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Women's role in reconstituting the post-conflict state

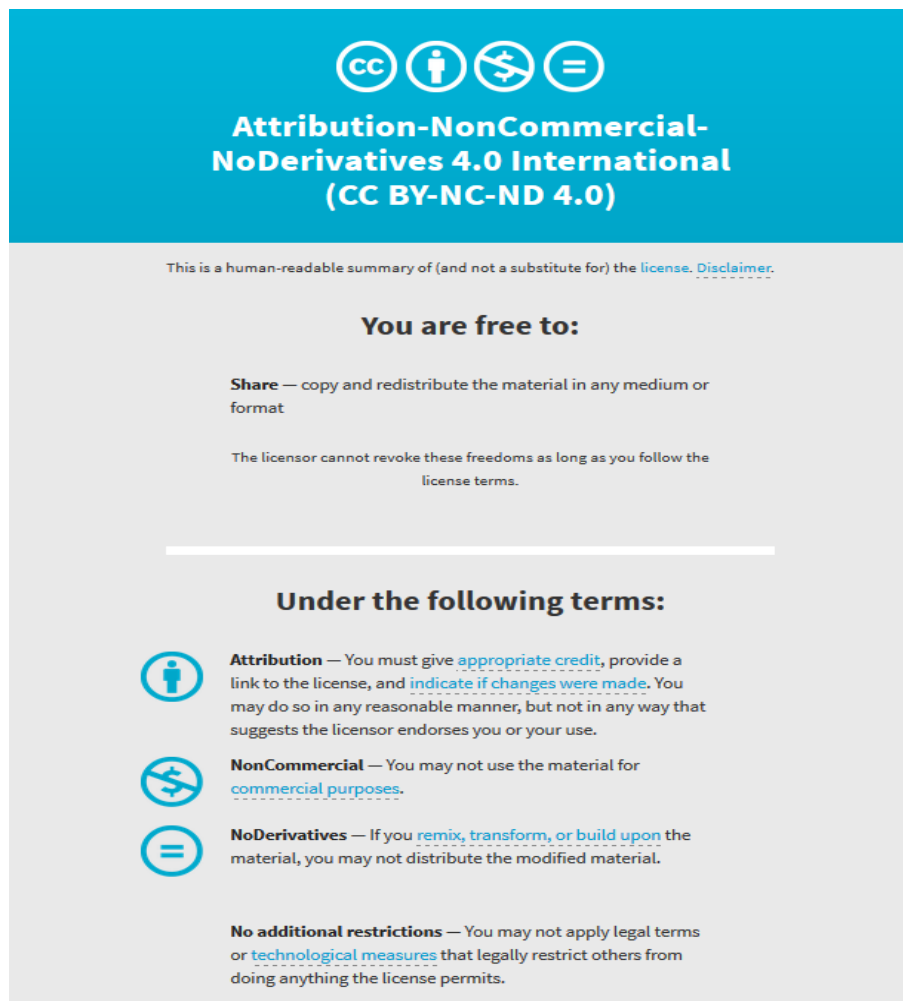
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WOMEN'S ROLE IN RECONSTITUTING THE POST-CONFLICT STATE

LAURA GRENFELL

INTRODUCTION

The end of the Cold War in 1989 heralded in the drafting of a new wave of constitutions, particularly in post-conflict states, as many Cold-War-related conflicts came to a gradual end. Since this time, more than 110 constitutions have been written or revised¹ — and one discernible global trend in this process of constitutional reform has been to entrench the right to equality between men and women as a constitutional principle.² This widespread acceptance of gender equality as an international norm of constitutionalism is in large part due to pressure from the international community as well as the influence of international and regional human rights treaties generally.³

1 Susan H Williams, 'Introduction: Comparative Constitutional Law, Gender Equality and Constitutional Design' in Susan H Williams (ed), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (Cambridge University Press, 2009) 1.

2 To date, 139 constitutions guarantee gender equality. See Laura Turquet et al, *Progress of the World's Women: In Pursuit of Justice* (UN Women, 2011) 24.

3 See, for example, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW') art 2; *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (adopted by the Meeting of Ministers 28 March 2003, and the Assembly of the African Union 21 July 2003), art 2. Both these treaties specifically direct state parties to incorporate the principle of equality into their constitutions.

At the same time, constitution making has become increasingly participatory and inclusive and less understood as a process for elite groups. In this period, the United Nations (UN), mostly through the work of peacekeeping missions authorised by the UN Security Council,⁴ has assisted many post-conflict states such as Timor-Leste, Afghanistan and Nepal with the process of drafting their constitutions. This assistance has included support with public participation programmes and, in some more recent cases, encouraging women's inclusion in the constitution-making process.

The year 1989 also marks the beginning of Judith Gardam's pioneering work into feminist approaches to international humanitarian law,⁵ which has led to the UN Security Council's unfolding Women, Peace and Security (WPS) agenda. Along with peers such as Hilary Charlesworth and Christine Chinkin, with whom she ventured in 1989,⁶ Gardam is at the vanguard of feminist legal scholarship in international law: together, in the passing of a quarter of a century, they have led the way in highlighting, challenging and even shifting important paradigms facing women in conflict and post-conflict settings, many of which had previously seemed largely invisible and intractable.

There are a number of paradigms operating in the post-conflict context which have a significant effect on the lives of women. First and foremost is the cultural and social pressure to perform the 'patriotic duty' of reconstituting the state through childbearing. For example, five years after independence, in 2007, Timor-Leste had the highest fertility rate in the world. A decade on since independence, each Timorese woman has on average six live births in her lifetime; as at 2012, Afghan women have five.⁷ In post-conflict states, this patriotic duty poses serious risks: the maternal mortality rates in post-conflict states such as Timor-Leste and Afghanistan are respectively triple and double the average for the Asia-Pacific region.⁸ For women in post-conflict states, childbearing and childrearing duties are borne in difficult

4 These include Afghanistan, Angola, Benin, Cambodia, Central African Republic, Congo, Cote-d'Ivoire, Egypt, Eritrea, Guatemala, Guinea Bissau, Iraq, Kosovo, Morocco, Mozambique, Namibia, Liberia, Libya, Nepal, Sierra Leone, Sudan, Somalia, South Sudan, Timor-Leste and Tunisia.

5 Judith Gardam, 'A Feminist Analysis of Certain Aspects of International Humanitarian Law' (1989) 12 *Australian Yearbook of International Law* 265.

6 Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1989) 12 *Australian Yearbook of International Law* 190; Christine Chinkin, 'A Gendered Perspective to the International Use of Force' (1989) 12 *Australian Yearbook of International Law* 279.

7 Afghanistan and Timor-Leste have by far the highest rates of live births per woman, with Timor-Leste's rate triple that of the regional average and Afghanistan more than double. Not surprisingly, both post-conflict states have the lowest rate of contraceptive prevalence in the Asia-Pacific region. See UN Economic and Social Commission for Asia and the Pacific ('ESCAP'), 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 41.

8 Ibid 40.

environments where state services are scarce, given the fragility and embryonic nature of the state.⁹

A second paradigm for women in post-conflict settings is that violence against women is often heightened. According to Megan Bastick, Karin Grimm and Rahel Kunz, 'a number of countries emerging from armed conflict report a very high and/or increasing incidence of criminal and family violence, including sexual and other forms of violence against women'.¹⁰ The UN Committee for the Convention on the Elimination of Discrimination Against Women (CEDAW Committee) argues that this escalation of gender-based violence in post-conflict states has a knock-on effect in that it 'undermine[s] women's equal and meaningful participation in political and public life'.¹¹ Such violence and intimidation often overshadow women's participation in constitution-making processes. For example, 70 per cent of women participating in Nepal's first Constituent Assembly (2008-12), established to draft Nepal's Constitution, reported facing violence as a result of their participation in politics.¹² In Afghanistan, women delegates were welcomed to the 2004 Constitutional Loya Jirga by the following statement made by the Chairman: 'Don't try to put yourself on the same level with men ... God has not given you equal rights ... [T]wo women are counted as equal to one man'.¹³ Cultural attitudes regarding the roles of women in society, combined with significant domestic responsibilities and high rates of violence and intimidation, mean that women face numerous obstacles in participating in public forums, especially high-profile forums where the political stakes are high, such as constitution-making forums.

9 Ibid 115, 17. As at 2012, half of Timor-Leste's population was living below the national poverty line. More than 70 per cent of the population lives in rural areas in both Timor-Leste and Afghanistan.

10 Megan Bastick, Karin Grimm and Rahel Kunz, *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (Geneva Centre for the Democratic Control of Armed Forces, 2007) 15. Such surveys support the statement made by the CEDAW Committee in regard to the challenges facing women in post-conflict states: 'For most women in post-conflict environments, the violence does not stop with the official ceasefire or the signing of the peace agreement and often increases in the post-conflict setting ... [A]ll forms of gender-based violence, in particular sexual violence, escalate in the post-conflict setting'. CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 47th sess, UN Doc CEDAW/C/GC/30 (18 October 2013) [35].

11 Ibid [37].

12 International Institute for Democracy and Electoral Assistance et al., *Women Members of the Constituent Assembly: A Summary of a Study on Contribution of Women in Constitution Making in Nepal* (International Institute for Democracy and Electoral Assistance, Women's Caucus, Constituent Assembly Secretariat, Nepal Law Society, 2013) 53.

13 Opening Statement quoted in Mir Hermatullah Sadat, 'The Implementation of Constitutional Human Rights in Afghanistan' (2004) 11(2) *Human Rights Brief* 48, 48.

Constitution-making promises change: it is a time for 'big questions' to be raised because it is a moment in which the foundation and ground rules for the state as well as the legal system are designed. Until the 1970s, constitutions were predominantly drafted by elite groups of men. Since this time, the paradigm of constitution making has shifted to be more inclusive, participatory, representative and transparent. In post-conflict settings, women increasingly understand the promise of the constitution-making process as a means of social and cultural change and hence they are ever more calling on constitutions to address endemic problems in their daily lives such as domestic violence. While the international community has been successful in encouraging the widespread constitutional entrenchment of the principle of the equality of men and women, this has not been translated into a clear articulation that women's equal and meaningful participation in constitution-making processes is necessary to ensure the 'creat[ion of] a common vision of the future of a state',¹⁴ particularly in post-conflict states where finding a common vision is especially critical and fraught. Sharing a role in designing the ground rules by which a state should operate in the future is an important step toward substantive equality for women in post-conflict states, as it opens up the possibility of addressing and changing structures of inequality.

In the twenty-first century, there is a widely held view that for new constitutions to enjoy democratic legitimacy they must be the product of some process of public participation process that reflects the composition of the population. For this reason, women are increasingly demanding that they make up approximately 50 per cent of constitutional drafters and those consulted. This was one of the first demands of a 2011 Egyptian Women's Charter, drawn up by local women's NGOs: that women 'be represented in the committee that will be entrusted with drafting the constitution' and that this representation be in proportion to women's makeup of the population as well as 'their past, present and future role in building the society'.¹⁵ Unfortunately, no women were included on Egypt's Expert Committee, which prepared recommendations on constitutional amendments, while women and youth shared only 10 per cent of reserved seats on Egypt's fifty-member Constitutional Committee. In contrast, in 2011, women in Tunisia gained about a quarter of all seats in its National Constituent Assembly, a number which analysts say represents the largest proportion of female representatives in the Arab world.¹⁶ In large part, this

14 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.

15 See Alliance for Arab Women and the Egyptian Women's Coalition, *Egyptian Women's Charter: Partners in the Revolution and in Building Democratic Egypt* (July 2011) <<http://www.unwomen.org/-/media/Headquarters/Media/Stories/en/charteregyptianwomenenpdf.pdf>>.

16 Freedom House, *Tunisia: Freedom in the World 2013* <<http://www.freedomhouse.org/report/freedom-world/2013/tunisia>>.

was thanks to an election law that stipulated parity for women on electoral lists as well as a mixed proportional election system. In late 2013, Tunisia's National Constituent Assembly successfully finalised the country's new constitution, a document which has been described as a progressive step for women's rights in the Arab world.

In 2013, the UN Secretary-General claimed that UN entities have provided support for women's participation in constitution-making processes,¹⁷ referring no doubt to UN activities in Egypt, Tunisia and Nepal, where the UN has been supporting women members to participate in constitution-making bodies as well as assisting civil society in engaging with these bodies through, for example, preparing women's charters. As this chapter argues, despite the UN's activities, one of the difficulties in encouraging women's increased participation in constitution making is that few UN bodies have clearly articulated women's right to participate in constitution making. For example, UN Security Council Resolution 1325 (2000), which began the Security Council's WPS agenda, speaks broadly and vaguely about women's 'full and equal' participation in post-conflict decision making, but none of the WPS resolutions which have followed have gone so far as the UN CEDAW Committee which, in 2013, explicitly articulated the need for women's 'equal and meaningful' participation in post-conflict *constitution* making.

In the Asia-Pacific region, the rate of women's formal participation in political institutions is surprisingly high in post-conflict states such as Afghanistan, Nepal and Timor-Leste: as at 2012, Nepal and Timor-Leste respectively have the highest proportion of women participating in national parliaments in the region, with Afghanistan not far behind, largely due to gender quotas imposed either through legislation or constitutional provisions.¹⁸ This proportion of women in parliament far exceeds the world average of 21 per cent.¹⁹ This is consistent with UN data showing that transitional countries represent a third of all countries that have achieved at least 33 per cent women's representation in parliament.²⁰ In the first decade of the early

17 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68th sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) [33].

18 Nepal 33 per cent, Timor-Leste 32 per cent and Afghanistan 28 per cent: ESCAP, 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 160. Both Nepal and Timor-Leste have legislated quotas: Constituent Assembly Ordinance 2013 (Nepal); *Law on the Elections of the National Parliament 2006* (Timor-Leste) as amended in 2011. *The Constitution of the Islamic Republic of Afghanistan* arts 83, 84 entrench gender quotas.

19 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68th sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) 5, Figure 1.

20 Human Rights Council, *Report of the Working Group on The Issue of Discrimination against Women in Law and in Practice*, 23rd sess, Agenda Item 3, UN Doc A/HRC/23/50 (19 April 2013), fn 19. In terms of women's share in ministerial positions, Timor-Leste is second in the region with 23 per cent, which exceeds the world average of 17 per cent. In Nepal, women make up 16 per cent of the Ministry,

twenty-first century, all three post-conflict states received constitutional assistance from the UN: Timor-Leste (2001-02), Afghanistan (2002-04) and Nepal (2008-14). While the rate of women's participation in constitution making has varied in each country, it is useful to examine the constitutional assistance offered by the UN and to assess its impact on women's inclusion in these constitution-making processes.

In this volume celebrating Professor Gardam's work, I examine whether international norms extend to a right of women to participate in post-conflict constitution-making processes. I trace the emergence of international norms relating to women's participation in constitution making in post-conflict states and analyse the international practice, particularly in regard to UN constitutional assistance. This chapter begins with an example of women's equal participation in constitution making, found in South Africa in the early 1990s, and it uses this example to sketch some of the tensions and trends apparent in participatory constitution making. It maps out the UN approach to encouraging women's participation in constitution making by analysing both UN documents and UN practice as seen in Timor-Leste, Afghanistan, and Nepal. It observes an increasing acceptance of using temporary special measures and calibrating electoral systems to be 'gender-responsive', so that more women can participate in elected constitution-drafting bodies, as well as an understanding that where political elites have a role in constitution-making bodies, elite women must also be appointed.

Given the frequency of constitutional reform in the post-Cold War era and the potential of such processes to assist in transforming post-conflict states, it is necessary that the international community clearly articulate women's right to participate in constitution-making processes. In the past, the focus has been solely on post-conflict elections rather than on facilitating women's participation in long-term, foundational design. Women need to have a role in shaping institutions and structures, rather than simply participating in parliaments when the ground rules have already been drawn up.

WOMEN'S PARTICIPATION IN POST-CONFLICT CONSTITUTION MAKING

New Constitutionalism: Equal and Meaningful Participation and Democratic Processes

At the beginning of the post-Cold-War era, for the first (and perhaps only) time in modern constitution making, women's equal participation was achieved via South Africa's post-apartheid constitution-making process. 'South Africa is the first country in which a constitution-making body has consisted of an equal number of

while in Afghanistan this figure is 12 per cent: see ESCAP, 'Statistical Yearbook for Asia and the Pacific 2013' (Statistical Yearbook, ESCAP, 3 December 2013) 161.

men and women.²¹ This may not surprise many commentators given that, of all constitution-making processes in the post-Cold-War era, South Africa's has received the most praise.

But it is important to pause before hailing this as a huge milestone: while this body was involved in drafting South Africa's first post-apartheid constitution, the 1994 Interim Constitution, it did not draft the much celebrated 1996 Constitution, which was drafted through an elected body. South Africa's Interim Constitution of 1994 was a result of negotiations and minimal democratic legitimacy; in other words, the process in which women enjoyed 'equal participation' was an elite process.²² In South Africa's first democratic elections in 1994, which elected the Constituent Assembly that drafted the 1996 Final Constitution, women won slightly under a quarter of the seats. However, the 1994 Interim Constitution was important, as it set out 34 constitutional principles, including guarantees of gender equality, with which the 1996 Final Constitution had to comply before receiving official certification by the Constitutional Court.²³ Thus the only experience to date of women's 'equal participation' in constitution making, in terms of the number of delegates at the Negotiating Council, has been through an elite process that did not directly lead to the democratic constitution that South Africans enjoy today, although it did lay the critical foundations of that constitution. Furthermore, the international community offered little direct constitutional assistance in this process and, in particular, the UN had no direct involvement.

South Africa's 1996 Constitution is praised worldwide as having played a key role in the country's successful transition to democracy. And yet its constitution-making process shows that a mix of elected bodies and elite bodies was involved — a factor often forgotten. This mix sits in tension with the twenty-first-century drive for a more inclusive, participatory, representative and transparent process of constitution making.²⁴ The shift from political elites to an inclusive process is often attributed in part to the broader trend of democratisation that has swept around the world since

21 Heinz Klug, 'Participating in the Design: Constitution-Making in South Africa' in Penelope Andrews and Stephen Ellmann (eds), *Post-Apartheid Constitutions: Perspectives on South Africa's Basic Laws* (Witwatersrand University Press, Ohio University Press, 2001) 128, 142.

22 Women's equal participation as delegates was only made possible through extensive lobbying by civil society: see *ibid.* See also, in particular, Catherine Albertyn, 'Women and the Transition to Democracy in South Africa' in Christina Murray (ed), *Gender and the New South African Legal Order* (Juta, 1994) 39, 54-7.

23 Klug, above n 21, 128. According to Klug, women's equal participation in South Africa's interim constitution-making process was achieved by the lobbying of civil society through a multi-party Women's National Coalition and, more specifically, the ANC's Women's League.

24 Vivien Hart, *Democratic Constitution Making* (Special Report No 107, United States Institute of Peace, July 2003).

the end of the Cold War, a trend which has led to increasing demands for inclusion and participation by marginalised groups. This participatory form of constitution making has been dubbed 'new constitutionalism' by Vivien Hart in her seminal report on participatory constitution making.²⁵ Under traditional constitutionalism, constitution making was considered an act of completion to be performed by elites so as to ensure future stability.²⁶ Under new constitutionalism, the *process* of constitution making is critical in order for the constitution to attain legitimacy on the domestic and international fronts. In Hart's view, this process is 'conversational' in that it is conducted 'by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable'.²⁷

In the post-conflict context, participatory processes offer many benefits: they assist in forging reconciliation through facilitating societal dialogue, and they may lead to lasting peace through building a shared vision of the future of the state. Such processes are considered to lead to greater empowerment of the population, as they can be a means of kickstarting an increase in participation in political life of various formerly marginalised sections of society such as women.²⁸ Elizabeth Katz argues that 'women's participation substantively changes constitutional text, brings unique and often taboo issues into the national spotlight [such as divorce and abortion], and empowers women participants'.²⁹ This is consistent with a study of twelve constitution-making processes in the post-Cold-War era, conducted by the Institute for Democracy and Electoral Assistance (IDEA), which claims that participatory processes 'tended to result in constitutional drafts which provided rights to those groups which had not up to then gained political protection or recognition, and addressed issues of social and economic justice'.³⁰ Furthermore, the use of such processes 'were shown to broaden the constitutional agenda'.³¹

In 2007, in the early days of Nepal's constitution-making process, the UN Secretary-General employed the language of new constitutionalism to argue

25 Ibid.

26 Ibid 3.

27 Ibid.

28 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 11.

29 Elizabeth Katz, 'Women's Involvement in International Constitution-Making' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012) 204, 205.

30 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 29.

31 Ibid.

that the constitution-making process offers the 'foundation for a more inclusive democratic system able to address the country's persistent problems of social exclusion'.³² Furthermore, he articulated the high hopes riding on this participatory process:

The Constituent Assembly is seen as the opportunity to create a 'new Nepal', and both the election that determines representation in this body and the constitution-making process that follows must be fashioned in such a way that those Nepalese who have too often been without a voice will be heard.³³

The mantra of inclusion, participation and transparency is not the whole story for new constitutionalism. Hart reminded us that 'constitution making is essentially about the distribution of power', which means that political elites find ways to control the process, as is shown through South Africa's example.³⁴ This tension between political elites and participatory processes is highlighted by the IDEA report, which states that where political elites feel that a participatory process threatens established power structures, their reaction has been to undermine the constitution, to amend it, or to prevent its adoption, implementation or enforcement.³⁵ While these power dynamics provide something of an antidote to the romanticism that could be attributed to the participatory drive of new constitutionalism, they do not counter the need for broad participation in constitution-making processes. These factors need to be weighed by those actors who exert influence over the design of constitution-making processes in post-conflict states.

In 2003, Hart argued that in this paradigm of new constitutionalism 'a right to participate in making a constitution' has emerged, and that it has both a moral and legal foundation. By moral foundation, Hart was referring to international norms of democracy. The legal foundation of an emerging right to participate in constitution making begins with Article 25 of the International Covenant on Civil and Political Rights (ICCPR) which provides: 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [such as sex] ... : (a) To *take part in the conduct of public affairs*, directly or through

32 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process*, UN Doc S/2007/17 (9 January 2007) [8]. At least in its discourse, the UN has invested heavily in the promise of new constitutionalism, as is illustrated, for example, by the naming of the UN Development Programme's (UNDP) 'Support to Participatory Constitution Building in Nepal'.

33 *Ibid* [20].

34 Vivien Hart, *Democratic Constitution Making* (Special Report No 107, United States Institute of Peace, July 2003) 9.

35 Kirsti Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies' (Second Draft, International IDEA — Democracy-Building and Conflict Management, 2006) 29.

freely chosen representatives'.³⁶ The UN Human Rights Committee (HRC) has interpreted these words broadly to include constitution making, by stating: 'Citizens also participate directly in the conduct of public affairs when they choose or change their constitution'.³⁷ Given the non-discrimination principle articulated in Article 2 of the ICCPR, this right to participate in choosing or changing the constitution is clearly to be enjoyed equally by women.

CEDAW adds to this legal foundation, although it does not use the same phrase as the ICCPR and its language is narrower.³⁸ Under Article 7 of CEDAW, states parties are required to

take all appropriate measures to eliminate discrimination against women in the *political and public life* of the country and, in particular, shall ensure to women, on equal terms with men, the right: ... (b) To participate in the *formulation of government policy* and the implementation thereof and to hold *public office* and perform all public functions at all levels of government.³⁹

The initial 1997 jurisprudence of the CEDAW Committee did not interpret this provision to specifically include constitution-making processes,⁴⁰ although it states that 'the obligation specified in article 7 extends to all areas of public and political life and is not limited to those areas specified' in the subparagraphs.⁴¹ Furthermore, the CEDAW Committee advises that Article 7 should be read in conjunction with Article 25 of the ICCPR and the HRC's jurisprudence, mentioned above. Thus while CEDAW does not explicitly state that women have the right to participate in constitution-making processes, the CEDAW Committee recognised the scope for such an interpretation. This shows that, as at 2003, when Hart claimed that a right to

36 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (emphasis added).

37 Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57th sess, 1510th mtg, UN Doc CCPR/C/21/Rev.1/Add.7 (1996) [6].

38 Since the 1940s and 1950s, women's political rights have been a matter of UN attention, culminating in the *Convention on the Political Rights of Women*, adopted by the UN General Assembly in 1952 (*Convention on the Political Rights of Women*), opened for signature 31 March 1953, 193 UNTS 135 (entered into force 7 July 1954), and *CEDAW*, adopted by the General Assembly in 1972. The former focused narrowly on women's entitlement to vote and hold public office and eligibility for election to all publicly elected bodies.

39 *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (emphasis added).

40 Only *CEDAW*, art 2 refers to constitutions in stating that states parties agree to 'condemn discrimination against women ... and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions'.

41 CEDAW Committee, *General Recommendation No 23: Political and Public Life*, 16th sess, UN Doc A/52/38, (1997) [5].

participate in constitution making had emerged, there was scope to argue that a right of women to participate in constitution making was emerging, although, as shown below, it was not until a decade later that the CEDAW Committee articulated this right.

With these moral and legal foundations in mind, it is useful to turn to consider the constitutional assistance offered by the international community, in particular the UN, since the beginning of the twenty-first century. This assistance has had a significant impact on such constitution-making processes in post-conflict states across the world.

UN Constitutional Assistance and International Norms

The era of 'new constitutionalism' coincides with the trend of international constitutional assistance for post-conflict states. The constitutional assistance offered by the international community understandably has an agenda that often reflects the assistance provider's sometimes idiosyncratic conception of regional and global security. One widely accepted means to achieving such security is encouraging regional and global compliance with international norms such as democracy, the rule of law and human rights.⁴² This means that constitutional assistance is designed, at least in part, to encourage a process which would further such international norms and ease the entry of failed or fragile post-conflict states towards membership of the international community. Two examples of this ritual of entry are the ratification of human rights treaties, such as the ICCPR and CEDAW, and the constitutional entrenchment of core principles such as gender equality.

Since the end of the Cold War, the UN has led the constitutional assistance being offered to post-conflict states such as Timor-Leste, Afghanistan and Nepal. This highlights the importance of those international norms being produced by UN bodies in relation to constitution making. Beginning with Namibia and Cambodia in the early 1990s, the UN has provided constitutional assistance as part of peacekeeping missions and political missions authorised by the UN Security Council in almost two dozen post-conflict states. Indeed, the UN claims that 'UN engagement in and assistance to constitution-making increasingly is a core component of the Organization's peacebuilding and state-building strategy'.⁴³

⁴² See, for example, the Organisation for Security and Cooperation in Europe, *Charter of Paris for a New Europe* (Paris, 19-21 November 1990); Danilo Turk, 'Recognition of States: A Comment' (1993) 4 *European Journal of International Law* 66.

⁴³ UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.

Within the UN, the UN Development Programme (UNDP) has led most direct constitutional assistance projects in post-conflict states, including support to women candidates and women members of drafting bodies. For example, in 2013 in Tunisia, UNDP set up workshops to support women candidates contesting the elections to the National Constituent Assembly (NCA); and, following the elections, it trained elected members on how to hold public consultations, and supported a national dialogue on drafting the new constitution. UN Women and its predecessor UNIFEM have also been involved in constitutional assistance, but their approach is more indirect. They have assisted women's NGOs to advocate for gender-responsive electoral systems and supported them to engage with, and make contributions to, constitution-drafting bodies such as Tunisia's NCA, often through preparing women's charters. For example, prior to 2011, UNIFEM worked with women's groups in Ecuador (2006-07) and in Nepal (2007-10) to bear indirect influence on constitution making and to advocate for electoral quotas for women.

To understand the UN's approach to constitution making, it is useful to consider a series of Guidance Notes of the Secretary General, which are aimed at offering 'strategic guidance' to UN bodies and agencies in their efforts as part of UN missions. The 2009 *Guidance Note on Assistance to Constitution-Making Processes* acknowledges the ad hoc nature of past UN constitutional assistance and it aims to offer coherent guidance for all UN agencies as to 'how to support national actors during the design and implementation of a constitution-making exercise'.⁴⁴ The Note sets out six principles on the drafting and contents of constitutions, such as to '[e]ncourage compliance with international norms and standards'.⁴⁵ While the principles relating to process include '[s]upport inclusivity, participation and transparency', they do not explicitly encompass any articulation of women's right to fully participate in the drafting process.⁴⁶

⁴⁴ Ibid 3.

⁴⁵ Ibid 1 (Guiding Principle No 2). In 2014, UNDP published the *UNDP Guidance Note on Constitution-Making Support*, which 'aims to provide a framework for the application' of the six principles articulated in the 2009 Guidance Note on Assistance to Constitution-Making Processes, p 7.

⁴⁶ Note that the UN Guidance Note on the Rule of Law sets out that a framework for strengthening the rule of law includes '[a]n electoral system, which, *inter alia* ... [a]ssures the right of everyone to take part in the government of his or her country, either directly or through freely chosen representatives, including through the application of temporary special measures'. (See UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes' (Guidance Note, April 2009) 6.) The trifecta of inclusiveness, participation and transparency found in the 2009 Guidance Note echoes the advice of four constitutional experts, who authored Interpeace's *Constitution-Making Handbook*, all of whom have experience in providing constitutional assistance in a series of post-conflict settings. However, unlike the UN Note on Constitution-Making, the *Handbook* specifically recognises the importance of gender equity on constitution making, in particular ensuring

While women's inclusion in the constitution-making process appears to be a blindspot in the UN's 2009 *Guidance Note on Assistance to Constitution-Making Processes*, in strong contrast, the UN *Guidance Note on Democracy* (2009) makes special mention of the need for women's participation in democracy building and the need to 'explicitly address the effects of discrimination against women' which 'contributes to women's exclusion and the marginalization of their concerns'.⁴⁷ Furthermore, the Note 'recogniz[es] the centrality of constitution-making to democratic transitions', but it stops short of spelling out that the gender discrimination which 'prevents women from engaging effectively in democratic processes' equally impedes women from participating in constitution making.⁴⁸

Another relevant stream of international norms relate to women, conflict and peace agreements. Since the beginning of the twenty-first century, coinciding with the period in which the UN has ramped up its constitutional assistance, the UN Security Council has become 'the primary norm-producing site on issues of women and armed conflict'⁴⁹ through its Women, Peace and Security (WPS) agenda which, from 2000-14, includes seven Security Council resolutions, beginning with Resolution 1325 in 2000.⁵⁰ These resolutions are primarily aimed at protecting women during armed conflict and encouraging women's full participation in the writing of peace agreements; unfortunately, the complexities of the post-conflict setting appear largely tangential to the WPS agenda. Resolution 1325 stresses 'the importance of [women's] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution'.⁵¹ While it addresses women's participation in post-conflict decision making, which implicitly includes constitution making, as constitutions generally aim to avert conflict and

women's full participation 'at all stages' (see Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution-Making and Reform: Options for the Process* (Handbook, Interpeace, 9 September 2011) 10).

47 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 4.

48 Ibid 6.

49 Aisling Swaine, 'Substantive New Normative Provisions on Women and Armed Conflict Concurrently Adopted by the UN Security Council and the CEDAW Committee' (2014) 18(5) *American Society of International Law* 2.

50 SC Res 1325, UN SCOR, 55th sess, 4213th mtg, UN Doc S/RES/1325 (31 October 2000); SC Res 1820, UN SCOR, 63rd sess, 5916th mtg, UN Doc S/RES/1820 (19 June 2008); SC Res 1888, UN SCOR, 64th sess, 6195th mtg, UN Doc S/RES/1888 (30 September 2009); SC Res 1889, UN SCOR, 64th sess, 6196th mtg, UN Doc S/RES/1889 (5 October 2009); SC Res 1960, UN SCOR, 65th sess, 6453rd mtg, UN Doc S/RES/1960 (16 December 2010); SC Res 2106, UN SCOR, 68th sess, 6984th mtg, UN Doc S/RES/2106 (24 June 2013); SC Res 2122, UN SCOR, 68th sess, 7044th mtg, UN Doc S/RES/2122 (18 October 2013).

51 SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000).

to secure peace,⁵² it does not explicitly refer to the process of constitution making. Constitutions are explicitly mentioned only obliquely in Resolution 1325 in regard to the need to protect women's human rights through various mechanisms including constitutions.⁵³

The 2013 WPS Security Council Resolution 2122, which focuses on women's leadership, comes tantalisingly close to articulating the need for women's full and equal participation in constitutional processes. In it, the Security Council

[s]tresses the importance of those Member States conducting post-conflict *electoral processes and constitutional reform* continuing their efforts, with support from United Nations entities, *to ensure women's full and equal participation in all phases of electoral processes*, noting that specific attention must be paid to women's safety prior to, and during, elections.⁵⁴

This omission of women's full and equal participation in constitutional reform is curious, given that the issue was raised in a 2002 study entitled *Women, Peace and Security* submitted by the UN Secretary-General pursuant to Resolution 1325, which states: 'Constitutional reform processes during [post-conflict] reconstruction should include the participation of women and take account of gender perspectives'.⁵⁵ Furthermore, at the end of 2011, the UN General Assembly passed a resolution on Women and Political Participation which encourages states to ensure an expanded role for women in peacebuilding efforts in line with the SC's WPS resolutions,⁵⁶ and, to further this purpose, it encourages states to appoint women to 'bodies responsible for designing constitutional ... reforms'.⁵⁷ Indeed, if one refers to the Guidelines of UN Department of Peacekeeping Operations in regard to post-conflict electoral process, it is possible to find some specific advice: 'Make sure that women are included on constitutional drafting committees'.⁵⁸ Despite this, the UNSC's WPS resolutions fall short of

52 While constitutions can be part of peace processes, the prevailing view is that the two should not be conflated — see Jamal Benomar, *Constitution-Making and Peace Building: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries* (UNDP, August 2003) 3.

53 SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000) [8(c)].

54 SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000) [8] (emphasis added).

55 Christine Chinkin, 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women' (Background Paper for Expert Group Meeting on 'Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women — A Framework of Model Provisions', UN Division for the Advancement of Women, 31 October 2003) 112.

56 *Women and Political Participation*, GA Res 66/130, UN GAOR, 66th sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012) [7].

57 Ibid [8] (emphasis added).

58 Gabrielle Russo, *DPKO/DFS — DPA Joint Guidelines on Women in Post-Conflict Electoral Processes* (Guidelines, UN Department of Peacekeeping Operations/ UN Department of Political Affairs, October 2007) 16.

directly advocating that women have a right to participate in constitution-building processes and the reason for this gap is not clear.

A couple of months after Resolution 2122 in 2013, CEDAW issued a general comment on women and post-conflict settings, which articulated the gap in the WPS agenda. It states: 'During the constitution-drafting process, the equal and meaningful participation of women is fundamental for the inclusion of constitutional guarantees of women's rights'.⁵⁹ In this, it frames women's participation as a policy outcome rather than as a matter of access. The CEDAW Committee broadly attempts to pin its source on Articles 1-5(a), 7 and 15 of CEDAW as well as, more tangentially, the WPS agenda, stating: 'The importance of a gender perspective in post-conflict electoral and constitutional reform is also emphasized in Security Council resolution 1325 (2000)'.⁶⁰ Overall, the Committee recommends that states parties '[e]nsure women's equal participation in constitution-drafting processes and adopt gender-sensitive mechanisms for public participation and input into constitution-drafting processes'.⁶¹

The CEDAW Committee is one of the few UN bodies that explicitly recognises women's right to participate in constitution making and one of the few whose approach understands the nexus between constitution drafting and electoral processes. In 2013, it set out some of the reasons underlying the low level of women's participation in constitution making, pointing out that the design of electoral systems, particularly the electoral rules and procedures, 'are not always gender-neutral'. It explains:

Decisions on the choice of electoral systems are important to overcome the traditional gender bias that undermines women's participation. Substantive progress towards the equal participation of women as candidates and voters as well as the holding of free and fair elections will not be possible unless a number of appropriate measures are taken, including a *gender-responsive electoral system and the adoption of temporary special measures* to enhance women's participation as candidates ... and ensure that women voters and female political candidates are not subject to violence either by State or private actors.⁶²

The CEDAW Committee describes 'the introduction of temporary special measures' such as gender quotas as one of the 'essential prerequisites to true equality in political life'.⁶³ At the UN level, the question of women's equal participation in the conduct of public affairs and the need for quotas to achieve this purpose were first raised in 1990

⁵⁹ CEDAW Committee, *General Comment No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, 47th sess, UN Doc CEDAW/C/GC/30 (1 November 2013) [71].

⁶⁰ Ibid [70].

⁶¹ Ibid [73(a)].

⁶² Ibid [72] (emphasis added).

⁶³ Ibid [15].

by a resolution of the UN's Economic and Social Council, which set out a target of 30 per cent for women in leadership positions by 1995 and equal representation by 2000.⁶⁴ Such measures were reiterated in the 1995 Beijing Platform for Action,⁶⁵ but it does not appear that the UN Secretariat endorsed these measures until 2010.⁶⁶

Since 2010, the UN has clearly embraced the idea of electoral quotas and other temporary special measures to ensure that women participate more fully in political decision making, including constitution making.⁶⁷ It has adopted the position that, to ensure women hold public office, international best practice involves the use of electoral systems that incorporate proportional representation.⁶⁸ In 2013, the Secretary-General offered global data on the significant number of states that have adopted constitutional provisions or legislation regarding such measures.⁶⁹ The report sets out that those countries with electoral quotas elected 25 per cent women members of parliament compared with 19 per cent without quotas.⁷⁰ Furthermore, the report explains that the choice of electoral system is critical to women's chances of being elected, as 'larger numbers of women are elected under proportional electoral systems (24.6 per cent) than under First-Past-the-Post majority or plurality systems (18.5 per cent)'.⁷¹

At the same time, there is international recognition that, in order to ensure that constitutions are implemented and enforced, constitution-making bodies must inevitably include appointed members, presumably from either civil society or the

64 *Recommendations and Conclusions Arising from the First Review and Appraisal of the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women to the Year 2000*, ESC Res 1990/15, UN ESCOR, 13th plen mtg, Supp No 1, UN Doc E/1990/90 (24 May 1990) Recommendation IV.

65 Fourth World Conference on Women, 4-5 September 1995, *Beijing Declaration and Platform for Action*, UN Doc A/CONF.177/20 (15 September 1995) [184], [189].

66 *Women's Participation in Peacebuilding — Report of the Secretary-General*, 65th sess, Provisional Agenda Item s 28(a) and 122, UN Doc A/65/354-S/2010/466 (7 September 2010) [41]-[44].

67 *Ibid.* In 2004, Women and Political Participation featured on the GA's agenda but it made no specific reference to women's participation in constitutional design or reform despite the UN's role in post-conflict states such as Afghanistan and Timor-Leste. Such matters were not mentioned until the GA's second resolution on this issue in late 2011 — see *Women and Political Participation*, GA Res 66/130, UN GAOR, 66th sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012).

68 *Strengthening the role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization — Report of the Secretary-General*, 66th sess, Provisional Agenda Item 69(b), UN Doc A/66/314 (19 August 2011) [41]-[42].

69 *Measures Taken and Progress Achieved in the Promotion of Women and Political Participation — Report of the Secretary-General*, 68th sess, Provisional Agenda Item 28, UN Doc A/68/184 (24 July 2013) [31]-[32].

70 *Ibid* [36]. It recognises that to be effective, these quota systems must be carefully calibrated and implemented.

71 *Ibid* [34].

political elite, and that women should figure among these appointments. This is indicated in the 2011 UN General Assembly Resolution on Women and Political Participation, which addresses the need for states to ensure an expanded role for women in peacebuilding efforts, and thus it 'encourages states to *appoint women* to posts within all levels of their Governments, including, where applicable, *bodies responsible for designing constitutional ... reforms*'.⁷² While this may be counter to the ideals of inclusiveness and participation associated with new constitutionalism, it may lead to the appointment of women members who are not as indebted to party structures as those women who are elected through the party system. The next section of this chapter thus traces the experiences of women delegates in Timor-Leste and Afghanistan in order to examine whether it is arguable that appointed women may be better placed than women who have been elected through the electoral system to respond to the women's charters presented by civil society.⁷³

UN Practice in Timor-Leste and Afghanistan

The need for temporary special measures to ensure women's participation in elections and hence constitution drafting has been contested over time. This is highlighted by the UN's experiences in offering constitutional assistance in Timor-Leste (2001-02) and Afghanistan (2002-04).

In 2001, at the time of the UN Transitional Administration in East Timor (UNTAET), there was a disagreement between various UN agencies as to whether the UN Transitional Administrator (TA) for Timor-Leste should adopt a regulation imposing a mandatory 30 per cent quota for women on the political party lists for the UN-run elections for the Constituent Assembly (CA). This body was tasked with drafting and adopting the state's first constitution, and with conducting a week-long public participation programme, before becoming Timor-Leste's first elected parliament. Prior to this, the TA had imposed various quotas for women's representation in Timor-Leste: for example, the TA had imposed a 50 per cent quota for women in development councils at the village and sub-district level and a 30 per cent quota for women in public administration. The proposal for a quota system for the CA was initially advocated by the Timorese National Council, a quasi-legislature appointed by the TA, as well as Rede Fete, a network of Timorese

72 *Women and Political Participation*, GA Res 66/130, UN GAOR, 66th sess, Agenda Item 28(a), UN Doc A/RES/66/130 (19 March 2012) [7]-[8] (emphasis added).

73 This dual focus on the need to ensure that women can be elected and appointed to public bodies is evident in some constitutional texts such as that of Ecuador, which in 2007 entrenched a principle of parity in order to ensure women's equal participation in public bodies. Like Tunisia, Ecuador has legislated candidate quotas in which a strict alternation between female and male candidates at national and/or sub-national levels is required by law.

women's organisations. It was to operate in relation only to seventy-five of the eighty-eight seats which were to be contested through a proportional system; it would not affect the other thirteen seats contested on a First-Past-The-Post basis. It appears that the proposal was supported by the Office of the High Commissioner for Human Rights, UNIFEM and UN Division on the Advancement of Women, but it was blocked by the Electoral Affairs Division of UNTAET on advice from the Political Affairs Division at UN headquarters. The latter argued:

UNTAET has exclusive responsibility for holding free and fair elections in East Timor ... [and] ... while some countries do have quotas for women (and for other groups), other democratic countries vehemently oppose the practise. This would include some members of the Security Council ... *Electoral quotas for women (or any other group) do not constitute international best practice for elections.*⁷⁴

In the end, the Timorese National Council backed down from its position. Despite the absence of any formal quotas imposed by the TA for the CA, Timorese women won 27 per cent of the seats. While most parties placed women in winnable positions, the second-largest political party failed to include any women on its candidate list. According to expert Michele Brandt, strict party-line voting meant that 'few [elected women in the CA] attempted to advance provisions that women's groups had put forward in a charter submitted to the Constituent Assembly'.⁷⁵ As a consequence, the Women's Charter,⁷⁶ prepared by Timorese women's NGOs as a means of engaging with the constitutional process, was largely ignored.

While the UN's involvement in Afghanistan, from 2002 onwards, was much lighter than its territorial administration of Timor-Leste, its constitutional assistance was arguably more targeted and effective in Afghanistan, in particular with respect to its advice regarding the constitution-making process.⁷⁷ In contrast to Timor-Leste, in Afghanistan's constitution-making process a quota was imposed for women's inclusion in all three of its constitution-making bodies. Afghan women comprised approximately 20 per cent of the nine-member Drafting Committee (an appointed body which produced the first draft), the thirty-five-member Constitutional Commission (an appointed body which was tasked with conducting public

⁷⁴ Quoted in Milena Pires, 'East Timor and the Debate on Quotas' in International IDEA, *The Implementation of Quotas: Asian Experiences* (Quota Workshop Report Series, No 1, International IDEA, 25 September 2002) 36, 38 (emphasis added).

⁷⁵ Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 16.

⁷⁶ See 'Women's Charter of Rights in East Timor', *The La'o Hamutuk Bulletin* (Dili, East Timor, August 2001) 2 <<http://www.laohamutuk.org/Bulletin/2001/Aug/bullv2n5.pdf>>.

⁷⁷ Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 25-7.

consultations) and the Constitutional Loya Jirga (CLJ) (a predominantly elected body which had the role of deciding on, and adopting, the final draft). A Presidential Decree set a quota for women's representation on the CLJ: its composition included 5 per cent appointed women (half of the appointed members) as well as sixty-four women elected by women.⁷⁸

Although this number fell below the demand for 'equal representation of women' made by a group of Afghan women's NGOs in a Women's Charter,⁷⁹ a document which was used to lobby the President and CLJ, it was nevertheless a significant achievement. In making such demands, Afghan women's NGOs enjoyed support from the international community. In the lead-up to the CLJ, in 2002, the UN Secretary-General flagged that Afghan authorities may be called upon to 'ensure full support for the participation of women' in the Loya Jirga and 'apply temporary special measures, including targets and quotas, targeted at Afghan women to accelerate the de facto equality of women and men in decision-making'.⁸⁰ This advocacy of gender quotas may have also influenced the constitutional entrenchment of gender quotas for Afghanistan's two legislative houses.

Overall, Afghanistan's constitutional process has been generally perceived as a success, in particular for women. For example, Brandt argues:

The representative nature of the CLJ is in part, what allows most Afghans to view the final constitution as a positive step toward democratic governance despite flaws in the participatory process. While diverse voices and opinions, including those of minority groups, may not have been reflected in the draft constitution, *the representation of minorities and women in the Constitutional Loya Jirga led to revisions to the draft that reflected their concerns* (such as quotas for women's representation in the legislature and recognition of minority languages). These groups, to a certain degree, were perhaps better able to advocate for the aspirations of their constituencies because the civic education and consultation process facilitated the delegates to be better informed about constitutional issues and how they related to their rights.⁸¹

Brandt is one of the experts who authored Interpeace's *Constitution-Making Handbook*, which, among other things, offers a comparison of the constitution-making processes in Timor-Leste and Afghanistan and is broadly critical of the efforts of

78 Ibid 20.

79 This Charter was entitled 'Afghan Women's Bill of Rights' see Item 13 (on file with author).

80 *Discrimination against Women and Girls in Afghanistan — Report of the Secretary-General* [to the Commission on the Status of Women], 46th sess, Provisional Agenda Item 3(a), UN Doc E/CN.6/2002/5 (28 January 2002) 17, para 69(a), (i).

81 Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 21 (emphasis added).

the international community.⁸² One factor identified by the *Handbook* is the international community's tendency to view elected bodies as the most legitimate bodies to prepare and adopt a constitution. This is illustrated through Timor-Leste's constitution-making experience, which, at the urging of UN officials, was performed by an elected body. Unfortunately, these elections were dominated by one political party and the outcome was that the elected body adopted a pre-prepared draft which has been viewed as a one-party constitution. Thus, the *Handbook* argues, the large percentage of women delegates in the Timorese Constituent Assembly had little impact on the final outcome.⁸³ In contrast the *Handbook* refers to the constitution-making process in Afghanistan where an appointed constitutional commission developed a draft constitution which was subsequently considered by a predominantly elected assembly, the CLJ, whose role was to decide on, and adopt, the Constitution. The *Handbook* argues that women had a greater influence on this constitution-making process in Afghanistan than was the case with the Timorese process.⁸⁴ Brandt attributes this elsewhere to the fact that the Afghan women delegates were not ' beholden to patriarchal party structures',⁸⁵ in that they were either appointed or they were voted for by women, outside party lines. In contrast, in Timor-Leste, women were placed on candidate lists by the largesse of political parties, and thus party loyalties meant that they were less able to act independently to advance the appeals articulated in the Women's Charter.

UN Practice in Nepal

The UN record of constitutional assistance in relation to women's inclusion is checkered. However, since the constitutions of Timor-Leste and Afghanistan were drafted, greater consensus has emerged in the international community, and the UN has developed a more coherent and facilitative approach. Nepal is one post-conflict state where this UN approach is apparent. It is possible that the UN's experience in Nepal has assisted the organisation to formulate a more consistent and nuanced approach to women's participation in constitution making.

In May 2006, six months before Nepal's Comprehensive Peace Agreement in late 2006, Nepal's House of Representatives adopted a resolution calling for at least 33 per cent representation of women in all parts of the state structure.

82 Michele Brandt, Jill Cottrell, Yash Ghai and Anthony Regan, *Constitution-Making and Reform: Options for the Process* (Handbook, Interpeace, 9 September 2011) 324-5.

83 Ibid 326.

84 Ibid.

85 Michele Brandt, *Constitutional Assistance in Post-Conflict Countries. The UN Experience: Cambodia, East Timor and Afghanistan* (United Nations Development Program, 2005) 35, fn xxxix.

In January 2007, the UN Secretary-General reported to the UN Security Council that despite this resolution

*the exclusion of women from participation in public life, and so far from the peace process, has been almost total. The promise of 33 per cent representation for women in all decision making structures has not been realized in existing peace process structures such as the Peace Committee and the Interim Constitution Drafting Committee. It is urgent that the Nepalese parties open the door to the role that women can and should play in the process, as reflected in Security Council resolution 1325 (2000).*⁸⁶

It is possible that this international influence ensured that the resolution of Nepal's House of Representatives was transformed into real terms. A gender quota for women's candidature in the 2008 elections to Nepal's first Constituent Assembly was subsequently set in both the 2007 Interim Constitution⁸⁷ and electoral legislation, and this enabled women's representation to reach 33 per cent. In particular, women were successful in winning half of the 335 proportional representation seats, while they had less success in relation to the First-Past-The-Post electoral system in which they won only 30 of 240 seats. The 601-member Constituent Assembly (CA), 95 per cent of which was elected in 2008, was 'hailed as one of the most representative institutions of its kind around the world'.⁸⁸ The CA was tasked with drafting the Constitution for Nepal as a 'secular, inclusive and fully democratic state', while also operating as Nepal's legislature. An official booklet on Nepal's participatory constitution-making process, produced by international and local constitutional experts with the support of UNDP, shows the desire to emphasise this as an inclusive and participatory process distinct from previous elite processes:

This is Nepal's fifth time drafting a constitution. Previous attempts were written by experts. They did not utilize a constituent assembly and were not written in an inclusive manner. This may be why they did not last.⁸⁹

One aspect of Nepal's 'inclusive' process was that it encompassed a significant number of women from marginalised and lower castes, whose lives are far removed from Nepal's political elite. However, after four years of deliberation the body failed to finalise a constitution and hence it was disbanded in 2012. A second Constituent

86 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process*, UN Doc S/2007/17 (9 January 2007) [20] (emphasis added).

87 *Interim Constitution of Nepal* (2007), art 63.

88 See CEDAW Committee, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women — Combined Fourth and Fifth Reports of States Parties — Nepal*, UN Doc CEDAW/C/NPL/4-5 (9 November 2010) 9.

89 Centre for Constitutional Dialogue, *Participatory Constitution-Making Process: Participatory Constitution Building in Nepal* (Booklet Series, No 10, Centre for Constitutional Dialogue and UNDP, 2009) 6.

Assembly was elected in 2013, with women once again gaining 30 per cent of the contested seats.⁹⁰

According to UNDP's analysis, the highly representative nature of the first Constituent Assembly 'added complications to the constitution drafting process', as 'getting consensus on the constitution became next to impossible'.⁹¹ The failure of the first Constituent Assembly led to some 'scepticism about the process of constitution-making through an elected and inclusive process'.⁹² While the main bone of contention related to federalism, there were other issues that also made consensus difficult, at least one of which related to gender. According to the US State Department, '[d]uring the constitution-drafting process, equal citizenship rights for women was one of the most contentious and highly politicized problems, with no final decisions made'.⁹³

UNDP's constitutional assistance project reflects on women's inclusion in Nepal's first Constituent Assembly:

The mere fact of holding seats does not automatically mean that women participate equally, or even that they have any significant influence at all ... [I]t was found that male Constituent Assembly members made many decisions during informal sessions that very seldom involved women.⁹⁴

One of the positive outcomes was the formation of a women's caucus across party lines, which contributed to putting women's interests on the political agenda.⁹⁵ Overall, the experience made clear that women's inclusion was beneficial even if it did not automatically translate into women's full and meaningful participation. While these revelations are by no means groundbreaking, as they largely mirror the difficulties faced by women delegates in other constitution-making processes,⁹⁶ the fact that UNDP has articulated and documented them provides hope that the UN will use the experience to help create conditions more conducive to women's equal and meaningful participation.

90 Women won 172 of the contested 575 seats. See National Democratic Institute, *In Nepal, Women Fight to Maintain Seats in the Constituent Assembly* (13 March 2014) <<https://www.ndi.org/nepal-women-fight-to-maintain-seats-in-parliament>>.

91 UNDP in Nepal, *Annual Report 2013* (UNDP, February 2014) 30.

92 Ibid 29.

93 United States Department of State, Bureau of Democracy, Human Rights and Labor, *Nepal 2013 Human Rights Report, Executive Summary* (Country Reports on Human Rights Practices for 2013 — Nepal, US Department of State, 27 February 2014) 16.

94 UNDP in Nepal, *Annual Report 2013* (UNDP, February 2014) 26.

95 Ibid 27.

96 See, for example, Catherine Albertyn, 'Women and the Transition to Democracy in South Africa' in Christina Murray (ed), *Gender and the New South African Legal Order* (Juta, 1994) 39, 54-7.

IMAGINING LAW

CONCLUSION

Despite the introduction in some countries such as Tunisia of gender parity laws that attempt to address the equal participation of women in legislatures and, in some cases, constitution-making bodies, in modern times South Africa's negotiated Interim Constitution represents the first — and only — time so far that a constitution has been drafted by equal numbers of men and women. UN discourse and practice indicate that there is an emerging international understanding that not only is there a need for women to participate in post-conflict constitution-making processes, but also that structural changes must be put in place to ensure that women can enjoy this right. One example of such change is the increasing use of proportional electoral systems as a means to elect a majority of members for a constitutional drafting body. Such systems have been used to elect constitution-making bodies in Nepal, Tunisia and Timor-Leste, and, as the first two countries show, a combination of electoral gender quotas with a system of proportional representation is most likely to ensure women's election to such bodies.

This chapter has briefly traced constitution-making experiences in Timor-Leste, Afghanistan and Nepal. The experience of Timor-Leste shows that initiatives for women's participation in constitution making arose from the ground up, via civil society, only to be pushed back by a lack of consensus within the UN and the international community more broadly. This was not the approach taken by the UN in relation to Afghanistan's constitution-making process, where the arrangement to allow some women to become members of constitution-making processes outside party structures, through being elected only by women or by being appointed, may have enabled women members to engage more actively with civil society and women's charters. One of the reasons underlying this difference is that the international community framed its intervention in Afghanistan in relation to reclaiming women's rights following the Taliban's regime of gender apartheid. This framework was assisted in part by the UN Security Council's evolving WPS agenda.

In the case of Nepal, the integrity of the Security Council's WPS agenda, which by 2006 was gaining some global momentum (at least in rhetoric), was being undermined by women's 'almost total'⁹⁷ exclusion from the Nepalese peace process. Thus the UN was under pressure to ensure that Nepalese leaders fulfilled their promise regarding women's participation in the Constituent Assembly, and the experience has enabled UNDP to gain a stronger understanding of some of the dynamics that hamper women's participation, even within constitution-making bodies. Thus the challenge for UNDP is to develop and offer strategies to post-conflict states which

97 *Report of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of Its Peace Process*, UN Doc S/2007/17 (9 January 2007) [20].

assist them in ensuring not only that women are included in constitution-making bodies but also that they are able to participate meaningfully within such bodies.

Following its experiences in Timor-Leste, Afghanistan and Nepal, the UN has, since 2010, begun to broadly articulate the need for gender-responsive electoral laws, gender quotas and the need to appoint women when it comes to constitution-making processes. These strategies need to be reflected in its *Guidance Note on Assistance to Constitution-Making Processes*, which, unless updated, offers inadequate guidance for constitutional assistance performed by UN agencies in post-conflict states. Overall, it is difficult to argue that the UN has consistently provided leadership in assisting women to participating equally and meaningfully in constitution-making processes. This mantle of leadership is often demonstrated by civil society, which is informed in some part by feminist scholarship.

Although constitutional assistance is a 'core component of the UN's peacebuilding and state-building strategy',⁹⁸ UN constitutional assistance has evolved very slowly: it has taken more than a quarter of a century for UN agencies to begin to understand the symbolic and substantive importance of women's participation in constitution making and the obstacles that hinder it. While the work of feminist international scholars such as Gardam, as well as Charlesworth and Chinkin, has shown much breadth in highlighting the paradigms and challenges women experience in conflict and in post-conflict settings, the Security Council has conceived its WPS agenda narrowly, so that it fails to take into account some of the critical dynamics operating in post-conflict settings when the foundations of states are being reformed through constitution-making processes. The next step for the UN Security Council's WPS agenda should be to explicitly set out women's right to participate in constitution-making processes and to articulate strategies to ensure that this participation is equal and meaningful.

98 UN Secretary-General Ban-Ki Moon, 'Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes' (Guidance Note, April 2009) 3.