabling a re-evaluation of the document down the track.

Furthermore, institutional guarantees, such as minority veto provisions associated with power-sharing arrangements,⁶² may be given to minorities groups when drafting the constitution so as to win over their support; however, such provisions do not necessarily need to stay in place once the peacebuilding process breaks down the distrust between old adversaries. Under these conditions a two-stage constitutional process may be beneficial – one devoted to the transition to peace and the other to the transition to democracy.⁶³ Sunset provisions, which enable the inclusion of certain clauses in the constitution for a specified time,⁶⁴ after which they become non-operative, or review provisions, as was included in the 1990 Fiji constitution,⁶⁵ reduce the stakes and makes it easier for stakeholders on the fringe to give tacit approval to the original constitution as it is not the end of deliberations.

When evaluating and reviewing the constitution regard should be had to the criteria/ indicators for success listed in Part Four. The evaluation and review process should help ensure that the constitution is a living document that is supported by the community.

⁶² Lijphart, A. “The Power-Sharing Approach” in J.V. Montville (ed.) (1991). *Conflict and Peacemaking in Multi-ethnic Societies*, Lexington Books, New York at 495

⁶³ Ghai, Yash: supra note 31 at 28

⁶⁴ Ghai, Yash: supra note 31 at 28

⁶⁵ Lal, Brij V (1998). *Another Way: The Politics of Constitutional Reform in Post-Coup Fiji*, NCDS Asia Pacific Press, Canberra at 57

RECOMMENDATION 7: CONTINUING EDUCATION/ EVALUATION & REVIEW

The Constitutional Commission (or on its dissolution the appropriate government department) should implement a continuing civic education campaign informing people about the contents of the ratified constitution and how citizens can enforce the rights contained in the document.

Evaluation of the success of the process and end document should be in accordance with the criteria/ indicators set out at the beginning of the process.

In order to gain the acquiescence of fringe interests the Constitutional Commission may insert sunset or review clauses into the draft document.

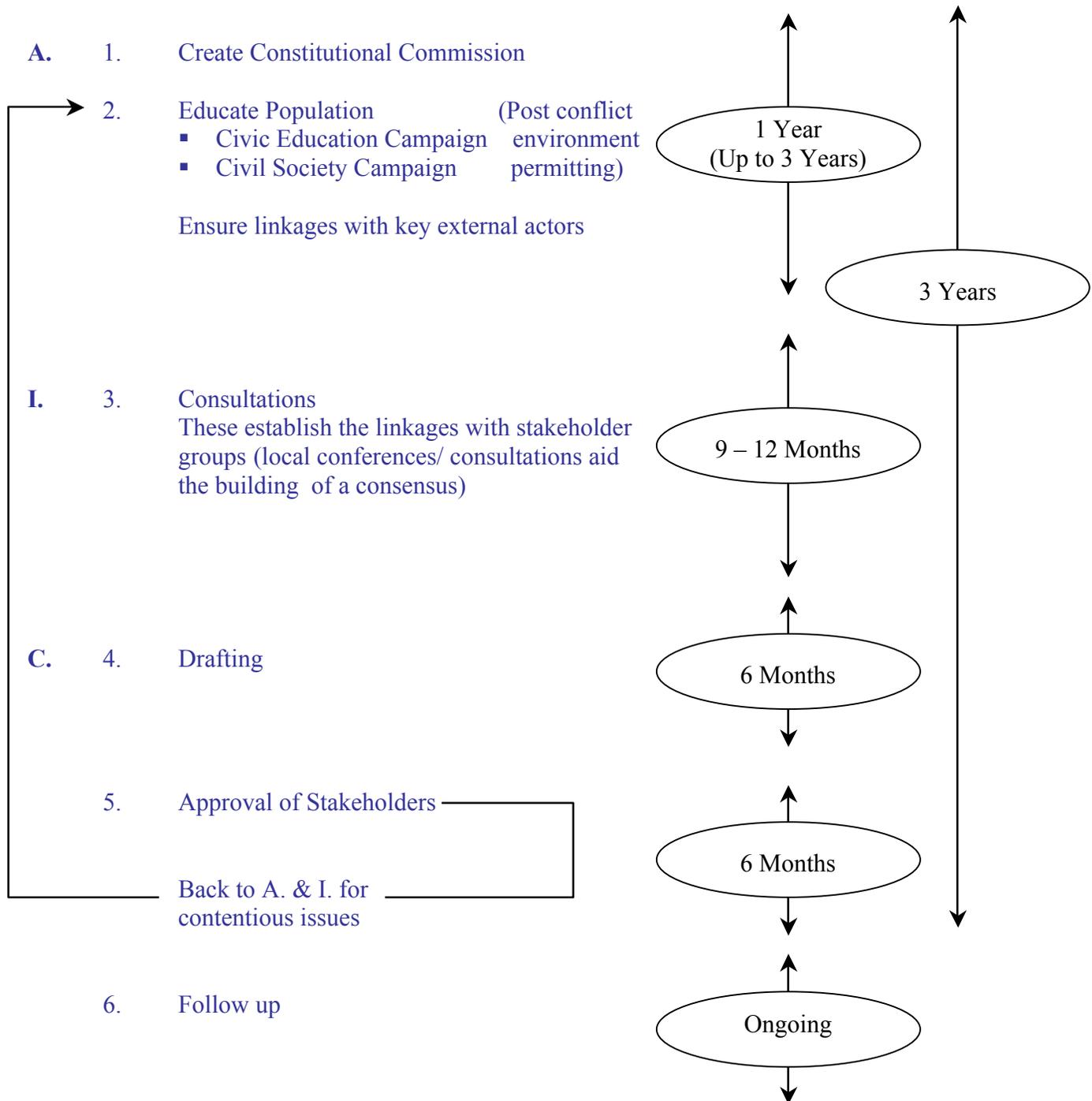
6. CONCLUSION

The institutional design for a post conflict participatory constitution-making process proposed in this policy paper is not intended to be prescriptive; rather the design is intended to act as a guide. The AIC methodology was used to fashion an institutional design that has been informed by the lessons derived from recent participatory constitution-making processes and recent post conflict constitution-making processes. This policy paper recommends that future processes be guided by the institutional design above; however, simultaneously recognizes that the design of the process in each instance should be imbued by considerations specific to the cultural context.

When crafting this institutional design, new constitutionalism was embraced as the philosophical underpinning because it offers a fresh approach to an age-old endeavor, namely constitution-making. However, it is not only a fresh approach, but one that promises to build a more inclusive democracy supported by the entire community, whilst bringing divergent parties together in order to build a consensus on important issues. Despite its potential, it is still unclear how best to implement this new approach to constitution-making in a post conflict environment. This policy paper addresses this dilemma by making recommendations on the best way to design a process for implementing new constitutionalism in a post conflict scenario. It is expected that the constitution-making process proposed will help legitimize a democratic outcome and aid the peacebuilding process.

7. FLOW CHART OF POST CONFLICT PARTICIPATORY CONSTITUTION-MAKING PROCESS

Pre condition: Interim Administration



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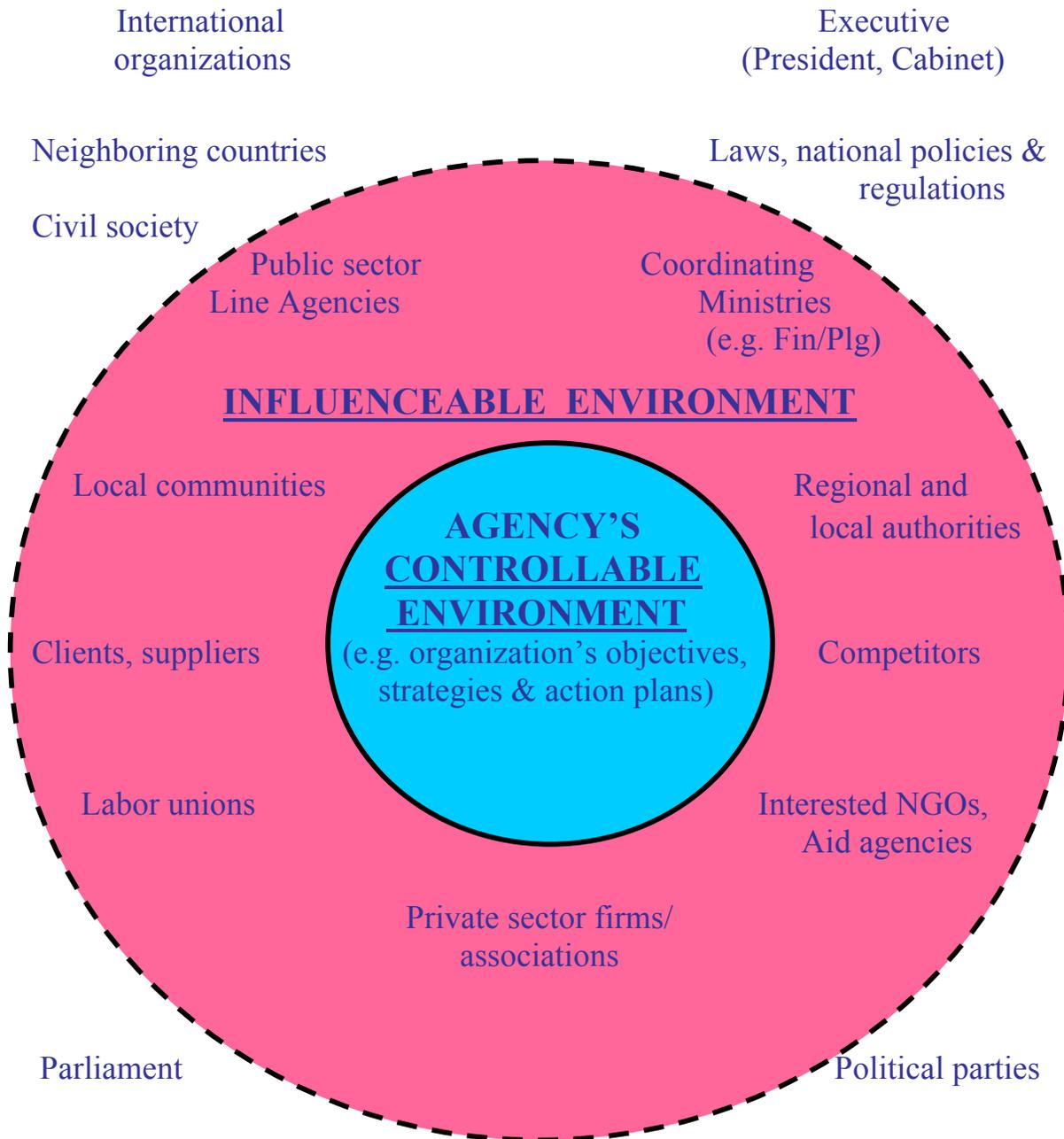
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APPENDIX 'A'

**A PUBLIC SECTOR AGENCY'S RELATIONS TO
ITS INSTITUTIONAL ENVIRONMENTS**

APPRECIATED ENVIRONMENT



APPENDIX 'B'

THE A.I.C. INSTITUTIONAL DESIGN FRAMEWORK

