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“UN Constitutional Assistance: An Emergent Policy Institution”

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UN CONSTITUTIONAL ASSISTANCE [UNCA]: AN EMERGENT POLICY INSTITUTION

Vijayashri Sripati*

I. Introduction

This essay's chief purpose is to establish the emergence of the UN's constitutional assistance as a "policy institution."¹ Its overarching argument is that our scholarly understanding and imagination of UN constitutional assistance will benefit by moving beyond the post-conflict or peace-building tableau. It contains five parts. In part I, I will define the term "constitution" and sketch out the essential elements of a constitution-making process. In Part II, I will trace the emergence—in the twenty-first

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¹ This essay is drawn from my doctoral dissertation titled: *United Nations Constitutional Assistance: A Historical and Post-Colonial Perspective* where I examine the purposes served by UN constitutional assistance through the 'policy institution'/ 'established practice' concept, using the methodology of "purposive analysis" (based on the official purposes advanced for the projects). The concept and methodology are drawn from Ralph Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008). 'Policy Institution' as used in Wilde's teleological study, combines an 'institution' as an 'established practice' focusing on 'policy', that is, the purposes for which the practice is associated. See *ibid.* at 36, fn. 99. See definition 6a of "institution" in the Oxford English Dictionary, online Oxford English Dictionary, <<http://www.oed.com>>:

6. a. An established law, custom, usage, practice, organization, or other element in the political or social life of a people...

For a detailed explanation of this methodology, see Vijaya Sripati, "Introduction," in *The Evolution of the UN's Constitutional Assistance: A Post-colonial and TWAIL Perspective* [unpublished doctoral dissertation]. "Established practice" is just the 'institution' part of Wilde's definition- and by extension mine - of 'policy institution.' For UNCA to be a 'policy institution' it has to be shown that it [the practice of constitutional assistance] has been put to common policy ends. An in-depth analysis of this theme is pursued in Vijayashri Sripati, "UNCA – A Mechanism for Implementing International Law and Policy" in *United Nations Constitutional Assistance: A Historical and Post-Colonial Perspective* at chapter 5 (analyzing how UNCA can be understood and is indeed, rationalized and legitimized by the UN as a device for implementing international law).

century—of UN constitutional assistance as a *policy institution* and analyze the salient features of that body’s constitutional assistance *policy*. I will argue that, in providing constitutional assistance, the UN sets standards for the process of constitution making and, broadly, for its contents, thus influencing the constitutional outcome. In Part III, I will explain how the UN slips constitutional assistance into its “development assistance” under its “democratic governance” framework. In Part IV, I will focus on the UN Democracy Fund’s (UNDEF) activities and recent UN-sponsored conferences on constitution-making to highlight the high-level policy attention that constitutional assistance as a democracy-promotion and conflict-resolution tool has received. I will conclude by highlighting recent developments that point to the UN’s continued support for constitution-making as an integral part of its “work.”

Part 1

II. Constitution and Constitution-making:

The term constitution “refers both to the institutions, practices, and principles that define and structure a system of government and to the written document that establishes or articulates such a system.”² By constitution-making, I refer to the processes by which new constitutions are written (or rewritten) and to the general outlines of constitutions, as opposed to the making of particular laws. Now, a written constitution has become almost an expression of political modernization, for nations, both old and new.³ And, as the

² See Suzette Hemberger, “Constitution” in *The Oxford Companion to Politics of the World* (Oxford: Oxford University Press, 2001), online: <www.oxfordreference.com>

³For example, governed all along by a 1953 royal decree, Bhutan never had a written constitution. However, owing to international demands for “modernization” and domestic compulsions, its King decided to give his people a written constitution, which was drafted - with the UNDP’s assistance – and enforced in 2008. See “UN’s Constitutional Assistance in Bhutan,” in *infra* Chapter 3 titled: *The Institution of UNCA*. For similar views see Doctor Miguel Herrero de Minon, “Democratic Transition and Constitutional Choices” in Council of Europe, European Commission for Democracy ed. *Constitution-Making as an*

spate of “post-conflict” constitution-making suggests, constitutions may also be codified in a peace agreement.⁴

Although constitution-making is today widely recognized and described as an “instrument for conflict resolution,”⁵ it has not been officially defined in UN documents or non-official sites.⁶ However, the UN’s constitutional assistance policy note sets out the essential components of and the various steps/stages in a typical constitution-making process.⁷

Instrument of Democratic Transition (Germany: Council of Europe, 1993) at 21 (arguing that a constitution is the “instrument and expression of political modernization”); Judge John Tunheim, “Rule of Law and the Kosovo Constitution,” (2009) 18 *Minn. J. of Int’l L.* 371 at 374 (arguing that “it is essential today in any new democracy to develop a written constitution that provides the basic guarantees of human rights... ..A constitution is essential to enshrine the rule of law.”) For other allusions to the importance of a constitution see e.g. *Ulaanbaatar Declaration - Democracy, Good Governance and Civil Society*, Outcome Documents, The Fifth International Conference, of New or Restored Democracies, Ulaanbaatar, Mongolia, (10-12 September 2003) at ix:

Recognizing also the foregoing challenges, and ...desiring to open up a path for further strengthening the global democratic movement by the consolidation of new or restored democracies, as well as supporting other states in introducing democratic reforms for the benefit of all members of society. Democracy should be rooted in the Constitution of the State to provide permanency and a legal foundation.

⁴ The Constitution of Bosnia and Herzegovina was adopted as Annex 4 of the Dayton Peace Accords, initiated in Dayton, Ohio on 21 November 1995 and came into force with the signing in Paris on 14 December 1995. See online: The Dayton Peace Accords, <<http://www.state.gov/www/regions/eur/bosnia/bosagree.html>>.

⁵ See Yash Ghai, “The Constitution Reform Process: Comparative Perspectives,” online <<http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf>>.

Constitution-making also goes on in other contexts, as occurred in the 1990s, wherein new states arose and old states were renovated against the backdrop of the fall of communism and the Soviet Union’s splinter.

⁶ The term constitution-making is conspicuous by its absence in the UN “Peacemaker” glossary – a “catalogue of current definitions and understandings of terms utilized by the UN within the context of international peacemaking.” The UN “Peacemaker” website is an online mediation support tool created by the UN’s Department of Political Affairs (DPA) in support of the UN Secretary-General and his representatives’ efforts in resolving international disputes and internal conflicts. However, the listing of “Constitution and Political System/structure/Institutions” as one of the thematic issues in the search engine for “peace agreements” on this website affirms that constitution-making is an integral part of a peace process. See UN Peacemaker at <<http://www.peacemaker.unlb.org/advancedrsearch.php>>; For peace-building definition see Agenda for Peace, *infra* note 24 at ¶ 21 (defining it as “action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”); For ‘constitution-building’ definition see Yash Ghai & Guido Galli, *Constitution Building Processes and Democratization* (Stockholm: IDEA, 2006) at 9 (defining it as being “more complex than the process of constitution-making alone, although the latter is an inseparable part of it.”); See generally Vincent Chetail, *Postconflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press, 2009).

⁷ See United Nations Interoffice Memorandum from the Secretary-General, “Guidance Note on United Nations Assistance to Constitution-making Processes” (June 8, 2009) at 2, 6, & 8 (charting out the stages in

I.II.1 Constitution-Making: Its Essential Components

Broadly speaking, recent constitution-making processes have typically begun with important stakeholders holding high-level negotiations and deciding in an agreement on the path to be taken towards constitution-making.⁸ Next, a representative body prepares a draft constitution usually after a public education and consultation campaign.⁹ Thereafter, an elected constituent power debates, discusses and adopts the draft constitution before it is finally adopted either through a referendum or any other procedure.¹⁰ Significantly, drawing upon foreign expertise and educating the public through an information campaign and inviting public participation in the process through public consultations¹¹ have today evolved as new standards for making constitutions.

I.II.1.1 Forms of Direct UN Constitutional Assistance

To begin with, the UN provides financial and logistic support and designs and manages the process.¹² The UN asserts that it strives to ensure that the process is “transparent, inclusive, and participatory.”¹³ It assists in the creation of constitution-

a constitution-making process and the specific tasks undertaken by the UN as part of its constitutional assistance). [Hereinafter UN Constitutional Assistance Guidance Note (2009)] [document on file with the author]

⁸ Ibid. at 6, 8 (components of a constitution-making process)

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid. at

¹² Ibid.

¹³ Ibid. at 2 & 3. See UN Security Council Resolution 1546 (2004) at ¶ 7 (a) (“the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall: promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq); *Report of the Secretary-General pursuant to paragraph 30 of Resolution 1546* (2004) at ¶ 30 (“To this end, my Special Representative and the UNAMI Office of Constitutional Support have held extensive consultations with the political leadership, the Constitution Drafting Committee, and members of Iraqi civil society with

drafting bodies and election of the constituent bodies such as a constituent assembly.¹⁴ It describes its assistance during negotiations as “political and strategic support” and “political facilitation” of “key contentious” “substantive and procedural issues.”¹⁵ It rounds off its assistance by providing the local constitution-makers with drafting-assistance¹⁶ and knowledge-based support and expertise (typically by providing them the services of foreign experts),¹⁷ and creating and managing a public education and public participation campaign by allying with local and/or external NGOs.¹⁸

I.II.1.2 Indirect Influences

Constitution-making does not occur in a vacuum. Indeed, the UN’s rationalizing discourses and legitimizing ideologies provide the framework for its constitutional assistance activities and serve as backdrops for constitution-making processes. For example, the post-Cold War and the twenty-first century constitution-making processes of Afghanistan, Iraq, Kosovo, Nepal, Bhutan, and Malawi - and other

a view to encouraging an inclusive, participatory and transparent constitution-making process that is responsive to the key demands of all Iraqi constituencies”).

¹⁴ *Ibid.* at 3. UN documents frequently cover constitutional assistance under the generic term “electoral assistance.” Since constitutional assistance is assistance in writing a constitution, it typically includes electoral assistance. But electoral assistance may not necessarily include constitutional assistance. For example, as we have seen, constitutional assistance is assistance in the making of a constitution and it typically comprises assistance to hold free and fair elections to a constituent power such as a constituent assembly and maybe even a referendum for the adoption of the constitution. But electoral assistance might only be assistance to hold free and fair elections to constitutional (or post-constitution) bodies such as parliaments and/or state legislatures and not a constituent assembly.

¹⁵ *Ibid.* at 3. Political and strategic support includes assistance in the “negotiation of an initial agreement on the structure of the constitution-making process” or “on the selection process for the Drafting Body and the Constituent Assembly”. *Ibid.*

¹⁶ *Ibid.* Drafting assistance comprises assistance in writing or drafting an array of documents ranging from rules of procedure to constitutional provisions and or provisions in the peace agreements. See e.g. Mediation Support Team Job Advertisement, *infra* note 74.

¹⁷ *Ibid.* at 3. Knowledge-based support and expert advice is typically given in the fields of constitutional law, constitutional design, and international human rights law, and on matters relating to the state’s treaty obligations and domestic effect of international treaties, bills of rights, provisions on judicial independence, and constitutionalization of internationally-designed bodies such as national human rights institutions. *Ibid.*

¹⁸ *Ibid.* at 3.

ongoing processes - have had “good governance” and the “rule of law” as their legitimizing ideologies.¹⁹

III. The UN & Internal Governance

I.III.1 Dismantling the Remnants of Colonialism

Constitution-making is a signature feature of sovereignty and is an expression of a people’s right to self-determination.²⁰ In June 1945, even as the UN Charter spoke of freedom and self-determination, colonial chains still bound millions around the world and compromised these ringing words. Conceived and crafted broadly by colonialists, the

¹⁹ See generally The Secretary General, *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, II 6, delivered to the Security Council, UN Doc. S/2004/616 (Aug. 23, 2004) (defining the rule of law and providing for a series of recommendations for negotiations, peace agreements and security council mandates); UNDP, “Governance for Sustainable Human Development - A UNDP Policy Document,” online: UNDP <<http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>>; UN, *UN Peace Mandate* (2008); See Rama Mani & Jana Krause, “Democratic Governance” in Vincent Chetail ed., *Post-Conflict Peacebuilding: A Lexicon* (Oxford: Oxford University Press, 2009) at 107 (describing how good governance entered the international lexicon)

²⁰ See International Covenant on Civil and Political Rights, art. 1.

UN Charter betrayed a colonial character.²¹ It first helped decide the future of territories and shape governments in the *decolonization context*.²²

I.III.2 Post-1989/ Peace-Building Context: Constitutional Assistance to Resolve Conflicts & Build Peace

However, the UN's concern with internal governance and by extension, constitution-making was not confined to the decolonization context.²³ Interestingly, in the post-Cold War era, the internal governance of many independent, sovereign, and conflicted states riveted its attention. Empowered by the Security Council, it assisted many such states write their constitutions and build new political institutions as a way to

²¹ See e.g. UN Charter, Art. 73 & 76 (drawing a critical distinction between Non-Self Governing Territories (NSGTs) and Trust Territories (Trusts) where the latter were to eventually transit to freedom under the scrutiny of the UN Trusteeship Council but the provisions for NSGTs comprised only a toothless "Declaration."). Consequently, there are still 16 NSGTs dotting the international landscape today. Indeed, "the term NSGT is in practice a euphemism for colonies." See El-Ayouti, *The UN and Decolonization: The Role of Afro-Asia* (The Hague: Martinus Nijhoff, 1971) at XIX, fn. 1 (citing to Clyde Eagleton, *International Government*). The UN assisted trust territories to transit to full statehood by supervising and certifying (for fairness) the referenda held therein. In some cases, administering powers renounced trusteeship and severed constitutional ties to the territory. Palau, the last UN Trust Territory gained independence on 1 October 1994 and the Trusteeship Council suspended operation a month later. See generally Secretary-General, *Report of the Secretary-General on Support by the United Nations System of the efforts of Governments to promote and consolidate new or restored democracies*, A/62/296, (23 August 2007); Secretary-General, *Report of the High-Level Panel on Threats, Challenges and Change – A More Secure World: Our Shared Responsibility*, Doc. A.59/565, para 299 and 85 (recommending the use of Trusteeship Council as a forum through which Member States could exercise collective trusteeship for the global environment). While the administering states have usually resisted UN involvement with their overseas territories, the Decolonization Committee does and can do no more than monitor the process and give its opinion.

²² See e.g. Katy Le Roy, *Nauru Constitutional Review: Background and Discussion Paper* (June 2006) at 3, 7, 10-11 (discussing UN's push for Nauru's independence and its tangential involvement in its constitution-making). [Hereinafter Le Roy, *Nauru Constitutional Review*]. Secretary-General, *Report of the Secretary-General on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/60/71, (5 October 2005); United Nations, *From Dependence to Freedom - The UN Role in the Advance of Dependent Peoples toward Self-Government or Independence* (New York: United Nations Office of Public Information 1976); UN G.A. Res., 742 (VIII) 459th plenary meeting, *Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government*, (27 November 1953). See also Yves Beigbeder, *International Monitoring of Plebiscites, Referenda, and National Elections* 129-43 (1994); Edmund Jan Osmańczyk & Anthony Mango, "Plebiscites" in *Encyclopedia of the United Nations and International Agreements* (London: Routledge, 2004) at 1803-1804.

²³ See e.g. Le Roy, *Nauru Constitutional Review*, *supra* note 22 at 3, 7, 10-11 (discussing UN's push for Nauru's independence and its indirect involvement in its constitution-making). [Hereinafter, Roy, *Nauru Constitutional Review*]

resolve their conflicts and build peace.²⁴ The then UN Secretary-General's *Agenda for Democratization (1996)*,²⁵ which forms part of the international peace-building discourse announced in part as follows:

The peace-keeping mandates entrusted to the United Nations now often include both the restoration of democracy and the protection of human rights. United Nations departments, agencies and programmes *have been called upon to help States draft constitutions*, create independent systems for the administration of justice, provide police forces that respect and enforce the rule of law, depoliticize military establishments and establish national institutions for the promotion and protection of human rights. They also have been asked by many States engaged in democratization to help encourage and facilitate the active participation of citizens in political processes, and to foster the emergence of a productive civil society, including responsible and independent communications media.²⁶

²⁴ See *Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, A/47/277 - S/24111, (17 June 1992) [*Hereinafter* Agenda for Peace]; *Report of the Secretary-General on the Work of the Organization, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, A/50/60 - S/1995/1, 3 January 1995 [*Hereinafter* Supplement to an Agenda for Peace]; General Assembly Resolution, A/Res/47/120B (20 September 1993) (acknowledging the usefulness of post-conflict peace-building activities provided that such activities were undertaken on the basis of agreements ending conflicts at the request of the governments concerned); "Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations," A/50/60 - S/1995/1 (25 January 1995) at 49-50 ¶ (acknowledging that peace agreements can provide the legal basis for UN's intervention in post-conflict situations and its peace-building activities); Thierry Tardy, ed., *Peace Operations after 11 September 2001* (London: Frank Cass, 2004) (covering the proceedings of a workshop held at the Geneva Centre for Security Policy which addressed the issue of peace operations in a post-9/11 context and was titled: *The Brahimi Report: Four Years On*).

²⁵ Boutros Boutros-Ghali, *An Agenda for Democratization* (New York: United Nations, 1996) [Democratization Agenda]; Report of the Secretary-General, *An Agenda for Development*, A/48/935 (6 May 1994) at ¶124 (declaring that "UN support has also been provided for drafting constitutions, instituting administrative and financial reforms, strengthening domestic human rights laws...").

²⁶ See *ibid.* at para 5 [emphasis added]. Beginning from the 1990s, the UN embraced conflict prevention or conflict resolution as its chief responsibility under the Charter and accordingly, stressed the importance of devising mechanisms to prevent and resolve conflicts. It was in this context of a culture of prevention that constitutional assistance as a conflict prevention mechanism first gained traction in UN policy circles. See also *infra* note 107

Almost a decade later, the UN reiterated constitutional assistance as an integral part of its “work.” For instance, in his 2005 “Report on the Work of the Organization,” the then Secretary-General stated:

The UN worked tirelessly around the globe throughout the year to prevent and resolve conflicts and to consolidate peace. From Afghanistan to Burundi, from Iraq to the Sudan, from Haiti to the Middle East, the tools employed were as diverse as the circumstances. My envoys used their good offices in seeking peace agreements or in trying to prevent disputes from violently escalating. Peacekeepers deployed to conflict zones in record numbers and in complex multidimensional operations working not only to provide security ... and to help war-torn countries, *write constitutions*, hold elections and strengthen human rights and the rule of law. United Nations agencies, funds and programmes tailored their assistance to the special needs of post-conflict societies.²⁷

The UN has provided constitutional assistance to the following countries (listed alphabetically): Afghanistan²⁸, Angola, Benin, Burundi, Cambodia, Congo, East-Timor (decolonization context)²⁹, Eritrea, Guatemala³⁰, Kosovo, Mozambique, Namibia (decolonization context), Liberia, Sierra Leone,³¹ and Sudan. It has offered constitutional

²⁷ *Report of the Secretary-General on the work of the Organization, General Assembly, Official Records, Sixtieth Session, Supplement No. 1 (A/60/1) (2005) at para 10 [emphasis added]; Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616 (23 August 2004) at ¶ 12 (“our (peace) operations have helped national actors ... draft new constitutions, revise legislation, inform and educate the public, develop ombudsman institutions, and human rights commissions... justice sector.”).*

²⁸ UN Assistance Mission in Afghanistan or UNAMA is a political mission headed by the representative of the UN Secretary-General.

²⁹ For the UN’s involvement in constitution-making in the decolonization context see e.g. Katy Le Roy, Nauru Constitutional Review, *supra* note 23.

³⁰ See *Agreement on Constitutional Reforms and the Electoral Regime, 1996*, online: www.guatemala.se/static/h249n2fls31o828.../guatemala.../peace8.pdf>; *Agreement on a Firm and Lasting Peace*, online: www.guatemala.se/static/h249n2fls31o828.../guatemala.../peace1.pdf>; Rajeev Pillay, *Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Guatemala* (undated).

³¹ See Statement submitted by the Civil Society Peacebuilding Engagement Committee (CSPEC) Sierra Leone to the High-Level Stakeholders Consultation on the Implementation of the Sierra Leone Peacebuilding Cooperation Framework (Compact): United Nations, New York, (19 May 08), online:

<www.wanep.org/images/sl_cso_statement.pdf> (reporting that the constitutional review has been completed and the Commission has submitted its report to the Cabinet); Peace-building Commission, *Conclusions and recommendations of the second biannual review of the implementation of the Sierra Leone Peace-building Cooperation Framework*, PBC/3/SLE/2, (16 December 2008) at ¶ 6 (recommending that the government of Sierra Leone should undertake a constitutional review exercise and ensure adequate follow-up to the report of the Constitutional Review Commission by holding consultations and raising awareness of its findings nationwide); “Sierra Leone Compact, The United Nations Peace-building Commission and the Republic of Sierra Leone Framework for Cooperation: Building on Progress” (May 4, 2007), online: www.peacebuildingcommission.org/files/index.php?act...id=121 (stating that one of the strategies of the Sierra Leone Compact was to “intensify efforts to ensure an inclusive and participatory legislative and constitutional reform processes”); “Peace-building Commission adopts recommendations for Government of Sierra Leone, United Nations, international partners; outlines commission’s future role,” (12 June 2008) online: <<http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-7FS3NA?OpenDocument>> (reporting that UNISOIL had been replaced with an “integrated peace-building office” in Sierra Leone and that the Cabinet had just received a report on the ongoing constitutional review process, paving the way for the next stage of consultations, which was expected to involve members of civil society”); Sierra Leone, UN’s Joint Vision, *Supporting Sierra Leone: A Joint Vision of the UN’s Family* at 2, online: <www.sl.undp.org/1_doc/joint_un_vision_sl_final.pdf> (“we will continue promoting the rule of law, the rights of marginalized groups, women and children, and assist in the review of Sierra Leone’s Constitution”); *Second Report of the Secretary-General on the UN-Integrated Office in Sierra Leone*, S/2006/695, (29 August 2006) at ¶ 9 (reporting that the Sierra Leone President had informed UNISOIL of his government’s intention to amend the 1991 constitution which will be included on the ballot for a referendum during the 2007 elections and that the “Law Review Commission of Sierra Leone had already started reviewing the 1991 Constitution to ensure that it reflects the new political, social, and economic reality in the country”); UN Department of Public Information, “Security Council extends mandate of Sierra Leone Office until 30 September 2008 unanimously adopting resolution 1793 (2007),” SC/9212 (21 December 2007) online: <<http://www.un.org/news/press/docs/2007/SC9212.doc.htm>> (reporting that when UNISOIL’s mandate expires in September 2008, it be replaced by a leaner integrated political office, that would focus on carrying forward the peace-consolidation process, mobilizing international donor support, supporting the work of the Peace-building Commission and the Peace-building Fund and completing any residual tasks left over from UNISOIL’s mandate, particularly promoting national reconciliation and supporting the constitutional reform process.”); Lotta Teale, “The Review of the Constitution: What the Report Says and Should Sierra Leone Make These Changes?” (May 9, 2007), online: <http://www.slcmp.org/drwebsite/articles/The_Review_of_the_Constitution_What_the_Report_Says_and_Should_Sierra_Leone_Make_These_Changes.shtml> (reporting that the report of the Constitutional Review Committee was published in April 2007, with proposals for changes to the Constitution of Sierra Leone and that there is talk of a referendum); Sixth report of the Secretary-General on the United Nations Integrated Office in Sierra Leone, S/2008/281 (29 April 2008) at ¶ 28 titled “Enhancing Democratic Governance” (affirming the UN’s constitutional assistance), at ¶39 F (stating that the constitution review commission submitted its report on 10 January 2008 that recommended the amendment of the entrenched provisions in the constitution that will require national approval by referendum); “UN Peace-building Office (UNIPSIL) to replace UNISOIL,” online: < http://english.grioo.com/ar_un_peace-building_office_unipsil_to_replace_uniosil.71.html> (stating that the UN Security Council will establish a United Nations peace-building office (UNIPSIL) as approved by the UN Security Council Resolution 1829 to replace the United Nations Integrated Office (UNISOIL) (2008) 1 October 2008); First report of the Secretary-General on the United Nations Integrated Peace-building Office in Sierra Leone (UNIPSIL), S/2009/59, (30 January 2009) at ¶ 53-54 (affirming UNIPSIL’s willingness to provide constitutional assistance to the government) ;For information on what a UN peace-building office is see Secretary-General’s Note on the Peace-building Office, online:< www.peacewomen.org/un/women_reform/PBC/PBSO_SG_note.pdf; Peace-Building Commission, *Conference Room Paper for the country specific meeting on Sierra Leone*, PBC/2/SIL/CRP.1 (10 October 2006) at ¶ 14 (stating that a national referendum on amendments to the constitution will take place following the constitutional review by the Law Reform Commission to ensure the constitution reflects the new political, social, and economic reality in the country); See generally UNISOIL, online:<<http://www.uniosil.org/>>.

assistance to Afghanistan, Iraq, Nepal, and Somalia through its special political missions³² and to the Central African Republic,³³ Guinea-Bissau,³⁴ and Coite d'Ivoire through its Peace-building Support Offices and Mediation Support Unit.³⁵

³² Special Political Missions [SPMs] have not been legislatively defined. For comments on the need to articulate a clearer definition of SPMs and better present their programmatic and budgetary requirements see reports of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) A/63/593 and A/63/601. UN member states have also emphasized the need for articulating the modalities for their creation. See e.g. “Budget Committee takes up proposed \$467 million in financing for 27 political missions in 2009” (16 December 2008), online: ReliefWeb <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/KSAI-7ME4A8?OpenDocument>> (reproducing the Japanese representative’s call to the Secretary-General to clarify “what special political missions are”); Interview of Peter Barwick, UN Mediation Support Unit, by V. Sripathi (October 8, 2008). [on file] The defining feature of special political missions is their lack of a military component. Being “late-stage follow-up” kinds of missions, they are centered on assisting countries in “negotiating” political settlements and thereby have constitutional assistance as one of their key functions. They are authorized either by the General Assembly and/or the Security Council. Ibid.

³³ See Report of the Secretary-General, *The Situation in the Central African Republic and the activities of the United Nations Peace-Building Support Office in the Central African Republic*, S/2004/ 496 (16 June 2004) at ¶ 3 (reporting that the financial support of CAR’s foreign partners was indispensable to implementing its transitional government’s electoral schedule), ¶ 11 (“BONUCA and the UN family are assisting the Transitional Authorities inter alia in the drafting of ... the constitution and the ordinance on political parties”); Department of Political Affairs, “Implementation of the Bruxelles Programme of Action for Least developed Countries for the Decade 2001-2010” at 1, 2, online: <<http://www.un.org/special-rep/ohrrls/ldc/UN%20system%20%20DPA%20doc.pdf> >, (stating that the UN Secretary-General established the UN Peace-Building Support Office in Bangui (BONUCA) and that the DPA assisted the country in managing the constitutional crisis during 2001-2002). The Central African Republic adopted a new constitution by referendum on 5 December 2004.

³⁴ See UN Security Council Resolution S/RES/1216 (21 December 1998) (requesting that the Secretary-General recommend a possible role for the UN in Guinea-Bissau’s peace process); UN Security Council Resolution S/RES/1233 (6 April 1999) (supporting the decision of the UN Secretary-General to establish the UN Peace-building support office in Guinea-Bissau); UN Security Council Resolution S/RES/1580 (22 December 2004) (revising and extending the mandate of the UN Peace-building Support Office in Guinea-Bissau – UNOGBIS); UN Security Council Resolution S/RES/1216 (21 December 1998); UN Security Council Resolution, S/Res/1876 (26 June 2009) at XII A¶ (extending the mandate of UNOGBIS until 31 December and requesting the Secretary-General to establish a UN Integrated Peace-building Office in Guinea-Bissau (UNIOGBIS) to succeed UNOGBIS for an initial period of 12 months after that so that it may take up key tasks including “strengthening the capacities of national institutions in order to maintain the constitutional order, ... and full respect for the rule of law”); *Report of the Secretary-General on developments in Guinea-Bissau and on the activities of UN Peace-Building Support Office in that country*, S/2008/751, (2 December 2008) at ¶ 21 (“the need to review and formulate existing and new legislation, including constitutional frameworks, was also underlined”); *Report of the Secretary-General on developments in Guinea-Bissau and on the activities of UN Peace-Building Support Office in that country*, S/2000/362, (28 June 2000) at ¶ 9 (stating that the Guinea-Bissau “authorities have stated the need for a new post-conflict constitution”) at ¶ 20 (“endemic poverty remains the single most debilitating social and economic problem threatening the consolidation of democracy and the constitutional order”); Report of the Secretary-General on Guinea Bissau and on the activities of UNOGBIS as of 11 June 2009, S/2009/302 (10 June 2009); Report of the Mission to Guinea-Bissau of the PeaceBuilding Commission’s Country-Specific Configuration on Guinea-Bissau (6-11 April, 2008) at ¶ 24 (emphasizing the privatization and other reforms recommended and undertaken by the World Bank in Guinea-Bissau) online: <<http://www.un.org/peace/africa/pdf/GuineaBissau.pdf>>; *Priority Plan for the UN Peace-building Fund (PBF) – Guinea Bissau* (June 2008).

I.III.3 Into the 21st Century: Emergence of UN Constitutional Assistance as a Policy Institution

UN constitutional assistance first received high-level policy attention in 2000 due to the work of the Brahimi panel on peace operations.³⁶ However, that concept was not explicitly mentioned in the Brahimi report.³⁷ But according to Dean Brian Atwood, “there was no question that the panel’s members - in their report - alluded to constitutional and other forms of assistance rendered by the UN in the peace-building context.”³⁸ In addition, members discussed the importance of requiring all UN-assisted constitution-making processes to be “transparent, inclusive, and participatory.”³⁹ Although technically speaking, “electoral assistance” does not include constitutional assistance,⁴⁰ Dean Atwood concludes - and I concur, - that the Brahimi Report, akin to

³⁵ See *UN Department of Political Affairs Mediation Support Unit Project Proposal & Programme of Work 2008* (version dated 2 January 2008 on file with the author). The UN Mediation Support Unit has also been involved in constitutional matters in Myanmar and Bolivia. *Ibid.* at 7 & 11-12. See e.g. UNDP Bolivia, “Supporting consensus-building processes for the installation of the Constituent Assembly” (undated), online: <www.democraticdialoguenetwork.org/file.pl?files_id=320;folder>. For the most recent “Background Note” (current facts and figures) see online: “UN Political and Peace-building Missions,” (31 March 2009) <<http://www.un.org/Depts/dpko/dpko/ppbm.pdf>>

³⁶ See Report of the Panel on United Nations Peace Operations, A/55/305 -S/2000/809, 21 August 2000 [*Hereinafter* Brahimi Report]. The then Secretary-General Kofi Annan created this 10-member panel which was chaired by the veteran Algerian diplomat Mr. Lakhder Brahimi. Therefore, it is widely known as the Brahimi panel and its report is called the Brahimi Report.

³⁷ For tangential references to constitutional assistance in the Brahimi Report, see Brahimi Report *supra* note 36 at ¶ 30 (long-term conflict prevention) & 35-38 (peace-building strategies including electoral assistance).

³⁸ Interview of Brian Atwood, Dean, Humphrey Institute of Public Affairs, University of Minnesota, by V. Sripathi (March 12, 2009) (on file). In fact, the UN’s electoral and constitutional assistance experience in countries like Namibia and Cambodia was discussed by the panel as it considered different elements of peace-building. *Ibid.* Mr. Brian Atwood who formerly headed the United States Agency for International Development (USAID) was one of the members on this panel. For a complete list of this panel’s members see Brahimi Report *supra* note 36 at 48 (Annex 1).

³⁹ Interview of Mr. Brian Atwood, *supra* note 38

⁴⁰ See text of *supra* note 14.

other UN reports and policy documents, uses a broad definition of “electoral assistance” to cover for constitutional assistance.⁴¹

Constitutional assistance, as a stand-alone topic, appeared formally and explicitly on the UN policy-making radar screen only in 2005, – long after the organization had first begun supporting constitution-making. The UN Secretary-General’s Policy Committee prepared and circulated for internal consideration, a policy paper on this theme.⁴² According to Dr. Jamal Benomar, the UN’s constitutional assistance policy was finalized and endorsed by this high-level committee in 2006.⁴³ Subsequently, the UN took stock of its existing constitutional assistance capacities⁴⁴ and drawing from its past lessons, prepared and circulated a policy note for guidance within the UN ranks.⁴⁵ This policy note was updated in 2009 by the UN Secretary-General⁴⁶ and it is the UN’s current official policy on the topic.⁴⁷

The UN Constitutional Assistance Policy

⁴¹ Interview of Mr. Brian Atwood, *supra* note 38

⁴² See Report of the Secretary-General, *Progress Report on the Prevention of Armed Conflict*, A/60/891 18 July 2006 at ¶ 91 (mentioning the creation of the Policy Committee in 2005); “Security Council Report Special Report No. 2” (5 October 2007) at 2 online: <www.securitycouncilreport.org> (reporting that an “internal” policy paper on constitutional reform and constitution-making was awaiting approval by the UN Secretary-General’s Policy Committee)

⁴³ Interview of Jamal Benomar, Director, Rule of Law Unit, United Nations Headquarters, New York, by V. Sripati (January 28, 2009) (on file)

⁴⁴ See e.g. UN Executive Office of the Secretary-General, “Inventory - UN Capacity in Peace-Building” (September 2006) at 75 (constitution-making), annex 4 at 110-115 (constitution-making), 103-109 (good offices and mediation) and 86-102 (human rights) online: <www.undp.org/cpr/iase/content/docs/Oct_Links/doc_4.pdf>.

⁴⁵ See UN Guidance Note on Constitution-making (undated). [Policy document on file with the author]. The policy is however not cast in stone and some aspects of it are subject to periodic revision. [Hereinafter UN Constitutional Assistance Guidance Note (undated)]

⁴⁶ See UN Constitutional Assistance Guidance Note (2009), *supra* note 7 at 3, fn.1 (stating that it grew from an “internal consultation process review undertaken in 2009 to revise the original note published in 2006”). In updating this constitutional assistance policy note, the UN Secretary-General was guided by his earlier note on rule of law assistance: United Nations Guidance Note of the Secretary-General, “UN Approach to Rule of Law Assistance.” *Ibid.* at 2 (summary).

⁴⁷ This policy note is a “living document” and will be updated periodically. *Ibid.* at 3.

I.III.4 Its Guiding Principles and Framework

The UN regards constitution-making processes as crucial opportunities to build and consolidate “sustainable peace” and prevent (future) conflicts.⁴⁸ It submits that it assists countries to write their constitutions only at their request.⁴⁹ And that such assistance flows from the understanding that constitution-making is quintessentially a “sovereign national process,” whose success and legitimacy rests on it being nationally-owned and led.⁵⁰ Significantly, it considers how a constitution is made as equally important as its design and content.⁵¹ Therefore, ensuring that a constitution-making process is “inclusive, participatory, and transparent” and that the (resultant) constitution is rooted in “international human rights and other norms and standards” are its core twin goals.⁵² In short, it envisions (its) constitutional assistance as both, an international standard-setting and standard-implementing mechanism.⁵³ It therefore considers it legitimate to “speak out” when a draft constitution does not comply with international standards.⁵⁴ According to the UN, the local context shapes its constitutional assistance

⁴⁸ See UN Constitutional Assistance Guidance Note (2009), *supra* note 7 at 1 (¶ 1), 2 (“For the United Nations, constitution-making is a broad concept that covers the process of drafting and substance of a new constitution or reforms of an existing constitution”) & 3.

⁴⁹ *Ibid.* at 1 (¶ 3). I argue that this statement conceals more than it reveals. This point is revisited later in my dissertation but at this point it is sufficient to see *infra* notes 79-85 and accompanying text.

⁵⁰ *Ibid.* at 1 (para 3).

⁵¹ *Ibid.* at 2 (summary)

⁵² *Ibid.* at 2 (summary) & 4 ¶ 2

⁵³ *Ibid.* at 4 ¶ 2; *Ibid.* at UN Constitutional Assistance Guidance Note (undated), *supra* note 45 at 2.

⁵⁴ These standards may concern administration of justice, transitional justice, electoral systems and a range of other constitutional issues. *Ibid.* at 4 ¶ 2. See generally UN Security Council Resolution on Women, Peace and Security, S/RES/1325 (2000), online: Security Council Resolutions <<http://www.un.org/documents/scres.htm>> (urging member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict); United Nations, *Women, Peace and Security: Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325* (New York: United Nations, 2000); UN Security Council Resolution, S/Res/1432, (12 July 2002) (referring to - but not delineating - the “standards of a modern democracy”)

program and it therefore does not advocate a “one size fits all” constitutional model or process.⁵⁵

International Standard-setting

Standard-setting for constitution-making first began in the peace-building context when peace agreements: both the processes by which they were negotiated and their substance began to be normatively addressed by international law.⁵⁶

I.III.4.1 Human Rights

For example, to address the exclusion of women from all phases of formalized peace processes,⁵⁷ the UN Security Council in 2000 called upon all the relevant actors when negotiating and implementing peace agreements to adopt measures that ensure the

⁵⁵ See UN Constitutional Assistance Guidance Note (2009), *supra* note 7 at 4.

⁵⁶ International standards comprise UN guidelines, guidelines and recommendations of the secretary-general, and Security Council resolutions. See Brahimi Report, *supra* note 36 at ¶58 (recommending empowering the UN to put conditions on peace agreements in which it will be involved, including ensuring the presence of adviser-observers at peace negotiations); *Security Council Resolution 1325 (2000)*, S/RES/1325 (2000) (31 October 2000) (highlighting the importance of bringing gender perspectives to the center of all UN conflict prevention and resolution efforts and peace-building, and reconstruction efforts); United Nations, *Women, Peace and Security – Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000)* (New York: United Nations, 2002) [hereinafter *Women, Peace, and Security*]; UN Press Release SG/SM/7257, Secretary-General Comments on Guidelines Given to Envoys (Dec. 10, 1999) (noting the issuance of guidelines addressing human rights and peace negotiations); UN Comm’n on Hum Rts., Addendum: *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 [hereinafter *Principles to Combat Impunity*]; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, UN Doc. S/2004/616 ¶ 9-10 & 64-65 (3 August 2004) (providing for a series of recommendations for negotiations, peace agreements, and Security Council mandates); *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General’s High-Level Panel on Threats, Challenges, and Change, ¶ 103, 226-228; 264, online: <<http://www.un.org/secureworld/>>. For “Paris Principles” or “Principles relating to the status and functioning of national institutions for protection and promotion of human rights” see Fact Sheet No.19, National Institutions for the Promotion and Protection of Human Rights (28 December 1993), online: Office of the High Commissioner of Human Rights (OHCHR), <<http://www.unhcr.ch/html/menu6/2/fs19.htm>>. Although these principles did not evolve in the peace-building context, they have hugely influenced the shaping of human rights institutions in the post-conflict context.

⁵⁷ Peace processes typically go through many stages including negotiations, the formulation of peace accords and reconstruction plans.

protection of and respect for the human rights of women and girls, particularly as *they* relate to the constitution and the electoral system.⁵⁸ Subsequently, a UN Study recommended that constitutional processes should include the participation of women and principles of gender equality and non-discrimination should be considered during constitution-making and constitutionalized thereafter.⁵⁹ It also recommended the adoption of various measures, including quotas to ensure the equitable participation of women in electoral processes.⁶⁰ In the aftermath of September 11, 2001, the potent international security measures legislated by the Security Council to counter terrorism functioned as (post-9/11) standards for both domestic criminal law and constitutional content.⁶¹

⁵⁸ *UN Security Council Resolution 1325* (2000), S/RES/1325 (2000) (31 October 2000) at ¶ 8 (b) & (c)

⁵⁹ See *Women, Peace, and Security Study*, *supra* note 56 at 126-127. See also UN Constitutional Assistance Guidance Note (2009), *supra* note 7 at 2 (advocating that “the principle of equality between men and women should be embedded in constitutions.”)¶

⁶⁰ See *Women, Peace, and Security Study*, *supra* note 56 at 111 (para 340), 126 -127. This study was undertaken in response to the UN Security Council Resolution 1325 (2000) on women, peace, and security and to recommend measures for its full implementation.

⁶¹ UN Security Council Resolution 1373, S/Res/1363 (28 September 2001) (“deciding” that states will have to reform domestic laws in many ways including criminalizing the collection of funds to be used in terrorist acts) [emphasis added]; UN Security Council Resolution 1455, S/Res/1455 (17 January 2003); See *e.g.* Constitution of the Islamic Republic of Afghanistan, (2004) Ch. 1 art. 7 (“the state prevents all types of terrorist activities, production and consumption of intoxicants (*muskirat*), production and smuggling of narcotics”) [emphasis added]; Constitution of Iraq, 2005, Section 1(Fundamental Principles), art. 7 (“First: No entity or program, under any name, may adopt racism, *terrorism*, the calling of others infidels, ethnic cleansing, or incite, facilitate, glorify, promote, or justify thereto, especially the Saddamist Baath in Iraq and its symbols, regardless of the name that it adopts. This may not be part of the political pluralism in Iraq. This will be organized by law.”) [emphasis added]. The UN’s Policy Working Group on the UN and Terrorism (UNPWG) recommended that “states should be encouraged to view the implementation of UNSCR 1373 as an instrument of democratic governance and statecraft” and that “model legislation” could be developed and advice provided to member states to “ensure that existing laws designed to fight domestic terrorism are amended in order to ensure their effectiveness against terrorism.” *Ibid.* at *Report of the Policy Working Group on the United Nations and Terrorism*, at Part V (Recommendations) ¶ 14-15 [emphasis added]. [hereinafter UNPWG Report] For other recommendations of the UNPWG focusing on the role of IFIs see *ibid* at III C ¶ 38-41 (Prevention and Resolution of Conflicts); online: <<http://www.globalsecurity.org/security/library/report/2002/un-wrkng-grp-terrorism-denial.htm>>; See generally Kim Lane Schepple, “The Migration of constitutional ideas: the post-9/11 globalization of public law and the international state of emergency” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 347-373; Paul Sasz, “The Security Council Starts Legislating,” (2002) 96 *Am. J. Int’l L.* 901; Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2007); See Vera Gowland, “The Functions of the United Nations Security Council

I.III.4.2 B. Financial Standards

Peace-building involves everything, from disarming armed groups to designing economies, to speeding up foreign investment, to sculpting constitutions, to formulating new national laws and ‘national development frameworks,’ to fighting corruption and promoting “good governance.” As dominant financiers of post-conflict reconstruction⁶² and development assistance, the political economy philosophy underpinning International Financial Institutions’ [IFIs] prescriptive policies or [international financial] “standards,”⁶³ have become an integral (though implicit) part of the UN’s standards for

in the International Legal System”, in Michael Byers (ed.), *The Role of Law in International Politics*, (Oxford: Oxford University Press, 2000), 305 at 307.

⁶² For a good critique of IFIs’ intrusive role in post-conflict reconstruction see Kristen Boon, “Open for Business’: International Financial Institutions, Post-Conflict Economic Reform and the Rule of Law” (2006) 39 *N.Y.U. J. of Int’l L & Politics* 513 (focusing on Iraq, Afghanistan & East-Timor); Jonathan Goodhand, *Conflict Assessments – A Synthesis Report: Kyrgyzstan, Moldova, Nepal, and Sri Lanka* (London: The Conflict Security & Development Group, Center for Defense Studies, King’s College, London, 2001) (arguing that IFIs who have had a strong “signaling effect” in Nepal have set the “framework for development assistance and the hierarchy of priorities” there including the adoption of the market economy model). See also Astri Suhrke et al., *Peace Processes and State-building: Economic and Institutional Provisions of Peace Agreements* (Bergen: Chr. Michelsen Institute, 2007) (surveying a sample of 27 peace agreements since 1989 to analyze their provisions relating to economic recovery and reform and to highlight the role of international aid agencies in their making); John Darby & Roger Mac Ginty, “Introduction: What Peace? What Process?” in John Darby & Roger Mac Ginty eds., *Contemporary Peacemaking – Conflict, Peace Processes, and Post-war Reconstruction* (New York: Palgrave, Macmillan, 2008) 1 at 5 (affirming that neo-liberal economic norms are the pillars supporting Western-backed post-conflict reconstruction programs; “indeed, international reconstruction assistance is usually explicitly linked to an acceptance of World Bank and IMF stipulations”); *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, “Political Economy of Women’s Human Rights,”* A/HRC/11/6, (18 May 2009); David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the magnitude of Neo-liberalism* (2000) 63 *Law & Contemp Problems* 83-109; See generally David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules & Democracy’s Promise* (Cambridge: Cambridge University Press, 2008). For an important role envisioned for IFIs even in the eradication of terrorism see UNPWG Report, *supra* note 61 at Part V (Recommendations), ¶ 17 (“a network involving the United Nations system and the Bretton Woods institutions should be created to help Member States (in particular those needing greater assistance) to implement the recommendations of the Counter-Terrorism Committee”).

⁶³ IFIs here refer to the World Bank, International Monetary Fund (IMF) and the Asian Development Bank (ADB). See Gerrit W. Gong, “Standards of Civilization Today” in Mehdi Mozaffari, eds. *Globalization & Civilization* (London: Routledge, 2002) 77 at 85-94. See generally Gerrit W. Gong, *Standard, The Standard of ‘Civilization’ in International Society* (Oxford: Oxford University Press, 1984); Brett Bowden & Leonard Seabroke eds. *Global Standards of Market Civilization* (London: Routledge, 2006). For a list of Least Developed Countries [LDCs] see <<http://www.un.org/special-rep/ohrlls/ldc/list>>. For criteria of the identification of LDCs see <<http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm>>. See Report of

constitutional content.⁶⁴ The international financial standards for internal reform and restructuring cover the design and implementation of fiscal and monetary policy and institution building. They also include the adoption and application of a market-based capitalist economic system (free market reforms), private property rights coupled with fair judicial mechanisms for their enforcement, liberalization of trade, protection of intellectual property, privatization, and general accounting principles.⁶⁵

Cumulatively, through these standards and the activities that collectively constitute - a pre-designed package of - its (constitutional) assistance, the UN arguably influences, both constitution-making *processes*⁶⁶ and their constitutional *outcomes*. Consequently, UN-assisted constitution-making processes and their resultant constitutions share some common features.⁶⁷

the Special Rapporteur on violence against women, its causes and consequences, “political economy of women’s rights”, A/HRC/11/6 (18 May 2009) at ¶ (arguing that the neoliberal policy environment has undermined women’s rights and created new inequalities).

⁶⁴ See text of pages 22-23 (for a discussion on the involvement of IFIs in framing the national development frameworks); See generally 2005 Paris Declaration on Aid Effectiveness, online: <http://www.adb.org/media/articles/2005/7033_international_community_aid/paris_declaration.pdf> (referring to an emerging international consensus on concepts and approaches to fragile states, many of which apply to post-conflict situations).

⁶⁵ See Gong, “Standards of Civilization Today” in Mozaffari, *Globalization & Civilization*, *supra* note 63, 77 at 86-87, 90-92. See generally “POGAR, Programme on Governance in the Arab region,” online: <www.pogar.org/countries/theme.aspx?t=4&cid=6> (providing detailed information on the UN’s constitutional and parliamentary reform assistance and attendant fiscal reforms in the Arab region such as Iraq, Somalia, and Sudan). For the World Bank’s active role in the reform of bankruptcy law, banking law, tax law, property rights, corporate governance, and financial sector laws see “Law Reform,” online: The World Bank, Law Reform, <<http://go.worldbank.org/X5EBV66IP0>>; “Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learned,” online: The World Bank, Justice Reform in Fragile States, <<http://go.worldbank.org/MB6Z0CUII0>>.

⁶⁶ For the UN’s TIP-standard regarding how to make a constitution see *supra* note 13; *The Government of Rwanda – Poverty Reduction Strategy Paper (PRSP)* (2002) at 58 (“Constitutional Reform: To consult the population in the development of the new constitution).

⁶⁷ For details on this see Vijayashri Sripati, “The Institution of UN Constitutional Assistance” in *United Nations Constitutional Assistance: A Historical and Post-Colonial Perspective* (unpublished dissertation) at Chapter 3.

I.IV.3. UN Constitutional Assistance: Development of Institutional Basis & Strengthening of (UN's) Capacities

The momentum at the policy-making front rippled outward to strengthen the institutional basis for, as well as the UN's capacities in, constitutional assistance. By the time the UN's constitutional assistance policy was worked out and finally endorsed, the UN Peace-building Commission (PBC)⁶⁸ and the Mediation Support Unit (within the Department of Political Affairs - DPA) were created.⁶⁹ The idea that constitutional assistance - though carried out by an array of UN entities⁷⁰ - is a distinct activity which requires for its effective provision, the consolidation of expertise in diverse areas⁷¹ through a focal-point⁷² led to the creation of the Rule of Law Research Group [hereinafter Group] and a Rule of Law unit in 2007.⁷³

⁶⁸ The PBC was established in 2005 as a subsidiary body of the Security Council. See generally online: "Peacebuilding Commission," <<http://www.pbc.org>>

⁶⁹ Interview of Jamal Benomar, *supra* note 43. This development resulted from the 2005 World Summit Outcome wherein UN member states resolved to support the UN's good offices capacity, including in the mediation of disputes. See *World Summit Outcome Document*, UN Gen. Ass. Res. A/RES/60/1 (24 October 2005) at ¶ 76.

⁷⁰ Interview of Jamal Benomar, *supra* note 43. The Department of Political Affairs (DPA), Department of Peacekeeping Operations (DPKO), the UN Development Programme (UNDP) and UNIFEM are other members of the UN family that are involved in constitution-making and/or engaged in providing constitutional assistance. See *Ibid*.

⁷¹ Providing effective constitutional assistance typically requires expertise in political facilitation, legal services, human rights, governance reform and public information. *Ibid.* at interview of Jamal Benomar, *supra* note 43.

⁷² Interview of Jamal Benomar, *supra* note 43.

⁷³ See Interview, *ibid*. See UN Department of Public Information, Deputy Secretary-General DSG/SM/420 GA/L/3345 "United Nations Working to Enhance Delivery of Rule of Law Assistance to Member States, Deputy Secretary-General tells Sixth Committee" (14 October 2008), online: <http://www.un.org/News/Press/docs/2008/dsgsm420.doc.htm>; Veronica Taylor, "UN establishes Rule of Law Unit" (Nov. 4, 2007) in Law and Development Blog, online: <<http://lawprofessors.typepad.com/lawdevelopment/2007/11/un-establishes-.html>>; Executive Office of the Secretary-General, "United Nations Interoffice Memorandum - Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance" (14 April 2008), online: <<http://www.undg.org/docs/9867/SG-memo-on-RoL-Guidance-Note-14Apr08.pdf>> (explaining that the Group was an inter-agency mechanism created as a follow-up to the 2005 World Summit for coordinating system-wide attention on the rule of law and the *Guidance Note* - attached to the interoffice memo- grew from consultations among experienced rule of law specialists in the organization); *Uniting our strengths: Enhancing United Nations support for the rule of law*, Report of the Secretary-General, A/61/636-

The UN's constitutional assistance program received further impetus with the launch of a full-time Standby Team of Mediation Experts in March 2008.⁷⁴ Comprising internationally acclaimed experts in constitution-making, constitutional arrangements and power-sharing, and ceasefires and transitional justice, this team is now at the ready to swoop down into a given conflict-ridden area to help resolve the crisis there.⁷⁵ The idea

S/2006/980, (14 December 2006) at 7, fn. 4 & 16, fn.8 (affirming that the Rule of Law Coordination and Resource Group will “at the request of member states” “coordinate the UN’s constitutional assistance”).

⁷⁴ See UN Press Conference, Dept. of Public Information, “Press Conference to Launch United Nations Standby Team of Mediation Experts” (5 March 2008), online: <http://www.un.org/News/briefings/docs/2008/080305_Pascoe.doc.htm> (reporting that while the program’s initial term was one year, it would be eventually extended); “Top UN Mediation Team now on Call for Crises around the World” (5 Mar. 2008), online: UN News Service <<http://www.un.org/apps/news/story.asp?NewsID=25866&Cr=diplomacy&Cr1>>. For a description of the professional duties of the UN Standby Team Members, see “Deadline: Senior Mediation Experts UN DPA/MSU” (Closing date: 30 September 2007) online: <<http://peacemakers.ca.etherwork.net/bulletins/?p=651>>:

“We are seeking a team leader to ... draft or participate in the drafting of relevant necessary documents, including peace agreements;

We are seeking senior mediation experts in:

... constitution-making in the context of comprehensive peace agreements;

Main Role and responsibilities:

The main responsibility of the mediation expert is to assist and support the mediation team, the observers and the parties to the mediation by:

- Providing technical expertise and advice within the area of expertise;
- As necessary and appropriate, participate in the mediation talks and contributing to the drafting of relevant sections of the peace agreements and other documents;.... [emphasis added].

For a brief description of the MSU projects see remarks of Under-Secretary-General, H.E. Ambassador Ibrahim Gambari, Under-Secretary-General for Political Affairs, Summary Note, “Operational Conflict Prevention” (New York: United Nations, September 2006) at 8.

⁷⁵ UN Press Conference, Dept. of Public Information, “Press Conference to Launch United Nations Standby Team of Mediation Experts” (5 March 2008), online: <http://www.un.org/News/briefings/docs/2008/080305_Pascoe.doc.htm>; “Top UN Mediation Team now on Call for Crises around the World” (5 Mar. 2008), online: UN News Service <<http://www.un.org/apps/news/story.asp?NewsID=25866&Cr=diplomacy&Cr1>> (the “UN Mediation Team” in the UN’s Department of Political Affairs comprises the following members Joyce Neu (United States), Jeffrey Mapendere (Zimbabwe), Patrick Gavigan (United States & Ireland) John McGarry (Canada) and Andrew Ladley (New Zealand) and is financed for its first year by the Norwegian government). For major UN documents and/or reports alluding to the UN’s role in constitution-making and constitutional assistance functions by calling for strengthening its mediation and conflict prevention capacities, see UN General Assembly Resolution 57/337 (July 18, 2003) (calling for strengthening the capacity of the UN’s capacity for “early warning, collection of information and analysis”); UN General Assembly Resolution 61/230 (22 December 2006) (recognizing the important role of the good offices of the Secretary-General in Africa and encouraging the Secretary-General to use mediation as often as possible to solve conflicts); Security Council Presidential Statement, S/PRST, Aug. 2007 (spurring the Secretary-

behind this initiative was to have a reserve of experts on call, so political disputes do not erupt into violence, or if violence has already broken out, to manage ceasefire negotiations.

On the human rights front, the endorsement of the UN constitutional assistance policy spurred the creation of “best practices” in constitution-making from a human rights perspective. The Office of the High Commissioner for Human Rights (OHCHR) therefore began work on a “tool” to enhance its capacity (both in the field and at its headquarters) in supporting constitution-making.⁷⁶ To effectively engage other UN agencies in this process and to get input from those both inside and outside of OHCHR⁷⁷ it recently held a seminar on constitution-making.⁷⁸

General to improve the Secretariat’s early warning, mediation support and other preventive activities in Africa and around the world”); Security Council Resolution 1625 (2005) (calling upon the Secretary-General to assist countries at risk of armed conflict in performing strategic conflict risk assessments, in implementing the measures agreed by the concerned countries, in enhancing national dispute management capacities and in addressing the root causes of armed conflict); *Brahimi Report*, *supra* note 36 at ¶137 ; UN General Assembly Resolution, 60/1, World Summit of 2005 (renewing the international community’s commitment to a “culture of conflict prevention” and pledge to strengthen the capacity of the UN for the prevention of armed conflict); Report of the Secretary-General, *Proposed Programme Budget for the biennium 2008-09*, A/62/521(2 November 2007).

⁷⁶ See OHCHR, “High Commissioner’s Strategic Management Plan 2008-2009,” online:

< <http://www.ohchr.org/Documents/Press/SMP2008-2009.pdf> > which states as follows:

Also, in carrying out the role assigned to OHCHR pursuant to the 2007 UN Policy Committee decision on constitutional reform, the Office will follow up on its 2007 mapping of the UN system’s expertise in human rights and constitution-making. A tool will be prepared with the objective of contributing to strengthening UN capacity in this area. *Ibid.* at 40 (Part 2).

As of now, the OHCHR has compiled a set of documents and texts as reference and analytical guides for constitution-making, revising/drafting national legislation and strategies to consolidate human rights and democratic foundations. See OHCHR, “Democracy and Human Rights” in *Democracy and the UN* at 3, online: <http://www.unis.unvienna.org/pdf/Democracy_Human_Rights_2008.pdf>; See generally OHCHR, *Rule-of-Law Tools for Post-Conflict States – Mapping the Justice Sector* (New York: UN, OHCHR, July 2006)]; Report of the Secretary-General, *Strengthening of the Rule of Law*, A/51/555, 25 October 1996 at para 3 (a) – (c) (explaining how the OHCHR assists in constitution-making).

⁷⁷ See Robert Husbands, Rule of Law & Democracy Unit, OHCHR, Geneva, email dated January 26, 2009. This short publication is expected to provide guidance to staff of OHCHR, and potentially others who are interested in providing assistance about the human rights aspects of constitutional issues and about how

Part II

IV. Constitutional Assistance as a part of “Developmental Assistance”:

But perhaps what is not widely known and not alluded to in the UN’s guidance note is that, today the UN also offers constitutional assistance as part of its “development assistance” under the wider “democratic governance” framework.⁷⁹ In fact, as the account below shows, it slips such assistance into its wider development assistance and thereby avoids treading the inflammatory path of discounting (national) sovereignty and instead

they might wish to undertake technical assistance in this area when new constitutions are drafted or an existing constitution is amended. *Ibid.*

⁷⁸ See OHCHR, “Seminar to reinforce OHCHR’s capacity to provide constitutional assistance to states,” Geneva, Switzerland, (December 10-11, 2008) [on file with the author]. Plans are afoot to hold a second seminar towards the end of 2009 where the draft publication – to be developed by a consultant – will be reviewed and commented upon before it is finally released. See Robert Husbands email, *supra* note 77.

⁷⁹ Interview of Jamal Benomar, *supra* note 43. See generally UNDP, “Governance for Sustainable Human Development – A UNDP Policy Document” (1997), online: UNDP POGAR Democratic Governance <<http://www.pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf>>; Gita Welch and Zahra Nuru, “UNDP - Governance for the Future: Democracy and Development in the Least Developed Countries,” online: UNDP Democratic Governance <<http://www.undp.org/governance/>>; Mapping of Democratic Governance Projects that Support MDG Achievement, online: www.undp.org/oslocentre/docs09/Annex.xls [visited August 24, 2009]; The Constitution and its Relationship to the Legislature, online: UNDP <www.undp.org/governance/docs/Parl-Pub-constitution.htm> (listing UNDP constitution reform activities in Ecuador, Eritrea, Guyana and Tulealeu); Noha El-Mikawy, *Democratic Governance Services: MDGs and Gender* (Cairo, Egypt, 2005), online: <www.c2015as-ihl.org/files/cairo_july05_elmikawy_gender_governance.swf>:

Slide 4 states:

Policy Support Provided under the Democratic Governance Practice Area:

Participatory Democratic Reform:

- Electoral processes and electoral bodies

Slide 7 states:

How Do We Do It:

Providing Assistance With:

- Legal Framework (e.g. constitutional reform, Iraq, Sudan)
.... [bold font in the original has been removed]

For an account of how the post-World War II conception of “development” amounts to a continuation of colonial policies see “Helna Norberg-Hedge” in Nermeen Shaikh, ed., *The Present as History: Critical Perspectives on Global Power* (New York: Columbia University Press, 2008) 17 at 17.

works in lockstep with it. And the UNDP is emerging as the key player⁸⁰ in this regard.

It has provided constitutional assistance to the following countries: Bhutan, Democratic

⁸⁰ Interview of Jamal Benomar, *supra* note 43. See e.g. Nicholas Rosellini, UN Resident Coordinator, Good Governance and Democracy, (October 15, 2007) online: <www.undp.org/bt/governance/docs/RC_on_grad07.ppt>.

UN's Role in Democratic Governance

- Supporting the rule of law
- Support public administration reform
- Build capacities of democratic institutions like the election commissions, anti-corruption commissions.
- Helps countries strengthen their electoral and legislative systems
- Improve access to justice, public administration
- Promotes human rights
- Promotes participation and accountability

Ibid. at Slide 10.

What can the UN do to promote democratic governance?

- *Capacity development of constitutional bodies*
- Strengthening local governance through decentralization
- Access to information through promotion of e-governance
- Civil society and media
- Civic participation

Ibid. at slide 17 [emphasis added]

Ensuring Credible and Quality Support to National Partners - The Practice Architecture, Bureau for Development Policy (BDP) (21 October 2008) online: <europeandcis.undp.org/uploads/public1/files/Regina...>:

UNDP devotes the largest share of its resources – 40 percent or approximately US\$1.5 billion each year – to making democratic governance deliver for the poor. This positions UNDP as one of the largest providers of democratic governance technical assistance in the world; we support an election somewhere in the world on average every two weeks and support one in every three parliaments around the world. We are often –doing extraordinary things behind the scenes such as supporting the first free elections in the Democratic Republic of Congo in over 40 years or helping Nepal to craft its new constitution. Ibid. [emphasis added]

UNDP, UNDP Democratic Governance Thematic Trust Fund, (undated), at 17-18 online: <<http://www.undp.org>> (stating that the UNDP supports “broad-based and participatory constitutional reviews and reforms” through the Democratic Governance Thematic Trust Fund [DGTF]); “The Constitution and its relationship to the Legislature” (citing examples of “UNDP Constitutional Reform Activities” in Columbia, Ecuador, Eritrea, Guyana and Tokelau): online, UNDP Publications, <<http://www.pogar.org/publications/other/undp/legis/constitutionpdf>>; Bengt Save-Soderbergh & Izumi N. Lennartsson, “Electoral Assistance and democratization” in Hampson & Malone, *From Reaction to Conflict Prevention*, *infra* note 107, 357 at 361 (describing the democracy assistance provided by lower profile UN political offices with flexible mandates and which work closely with the UNDP’s UN Resident Coordinator and which “may thus have closer links with ‘good governance’ assistance”); Analysis of UNDP Elections Survey, (undated) online: <www.iknowpolitics.org/files/Analysis%20of%20UNDP%20Election%20Survey.doc> (a survey

Republic of Congo (DRC), Ecuador, Eritrea, Gambia, Guyana, Malawi, Maldives, Nauru,⁸¹ Solomon Islands, Tokelau⁸², and Zambia.

Under this paradigm, the UN offers constitutional assistance as a “long-term” conflict-prevention measure where the idea is that socio-economic development has the powerful potential to prevent (armed) conflict and sustain peace.⁸³ For instance, the UN

conducted in 2006 documenting the electoral assistance provided by the UNDP in various countries); UN Electoral Assistance – A System-Wide Endeavour, online: <http://www.un.org/Depts/dpa/french/electoral_assistance/ea_content/ea_un_system.htm> (stating:

Within the United Nations system, and in close consultation with the Electoral Assistance Division, UNDP plays an important role in providing technical support and assistance to electoral processes. *It engages with the countries in long-term capacity building and institutional building of the electoral bodies between elections. It plays a key role in aid coordination and in coordination of electoral assistance at election time. When United Nations electoral assistance is provided to a country, UNDP's Country Office plays the role of central support system of the UN system for such an undertaking. UNDP electoral assistance projects are executed using the array of modalities of execution currently available (DESA and OPS execution, national execution, execution by other agencies, etc.).* [emphasis added]

⁸¹ Nauru and Solomon Islands are island countries of the Pacific. The other island countries of this region are Australia, Fiji, Kiribati, Marshall Islands, Micronesia, New Zealand, Palau, Papua New Guinea, Samoa, Tonga, Tuvalu, and Vanuata.

⁸² See UNDP, Democratic Governance Factsheet, “People-centered Development,” online: UNDP Multi-country Office Samoa, <<http://www.undp.org.ws/OurWork/DemocraticGovernance/tabid/2039/language/en-US/Default.aspx>> (“For Tokelau, an e-government project covering all telecommunications is linked to an overall good governance programme including drafting the constitution, strengthening the legal framework, training local authorities, and gender mainstreaming”); UNDP, “Focus Area – Democratic Governance,” online: UNDP Multi-country Office Samoa, “Focus Area – Democratic Governance,” <<http://www.undp.org.ws/OurWork/DemocraticGovernance/tabid/2039/language/en-US/Default.aspx>>. (stating that the UNDP’s democratic governance program in Tokelau included support in drafting the constitution, strengthening of the justice system and assisting Tokelau in holding wide consultations on the meaning of self-determination and decolonization); Tokelau, “Country Background,” online: UNDP Multi-country Office Samoa, <<http://www.undp.org.ws/OurWork/CountryProgramme/Tokelau/tabid/937/language/en-US/Default.aspx>> (“Tokelauans are drafting a constitution and developing institutions and patterns of self-government as Tokelau moves toward free association with New Zealand).

⁸³ Within the UN family, the UNDP adopted a conflict prevention strategy in November 2000 devoting 20 per cent of its track 3 funding for “preventive and curative activities.” See *Role of UNDP in Crisis and post-conflict situations*, D/P/2001/14, (November 2000) at ¶ 58, ¶4-15 (underscoring its commitment to link its development work to conflict prevention), ¶ 39 (underscoring its commitment to promote the rule of law since “violent conflict often arises when respect for the rule of law breaks down as a result of unsound

resident coordinator⁸⁴ is expected to view humanitarian and development work through a “conflict-prevention” lens and make long-term (conflict) prevention a key focus of her work – a notion found appealing and consequently blessed by the Brahimi panel.⁸⁵ In this context, the resident coordinator can identify the need for long-term conflict-prevention measures such as gender-responsive constitutional reforms and could propose them to the government.

Indeed, the UN’s increasing involvement in constitution-making can be traced to “the expectations that countries have of it to deliver on” its (twenty-first century) “global commitments” in the development landscape.⁸⁶ For instance, UN country teams

or ineffective legal or constitutional systems”); UNDP Democratic Governance Group & Bureau for Development Policy, *Elections and Conflict Prevention – A Guide to Analysis, Planning and Programming* (undated) online: “UNDP Oslo Governance Center,” <<http://www.undp.org/oslocentre/>>

⁸⁴ UN resident coordinators are senior UN official cum designated representatives of the Secretary-General for developmental activities. See also Report of the Secretary-General, *Prevention of Armed Conflict*, A/55/985 (7 June 2001) at ¶ 99 (arguing that developmental assistance by itself cannot prevent or end conflict but it can however, “facilitate the creation of opportunities and the political, economic, and social spaces within which indigenous actors can identify, develop and use the resources necessary to build a peaceful, just, and equitable society”); Report of the Secretary-General, *Progress Report on the Prevention of Armed Conflict*, A/60/891 (18 July 2006) at ¶ 93 (reporting that UN resident coordinators are “routinely invited” to address the UN Secretary-General’s Policy Committee on Peace and Security on long-term prevention issues and specific situations).

⁸⁵ See Brahimi Report, *supra* note 36 at ¶ 30.

⁸⁶ See United Nations, “Common Country Assessment and UN Development Assistance Framework: Guidelines for UN Country Teams on Preparing a CCA and UNDAF” (February 2009) at 2 online: <www.undg.org/.../CCA-and-UNDAF-Guidelines-FINAL-February-2009> [*Hereinafter* UNDAF-Preparation Guidelines]; For long-term conflict prevention strategies of the UN see The Millennium Report of the Secretary-General of March 2000, the Brahimi Report, *supra* note 36 at ¶30. For a detailed analysis of the UN’s approach to long-term conflict prevention see Ralf Bredel, *Long Term Conflict Prevention and Industrial Development* (Leiden: Martinus Nijhoff, 2003) at 75-85; See also UN General Assembly Resolution 44/211, (22 December 1989), online: General Assembly <<http://www.un.org/Depts/dhl/res/resa44.htm>> (reaffirming NEX or the “national execution” principle, namely that “the operational activities of the UN system are carried out for the benefit of the developing countries, at the request of those countries, and in accordance with their own policies and priorities for development”)[emphasis added]; UN General Assembly Resolution 47/199 (22 December 1992) online: General Assembly <<http://daccessdds.un.org/doc/UNDOC/GEN/N93/276/41/IMG/N9327641.pdf?OpenElement>> (reiterating that “national execution should be the norm for programmes and projects supported by the UN system, taking into account the needs and capacities of recipient countries”); “National Execution: Promises and Challenges – Chapter II,” online: <<http://www.undp.org/eo/documents/nec2.htm>> (citing to UNDP Governing Council decision 93/25, 17 June 1993 which encouraged “greater use of UN specialized

(UNCTs)⁸⁷ are primarily engaged in assisting governments to coin and shape their priorities in tune with their (governments') international commitments and international human rights obligations.⁸⁸ In short, UNCTs prepare UNDAFs solely to assist countries strengthen their "capacity" in all spheres.⁸⁹ In this regard, a significant "opportunity" that "exists to place them (UNCTs) in a more strategic and influential position in a country's (national) development context"⁹⁰ - is when "*major changes in government (of that country) are expected, for instance, through elections or a new constitution.*"⁹¹ The UN's constitutional assistance is thus deemed to be the essential link in a country's

agencies in the design, technical appraisal and backstopping of nationally executed projects"); UNDP, "Procedures for National Execution, 1998," online: <<http://www.bi.undp.org/documents/NEX%20Procedures%20Manual.pdf>>.

⁸⁷ UNCTs refer to the UN agencies, funds, and programmes working in a particular country, both resident and non-resident under the leadership of the UN Resident Coordinator.

⁸⁸ This constitutes the UN Development Assistance Framework or UNDAF. See "What is UNDAF?" online: Human Rights in Development <<http://www.unhchr.ch/development/mainstreaming-04.html>>:

UNDAF stands for the United Nations Development Assistance Framework, a common program and resource framework for UN development agencies and programmes including, first and foremost the UN Development Group. Its purpose is to maximize the development impact of United Nations assistance by introducing goal-oriented collaboration in response to national development priorities, and to enhance coordination among individual programmes.

⁸⁹ See *UNDAF-preparation Guidelines*, *supra* note 86 at 4. "Capacity is defined as the ability of people, organizations and society as a whole to manage their affairs successfully. Capacity development: the process whereby by people, organizations and society as a whole unleash, strengthen, create, adapt and maintain capacity over time." *Ibid.* at 4, n.5. Preparation of the UNDAF is "mandatory" for the UN Country Team unless the country is emerging from a crisis situation, in which case, the UN contribution may be to support a post-conflict needs assessment (PCNA). *Ibid.* at 6. See "UN Transitional Strategy Guidance Note" (2005), online: <www.undg.org/archive_docs/7388-UN_Transitional_Strategy_Guidance_Note_-_DRAFT.doc>. Clearly, constitutional assistance constitutes a component of the UN's wider development assistance and is thus not restricted to only post-conflict situations.

⁹⁰ See "Annex I," in *UNDAF-preparation Guidelines*, *supra* note 86 at 47.

⁹¹ See "Annex I," in *UNDAF-Preparation Guidelines*, *supra* note 86 at 48 [emphasis added]; Annex 1 titled "Potential Support by the UN system to enhance National Capacities for Development: A Mapping of Illustrative Activities," in United Nations Development Group, "Enhancing the UN's Contribution to National Capacity Development - A UNDG Position Statement" (2006) at 11 & 13, online: United Nations Development Group <<http://www.undg.org/docs/7144/UNDG-Position-Paper-on-CD---FINAL-sent-out-21-Dec-2006.pdf>> [*Hereinafter* UNDG Position Statement]; See generally "UN Reform: Harmonization and Alignment to Achieve the Millennium Development Goals" (2005), online: <<http://www.un-kenya.org/UNReform.pdf>>.

development-process chain.⁹² The idea is that meeting a country's development challenges requires harnessing and strengthening its capacities in governance and political accountability - tasks for which the UN/UNDP - "a trusted partner" - is "uniquely placed" to help accomplish.⁹³ Such assistance is also expected to promote and protect human rights in the country concerned - an essential pre-requisite to realize the UN Charter ideals.⁹⁴

⁹² See e.g. "Role of the UN Malawi in a Changing Aid Environment – A Position Paper by the UN Country Team" (2006) at 6 online: < http://www.undg.org/archive_docs/9277-Role_of_the_UN_Malawi_in_a_changing_aid_environment.pdf > [Hereinafter *UN in Malawi: A Country Team Paper*]

The UN is fully aware of the need and scope for harnessing and strengthening of capacities, in public financial, human resource, results based management and monitoring and evaluation. ...

The UN is uniquely placed to strengthen capacities in governance and political accountability. ...

⁹³ UN in Malawi: A Country Team Paper, see *ibid*:

The UN's normative responsibilities and role as a trusted partner have led to, among other things, support in establishing constitutional and human rights bodies, designing and implementing the country's decentralization programme and support on sensitive issues including elections, governance and political accountability, media freedom and access to information. *Id.* [emphasis added]. *Ibid.*

UN Support to Government

Specific areas of support that the UN can provide include:

Implementation support, as part of overall capacity development efforts, including in sensitive areas such as procurement, elections and political governance; where surge capacity is required; and management of pooled funding mechanisms in situations where the beneficiary has yet to develop the capacity to manage and account for resources. *Ibid.* at 8. [emphasis added but bold font is in the original]

See UN Secretary-General, Millennium Report, A/54/2000:

Every step taken towards reducing poverty and achieving broad-based economic growth is a step toward conflict prevention. In many cases of internal conflict, poverty is coupled with sharp ethnic or religious cleavages, in which minority rights are insufficiently respected and the institutions of government are insufficiently inclusive. Long term preventive strategies in such instances must therefore work "to promote human rights, to protect minority rights and to institute political arrangements in which all groups are represented. ...Every group needs to become convinced that the state belongs to all people. *Ibid.* at 45.

⁹⁴ *Ibid.* See "Human Rights-Based Reviews of UNDP Programmes - Working Guidelines" (June 2003), online: < www.hurilink.org/tools/HRBAreviews_of_UNDP_Programmes_WorkingGuidelines03.pdf >- [*UNDP Programmes Human Rights Guidelines*]

Furthermore, UNCTs are urged to use the “unique opportunity of strategic importance” provided by Poverty Support Reduction Processes [PSRPs] by supporting the interventions therein.⁹⁵ As we have seen in the paragraph above, a UNDAF process - and by extension, a country’s constitution-making process - offers a “key entry point” to the UNDP to provide its “capacities” (i.e., constitutional assistance).⁹⁶ Given that the UNDP now uses the human rights conceptual framework for development⁹⁷ and poverty reduction and the IFIs are no longer confined to the economic realm and are actively engaged in health, education, governance, corruption, human rights and civil society partnership, constitution-making moments are times where the philosophies and the core goals (development and human rights) of the UNDP and IFIs broadly converge - and in fact, are encouraged to do so.⁹⁸

⁹⁵ See *UNDAF-Preparation Guidelines*, *supra* note 86 at 10; UNDG, “Guidance Note - UN Country Team Engagement in PRSPs” (December 2003), online: <www.undg.org/archive_docs/3533-2nd_PRSP_Guidance_Note_-_2nd_Guidance_Note.doc> [Engagement in PRSPs – Guidance Note]; Tim Jones & Peter Hardstaff, *Denying Democracy - How the IMF and World Bank take Power from People* (London: World Development Movement, 2005) at 6 (disclosing that following decades of protests and criticism over its structural adjustment credits and policies the World Bank renamed its various structural adjustment credits as “Poverty Reduction Support Credits” (PRSPs))[Hereinafter *Denying Democracy*]; “Poverty Reduction Strategy Papers (PRSPs): A Rough Guide” (2003), online: Bretton Woods Project <<http://www.brettonwoodsproject.org/topic/adjustment/PRSP%20rough%20guide/PRSP%20rough%20guide.pdf>> (stating that the IMF and the World Bank have “renamed” their lending facilities for poorer countries); IMF Factsheet, “Poverty Reduction and Growth Facility,” online: <<http://www.imf.org/external/np/exr/facts/prgf.htm>>.

⁹⁶ See *UNDAF-Preparation Guidelines*, *supra* note 86; *UNDG Position Statement*, *supra* note 91 at 4-5 11 & 13 (Annex 1 “Potential Support by the UN system to enhance National Capacities for Development: A Mapping of Illustrative Activities,”); Bengt Save-Soderbergh & Izumi N. Lennartsson, “Electoral Assistance and Democratization” in Hampson & Malone, *From Reaction to Conflict Prevention*, *infra* note 107, 357 at 361 (describing the democracy assistance provided by lower profile UN political offices with flexible mandates and which work closely with the UNDP’s UN Resident Coordinator and “may thus have closer links with ‘good governance’ assistance”). “Needs Assessments in the area of Constitutional Law: the Role of CCA/UNDAF processes,” was one of the topics on the agenda of the OHCHR Seminar on Constitution-Making, *infra* note 104.

⁹⁷ See *UNDP Programmes Human Rights Guidelines*, *supra* note 94; “The Application of a Human Rights-Based Approach to Development Programming - What is the Added Value?,” online: <http://www.undp.org/governance/docs/HR_Pub_AddedValue.pdf>; “Human Rights-based Approach to Development Programming in UNDP - Adding the Missing Link,” online: <http://www.undp.org/governance/docs/HR_Pub_Missinglink.pdf>

⁹⁸ See *UNDAF-Preparation Guidelines*, *supra* note 86 at 10; Jones & Hardstaff, *Denying Democracy*, *supra* note 95 at 6; *UN in Malawi - A Country Team Paper*, *supra* note 95 at 9 states:

Thus, the UNDP's constitutional assistance may result either from its initiation of constitutional reform or when it targets an ongoing constitution-making process to apply its leverage. Epitomizing the idea that sustainable development hangs on crisis prevention, the Bureau of Crisis Prevention and Recovery (BCPR) – “the most influential Bureau in UNDP on matters related to Rule of Law and constitutionalism” provides another thrust to UNDP's fast widening role in constitutional assistance.⁹⁹ Its focus on

Many donor organizations have locally resident international policy advisors and technical experts who among other things hope to influence the thinking and activities of government counterparts and other partners. ... Some donors would prefer to be able to rely upon multilateral organizations such as the UN and the World Bank to engage with Government on priority policy issues...

The World Bank is both a major donor and a member of the UN extended family. Given the scale of the challenges facing Malawi, the need for partnership between the two bodies is obvious, and the scope is wide, particularly in the social sectors, capacity development and implementation support. [emphasis added].

For definition of “capacity development” and “implementation support” see text of *supra* footnote 89; *Engagement in PRSPs – Guidance Note*, *supra* note 95 (containing Joint Letter Signed by Mr. Sherman Zhang, Managing Director of the World Bank and Mr. Mark Malloch Brown, Chair of the United Nations Development Group, to UN Resident Coordinators and World Bank Country Directors (May 5, 2003)) online: <www.undp.or.id/mdg/documents/Guidance%20for%20UNCT%20in%20PRSP.pdf> stating:

We are very pleased to see that the working partnership between the UN Resident Coordinators (along with the other members of the UNCT), and the World Bank Country Directors and/or Resident Representatives, has improved significantly in recent years. It is obvious that the impact of the World Bank and the UN Agencies in support of poverty reduction is maximized when their efforts complement each other.

... Indeed, we are seeing very positive results when the World Bank and UN Agencies work closely together in jointly supporting the PRSP process and building national capacity to monitor MDG programs.

In a “post-conflict” context PRSPs or UNDAF processes are strategic frameworks for peace-building and are in short, “post-conflict development tools.” See e.g. Vincent Kayijuka, “Strategic Framework for Peace-building in Burundi - Highlights and key Lessons Learned” Tokyo, (25 July 2008), online: Ministry of Foreign Affairs of Japan <<http://www.mofa.go.jp/policy/un/pko/seminar0807/burundi.pdf>>: (SLIDES)

Purpose of the Strategic Framework:

It is the tool for bringing together the Government of Burundi and its partners – both national and international – around a shared set of peace-building objectives. Ibid. at slide 6.

⁹⁹ Interview of Mr. Sudarshan, Policy Advisor - Legal Reform and Justice, UNDP Regional Center in Bangkok, Thailand by V. Sripathi (March 21 & April 28, 2009). See e.g. United Nations Development Programme Bureau for Crisis Prevention and Recovery (BCPR) Bureau Strategy 2007-2011 (January

putting in place institutions and systems of a durable nature, following breakdowns places it in the centre of national constitution-making efforts.¹⁰⁰

Part III

V. The UN Democracy Fund (UNDEF)

The recent creation of the UNDEF¹⁰¹ to support “democratic dialogue” and “constitutional support” projects¹⁰² attests to the heightened attention constitutional assistance has received as a conflict-prevention and democracy-promotion tool. A

2007) at 3, 18-19, online:< <http://europeandcis.undp.org/home/show/47C5775A-F203-1EE9-BBAC96CECB11142>> (arguing that its “prevention interventions” are aimed at strengthening conflict prevention institutions and for this purpose lists facilitating national dialogue, supporting the design of constitutional processes, capacity building for ensuring constitutional, electoral and judicial reforms as its proposed “outcomes”); UNDP, Bureau for Conflict Prevention, *NHDR Thematic Guidance Note* (August 2004).

¹⁰⁰ Ibid. Its mandate is to work on 'early recovery and development' in post-conflict situations. Ibid. See generally online: UNDP Crisis Prevention and Recovery, <http://www.undp.org/cpr/we_are/we_are.shtml>. As one of UNDP's “key partners,” the World Bank engages actively with it on key post-construction tasks. Ibid. at online: “Our Partners,” UNDP Crisis Prevention and Recovery, <http://www.undp.org/cpr/we_are/we_are.shtml>.

¹⁰¹ The key UN actors offering constitutional assistance include the Department of Public Affairs (UNDPA), the UNDP, UNIFEM, Office of the UN High Commissioner for Human Rights (OHCHR), the Department of Economic and Social Affairs (DESA), the Department of Peacekeeping Operations (DPKO) and the Peace-Building Support Office (PBSO). To ensure that it [UNDEF] works in lockstep with them, representatives from the DPA, DPKO, OHCHR, UNDP and UNIFEM) sit on the Policy Committee Group, one of UNDEF's principal lobbying arms.

¹⁰² The former UN Secretary-General, Mr. Kofi Annan announced the creation of UNDEF as a UN General Trust Fund at the African Union Summit in 2005. Its three main organs are the Advisory Board, the Programme Consultative Group (PCG) and the Office of the UN Democracy Fund. The Advisory Board comprising 19 members (13 member states, four personal representatives of the Secretary-General and two representatives of non-governmental organizations) offers policy guidance to the Secretary-General on the Fund's activities and funding guidelines. The Secretary-General approves all funding proposals on the basis of recommendations received from the Advisory Board. The UNDEF has six principal objectives and the remaining five are: civil society empowerment, civic education, voter registration and strengthening of political parties, human rights and fundamental freedoms, citizen's access to information and accountability, transparency and integrity. See UNDEF, “UNDEF Programme Framework” (2006) at 8 online: UN Democracy Fund < <http://www.un.org/democracyfund/XProgrammeFramework.htm>> As of December 31, 2006, UNDEF has funded 32 projects in the program area of “democratic dialogue and constitutional processes.” Ibid. at Annex II, UN General Assembly, *United Nations Office for Partnerships: Report of the Secretary-General*, (10 August 2007), A/62/220 online: UNHCR Refworld <<http://www.unhcr.org/refworld/docid/48abd5990.html>>. For a complete list of projects funded through the UNDEF by programme area, see *ibid.*

majority of the constitution support projects approved by this fund are implemented by the UNDP, underscoring its dominance in this field.¹⁰³

VI. Conferences and workshops on Constitution-Making

Yet another instance of the fundamental and high-level public international policy level-attention that constitutional assistance has received is the spate of conferences and workshops organized to discuss it.¹⁰⁴ Their thrust has been to affirm the indispensability of the UN's constitutional assistance but to reject the one-size-fits-all type of assistance and instead advocate its adaptation to suit different national needs. For instance, the "Vienna Declaration on Building Trust in Government" [hereinafter Vienna Declaration] adopted at the 7th Global Forum on Reinventing Government in 2007¹⁰⁵ affirmed that in post-conflict societies:

¹⁰³ See UNDEF Short-Listed Proposals (document on file with the author).

¹⁰⁴ See e.g. "Seminar to reinforce OHCHR's capacity to provide constitutional assistance to states," 10-11 December 2008, Geneva, Switzerland (organized by the OHCHR)(agenda on file); Public Seminar on "Challenges Ahead for United Nations Peace builders: Lessons from the Field and the New UN Peacebuilding Architecture," UN House, Tokyo, (July 25, 2008) online: Ministry of Foreign Affairs of Japan, <http://www.mofa.go.jp/policy/un/pko/seminar0807/index.html>>(co-organized by the United Nations Peace building Support Office (PBSO), the Hiroshima Peace builders Center (HPC), the United Nations University (UNU), and the Ministry of Foreign Affairs of Japan (MOFA)); "7th Global Forum on Reinventing Government: Building Trust in Government," Vienna, Austria (26 – 29 June 2007) online: UN Public Administration Programme, <<http://www.unpan.org/DPADM/GlobalForum/7thGlobalForum/tabid/601/Default.aspx>>; "Aide Memoire" "Governance Challenges in Crisis and Post-Crisis Countries" at 1 online: <<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN022878.pdf>> (listing "constitution-making" as the theme of one of the workshops to be held as a follow-up to the Forum's plenary session). The ubiquity of UN jobs for constitution-making experts and/or constitution support managers also attests to the increasing responsibilities the UN is undertaking in supporting constitution-making and the policy attention constitutional assistance has received.

¹⁰⁵See "7th Global Forum on Reinventing Government: Building Trust in Government" (26 – 29 June 2007) Vienna, Austria, online: UN Public Administration Programme, <<http://www.unpan.org/DPADM/GlobalForum/7thGlobalForum/tabid/601/Default.aspx>>; "Aide Memoire," "Governance Challenges in Crisis and Post-Crisis Countries," 7th Global Forum on Reinventing Government: Building Trust in Government, Vienna, Austria (26 – 29 June 2007) at 1 online: <<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN022878.pdf>>. The Global Forum was first organized by the Government of the United States in 1999. Since then, it has emerged as one of the most significant global events to address government reinvention. Through Resolution A/RES/57/277, the General Assembly requested the United Nations Secretariat to provide support to the Global Forum on Reinventing Government. Ibid.; "Workshop VII Final Report: Governance Challenges in Crisis & Post-

Security sector reform, justice and reconciliation, constitution making, and conflict prevention through redistributive justice need to occur simultaneously and in harmony with one another. While setting up new institutions is extremely demanding, it is even more difficult for them to achieve legitimacy and to function effectively. Within this context, we emphasize that international assistance organizations should tailor their support to the specific needs of each post-conflict country. Support should be granted at each stage of the transition process and should involve all key stakeholders.¹⁰⁶

VII. Conclusion

Today, far from ending its involvement in constitution-making, the UN declares constitutional assistance as a *conflict prevention* mechanism and thus its “core

Conflict Countries,” 7th Global Forum on Reinventing Government: Building Trust in Government, Vienna, Austria (26 – 29 June 2007), online: UN Public Administration Programme, <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan027842.pdf>>. For insights into the explicit and implicit linkages between IFIs and post-conflict reconstruction see Dennis Rondinelli, “Restoring Governance in Post-conflict Countries: Challenges of International Assistance,” Capacity Development Workshop VII, 7th Global Forum on Reinventing Government: Building Trust in Government, Vienna, Austria (26 – 29 June 2007), online: <<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN025512.pdf>>. For a candid assessment of the UN’s constitutional assistance in Afghanistan see Lakhder Brahimi, “State-Building in Crisis and Post-Conflict Countries,” 7th Global Forum on Reinventing Government Building Trust in Government” Vienna, Austria (26-29 June 2007), at 12, 16-17 online: <<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN026305.pdf>>; UNDESA & UNDP, “The Challenges of Restoring Governance in Crisis and Post-Conflict Countries” – 7th Global Forum on Reinventing Government Building Trust 26-29 June 2007, Vienna, Austria (New York: United Nations, 2007) at 39-48 online: <<http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN025512.pdf>> (identifying the diversity of constitution-making tasks and the challenges of strengthening constitutional government)

¹⁰⁶ See “The Vienna Declaration on Building Trust in Government,” “7th Global Forum on Reinventing Government: Building Trust in Government” (26-29 June 2007), online: UN Public Administration Programme <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026677.pdf>>; Report of the Secretary-General, Public Administration and Development, A/62/283, (21 August 2007) at Annex II (Vienna Declaration). For a full report on the 7th Global Forum on Reinventing Government see *ibid* at ¶ 26-36.

activity.”¹⁰⁷ Indeed, it is poised to increasingly support constitution-making in the future,¹⁰⁸ though the DPA remains vastly cash-strapped to carry out its widening responsibilities in this regard.¹⁰⁹ But the most recent call for “further developments” to strengthen the UN’s mediation capacity from a high-level Security Council meeting and the UNDP’s widening role in supporting constitution-making evidences that *internationalization* of conflict prevention, and by extension, constitution-making - as a means of strengthening peace and security - has come to stay.¹¹⁰

¹⁰⁷ See The Secretary-General, *Report of the Secretary-General, Progress Report on the Prevention of Armed Conflict*, A/60/891 (18 July 2006) at paras 46-47, 89 & Annex, Section C “Core Prevention activities of the UN System” at 40 & 50 (listing electoral assistance and support to constitution-making processes as (conflict) *prevention* activities). See also The Secretary-General, *Report of the Secretary-General on the implementation of Security Council resolution 1625 (2005) on conflict prevention, particularly in Africa*, S/2008/18, (14 January 2008); Bertrand G. Ramcharan, *Preventive Diplomacy at the UN* (Bloomington: Indiana University Press, (2008) at 164-174 [emphasis in original]; Michael S. Lund, “From Lessons to Action” in Fen Osler Hampson & David Malone eds., *From Reaction to Conflict Prevention: Opportunities for the UN System* (London: Lynne Rienner Publishers, 2002) at 159 & Appendix 7.1 “A Toolbox of Some Preventive Instruments” at 179 (listing constitutional assistance as a preventive instrument) [emphasis added]; Connie Peck, *The United Nations as a Dispute Settlement System – Improving the Mechanisms for the Prevention and Resolution of Conflict* (The Hague: Kluwer Law International, 1996); B. G. Ramcharan, *The International Law and Practice of Early Warning and Preventive Diplomacy: The Emerging Global Watch* (Boston: Martinus Nijhoff Publishers, 1991) at 24-25

¹⁰⁸ See *UN Guidance Constitution-making Note*, *supra* note 7 at 1 (stating that “the Organization is likely to be called upon in the future to assist other countries in their constitution-making processes”).

¹⁰⁹ See e.g. Report of the Secretary-General, *Proposed Programme Budget for the Biennium 2008-09*, A/62/521 (2 November 2007) at paras 2, 6, and 258 (underscoring the chronic “under-resourcing” of the Department of Political Affairs ... (despite) its function “to provide advice on the political dimension of the many existing and emerging global issues including *constitution-making*, responsibility to protect human rights, transitional justice, gender....”) [emphasis added]. For “important concerns” of the Non-Aligned Group and the Third World at the UN’s active involvement in constitution-making, see Attachment to the Letter dated 7 March 2008 from the Permanent Representatives of Antigua and Barbuda and Cuba to the United Nations addressed to the Secretary-General, A/C.5/62/24, (10 March 2008) (containing “proposals for a corrigendum to the report of the Secretary-General as contained in document A/62/521” one of which is to delete para 258).

¹¹⁰ See “Secretary-General, former Top Special Adviser join High-level meeting as security council stresses importance of mediation in peaceful settlement of disputes” (Sept. 23, 2008), online: ReliefWeb <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7JSMM3?OpenDocument>> (reporting that the UN Secretary-General has been called upon to submit a report on this topic). For concept paper for the Security Council meeting on “Mediation and settlement of disputes” (23 September 2008), see online: <<http://www.undemocracy.com/S-2008-590.pdf>>. For reprint of the Security Council Presidential Statement S/PRST/2008/ (23 September 2008), see *ibid.* The following gist of the remarks made by the Croatian Prime Minister at this High-Level Security Council Meeting is interesting:

The nature of contemporary conflict had changed from an “inter-State to intra-State level”, and the United Nations was now facing a different set of expectations and greater demand for its good offices and mediation. Additionally, the Organization was required to deal not only with overcoming tensions between opponents or

This brief essay has established the emergence of the UN's constitutional assistance as a "policy institution," that is, an "established practice."¹¹¹ Indeed, as we have seen, today, the UN offers constitutional assistance to post-conflict countries typically through its peace operations and to others as a component of its "development assistance" under the "democratic governance" framework. And practice has led theory in this regard which according to Dr. Roland Rich "is not unusual in the UN context."¹¹² The above account also disproves the UN's claim that it assists countries write their constitutions only at their request.

belligerents, but also with offering solutions for transitional justice or constitution-writing, and designing mechanisms for wealth-sharing or human rights protections. [see *ibid*].

¹¹¹ "Established practice" is just the 'institution' part of Wilde's definition- and by extension mine - of 'policy institution.' For UNCA to be a 'policy institution' it has to be shown that it [the practice of constitutional assistance] has been put to common policy ends. For a detailed analysis of this theme see Vijayashri Sripati, "UNCA – A Mechanism for Implementing International Law and Policy" in *The Evolution of the UN's Constitutional Assistance: A Post-colonial and TWAIL Perspective* at Chapter 5 (analyzing how UNCA can be understood and is indeed explained by the UN as a device for implementing international law) (in progress).

¹¹² Interview of Dr. Roland Rich, Executive Director, UNDEF by V. Sripati (October 24, 2008). [on file with the author].

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