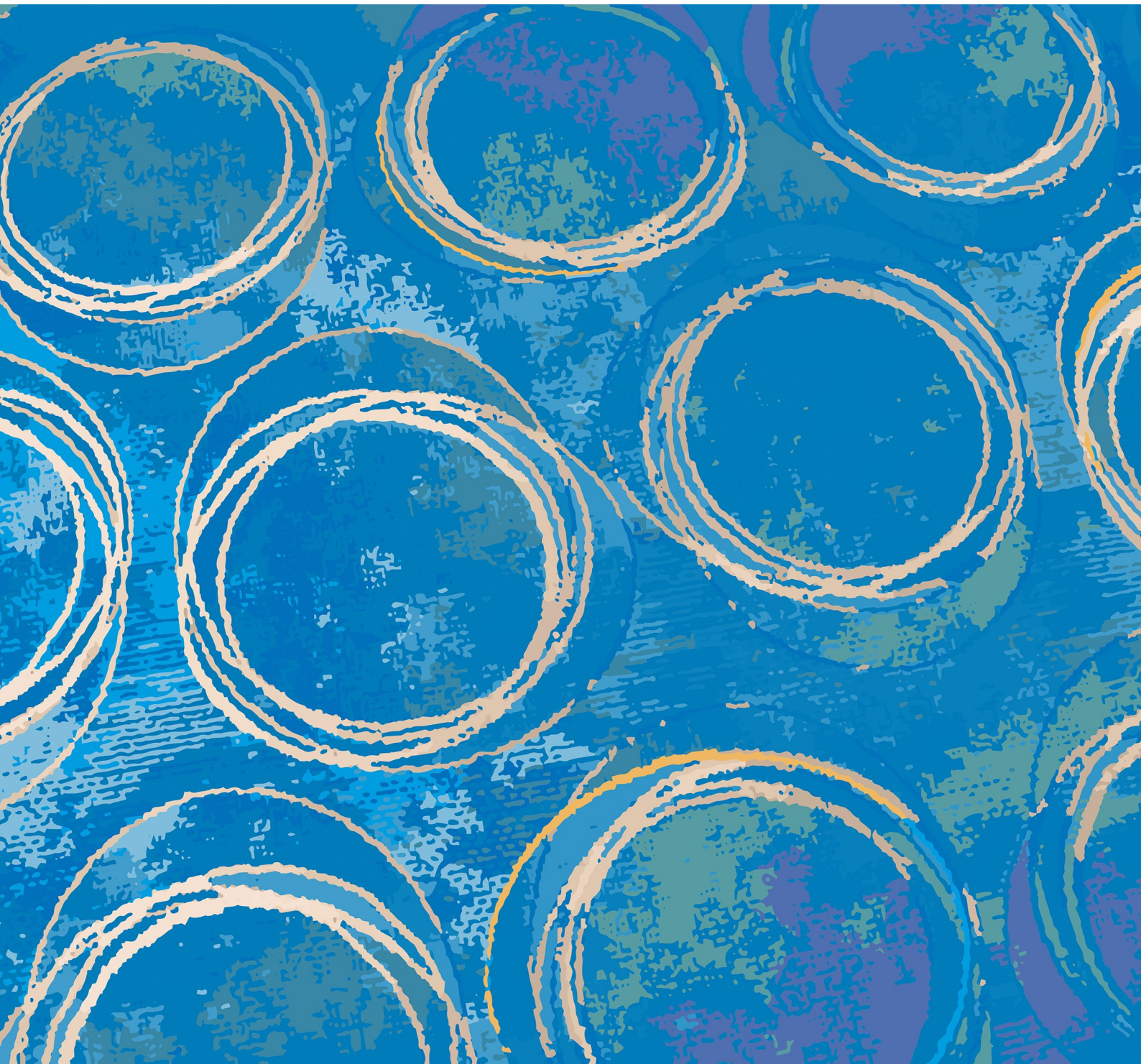




Interactions between Elections and Constitution-Building Processes in Fragile and Conflict-affected States

Fourth Edinburgh Dialogue on Post-Conflict Constitution-Building, 2017





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William Underwood, Sumit Bisarya and Kimana Zulueta-Fülscher

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Summary



On 4–5 December 2017 International IDEA—together with the Edinburgh Centre for Constitutional Law, the Global Justice Academy and the Political Settlements Research Programme at the University of Edinburgh hosted the fourth Edinburgh Dialogue on post-conflict constitution-building. The Edinburgh Dialogue is an annual event that brings together experts and practitioners from the fields of constitution-building, conflict resolution and mediation to advance research on a specific issue in post-conflict constitution-building. The topic of this year’s Edinburgh Dialogue was ‘The Quest for Legitimate Stability: Understanding the Interactions between Elections and Constitutions in Fragile and Conflict-affected State Transitions’.

Key points arising from the 2017 Edinburgh Dialogue included:

1. In many ways, the electoral and constitution-building processes are intertwined as two elements of the overall political settlement process, and crucial elements in the establishment of a new, legitimate political order. Those concerned with the design and structuring of transitional political processes should understand the ways in which electoral and constitutional processes interact in order to maximize the benefits, and minimize the risks.
2. The timing and sequencing of elections in relation to constitution-building in the political settlement process are driven largely by the function of elections (often the legitimization of a decision-making body), as well as by the domestic and international political context.
3. While elections and referendums can bring inclusivity and legitimacy to post-conflict constitution-building, their success depends on a number of factors, including the overall state of the institutional framework (and the extent to which the rule of law might be followed) and their design and general context: poorly designed or badly-timed elections/referendums may have significant negative consequences.
4. An underlying agreement between the key political actors is an essential prerequisite for the successful holding of elections and referendums in a post-conflict context but such an agreement might be the result of an incremental process rather than a one-off agreement. In both cases, elections would ideally play a supporting role regarding the political settlement process but might challenge the political settlement by bringing new majorities to the fore that might not abide by what has previously been agreed.

5. There are myriad ways in which electoral and constitution-building processes positively interact. These include the legitimation of a constituent assembly through elections, the legitimation of the constitution through referendum, the election of separate bodies to focus on governing and constitution-making, and constraining the power of elites within the parameters of popular will.
However, the relationship between electoral and constitution-building processes can also have negative consequences. These may include increasing instability through polarization during election/referendum campaigns and/or through disputes over election results, the eschewal of deliberation and negotiation in favour of majoritarian appeal to referendums or in favour of identity-based political parties, potential instability (in particular in low-security environments, creating competing legitimacies in the scenario of two parallel elected bodies), and the difficulty of finding meaningful representation in contexts where political party structures are weak.
6. International assistance with electoral, constitution-building and peace processes often involves three different epistemological communities. More coordination is needed between these three communities that should envision themselves contributing collectively to an overarching process of political settlement and the (re-)establishment and legitimation of a stable political order.

A number of other issues permeated the discussion, which related to general concerns and drivers of post-conflict elections, including domestic pressure, cost and security. This report focuses as far as possible, however, on the issues specific to the interaction between elections, constitution-building and referendums.

1. The variety of possible combinations of electoral and constitution-building processes



A simple model for the establishment of a new, democratic political order in a post-conflict context may look something like the following: warring parties sign a peace agreement -> elections are held for a constituent assembly -> the constituent assembly promulgates a constitution or proposes a text for referendum -> and elections are held for the newly constituted institutions.

The discussion of case studies made it explicit that, in the post-conflict context, this type of process may be the exception rather than the rule, and in its place there are many complex combinations of process designs relating to how constitution-making, elections and referendums are structured and used. If at the outset of a political settlement process one was to consider whether and how to use and sequence just four central options—elections, interim constitutions, final/amended constitutions and referendums—the case studies demonstrated that there are multiple and varied ways in which this deck of cards can be shuffled. For example:

- constitution-making without elections and with an interim constitution (e.g. Somalia, although the current constitution is still 'provisional' and a 'final' constitution is still planned to be ratified by referendum);
- constitution-making without preceding elections or ratifying referendum but with elections under the new constitutional order (e.g. Afghanistan);
- a not fully-elected group negotiates a constitution within the framework of an interim constitution—the final constitution is approved by referendum, with elections under the new constitutional order (e.g. Burundi);
- an elected constituent assembly drafts and promulgates a constitution, while it also functions as the regular legislature (e.g. Tunisia), sometimes holding a ratifying referendum after adoption (e.g. Cambodia);
- an interim constitution is negotiated among non-elected actors, paving the way for an elected constituent assembly (functioning as the regular legislature in parallel) to finalize and promulgate a constitution, with no referendum held after adoption (e.g. South Africa and Nepal);

- an interim constitution is negotiated among non-elected actors, paving the way for an elected constituent assembly to finalize and promulgate a constitution, with a concurrent elected legislature responsible for governing (e.g. Libya);
- an interim constitution is negotiated among non-elected actors, paving the way for an elected constituent assembly to draft the new constitution, with a ratifying referendum held before elections to the regular legislature (e.g. Iraq);
- a sitting legislature is tasked with overseeing the development of a new constitution for ratification at referendum, followed by eventual elections under the new constitutional order (e.g. Kenya); and
- an elected constituent assembly is responsible for drafting the new constitution, and functions in parallel with a sitting legislature; no referendum is held but regular elections continue after the adoption of the constitution (e.g. Colombia).

Referendums may further be used to approve peace agreements (e.g. Colombia) and they may also be used as a downstream constraint to encourage consensus-building in constituent assemblies (e.g. the constituent assemblies of South Africa and Tunisia could both avoid a referendum if a constitution was passed by a two-thirds majority but a referendum was required if it was passed by a 50 per cent-plus-1 majority).

It is clear that many ‘decisions’ regarding process design are driven by context, with little room for agency. For example, the security situation on the ground may prevent the holding of elections (e.g. Somalia and Afghanistan); alternatives to elections may also need to be tailored to the context (e.g. the Constitutional Loya Jirga had historical legitimacy and resonance in Afghanistan); or the previous constitutional framework or a court decision may require a particular form of process (e.g. the court in Kenya required a referendum). However, there also seemed to be processes that were driven by decisions, which appear to ignore the context: for example, despite the dire security situation, the lack of a legitimate legal and institutional framework, and the absence of any recent history of elections or even nominal political parties, Libya held consecutive elections for two separate bodies—the constituent assembly and the regular legislature—that arguably worsened the security situation on the ground.

Further, the apparent uniqueness of each case study made any categorization, or search for sequencing ‘patterns’, difficult if not impossible.

Having said this, there were some central themes which seemed to run through different case studies. These included the functions that elections/referendums might play in relation to constitution-building; the types of obstacles and challenges that arise in designing the timing, sequencing and interaction of these three elements; key factors for mitigating risks and maximizing opportunities; and areas for improvement for international assistance.

2. The functions of elections and referendums in post-conflict constitution-building processes



The function of elections and referendums may differ from case to case, or the same election may have several functions. Understanding these functions is important in designing an appropriate political settlement process regarding the timing, sequencing and interaction of elections and referendums with constitution-building.

In constitution-building processes, both elections and referendums are most often used to confer legitimacy. The standard case would be elections for a new constituent assembly to draft a constitution as representatives of the people (e.g. Tunisia). However, often the need to confer legitimacy arises where an earlier stage of the constitution-building process suffers from illegitimacy. Two key instances of the latter include a constitution drafted by non-elected actors which requires ratification through referendum for popular legitimacy (e.g. Burundi) and elections for a constituent assembly to work under a binding interim constitution drafted by non-elected actors (e.g. Nepal and South Africa).

But elections can also play other roles. Elections during transitions may be necessary to reconstitute the make-up of political institutions. In particular, where previous electoral systems have excluded particular groups, new elections under more inclusive rules may be necessary to provide more legitimate political institutions, including for instance a constitution-making body.

Further, the international community may often require elections to either provide legitimate partners for the donor and assistance community to work with, or to signal the end of a transitional governance period and act as part of an exit strategy for international actors.

With regard to referendums, sometimes they were used at the outset of a process to provide a popular mandate for negotiations (e.g. South Africa), and often they were used to provide popular ratification for a constitution drafted by elites (e.g. Burundi, and in theory eventually also to take place in Somalia). In some cases, the threat of referendum was used to force elites to come to consensus. For example, in both Tunisia and South Africa, a two-thirds majority of the constituent assembly was needed to avoid referendum.

The form of electoral system is an important consideration, the details of which are often overlooked. For example, in Tunisia the constituent assembly was elected under a list proportional system that delivered Ennahda 37 per cent of the vote share. If the system had been changed slightly (from Hare quota largest remainder to D'Hondt highest average), Ennahda's share would have increased from 41 to 69 per cent seat share (Ellis forthcoming).

In terms of elections, it is important to note two purposes of regular elections, which are absent when electing constitution-making bodies, namely public accountability for incumbents and stability of government over the medium term. One principal challenge in designing electoral systems for legislatures is to find a balance between inclusion and stability—too much inclusion may deliver a fragmented legislature which leads to unstable government and governance. In constituent assemblies, in particular where the assembly is not acting also as a legislature, stability is less of a concern as there is no government or policy agenda to carry through the legislative term. Overinclusion resulting in a fragmented assembly can still be problematic in terms of finding consensus but the balance with stability is less of a concern. Secondly, as elections for constituent assemblies are not repeated like elections for legislatures, they function less as a public accountability mechanism. Once elected, therefore, constituent assembly members generally may have less to fear in deviating from their mandates when compared with ordinary legislators.

3. Risks, obstacles and challenges



A central dilemma relates to sequencing. Should there first be elections, in order that a constitution is drafted by a freshly legitimized body, or should there first be constitution-making, to pave the way to elections under new, more legitimate rules? The use of interim constitutions has been posited as an answer to this dilemma but the case of Nepal demonstrated some of the difficulties inherent in a phased process. The first constituent assembly was elected without any natural coalition that could form a supermajority and failed to promulgate the constitution before a deadline imposed by the Supreme Court. The second constituent assembly included a more conservative majority alliance, just a few votes short of the two-thirds required to pass the constitution, which chafed at the constraints of the interim constitution, and in the view of significant opposition parties has used a tyranny of the majority to ignore the opposition's aspirations and concerns.

In a number of case studies, ongoing conflict simply had not allowed for the possibility of conducting free and fair elections but the dynamics of the political settlement called for advancement in the constitution-building process. In such cases, devising mechanisms to endow the constitution-making body with sufficient legitimacy in the absence of elections or a referendum is a critical challenge. Both Somalia and Afghanistan resorted to traditional structures to confer legitimacy to the process. In the case of Burundi, a referendum meant to ratify the constitutional text was used to legitimize both the process and the constitution. However, it is also clear that, in most cases, democratic legitimacy can only be afforded through elections, and at some point the demands for elections will become too strong to ignore.

Another risk would include key minority groups deciding to boycott either the entire process or specific elections and/or referendums, as for instance the Sunnis at the start of the constitution-making process in Iraq. Boycotting groups can take away the legitimizing role of elections and referendums.

With regard to referendums specifically, key challenges include the risk of further polarization and the inevitable consequence of creating 'losers'; scepticism over whether people understood enough to vote on an informed basis; and the bluntness of the tool in that the options for rejecting the constitution usually only include an extension of the transition or a reversion to the status quo ex ante. At the same time, there are frequently cases where referendums are difficult to avoid—for example, where a prior constitution being replaced has been ratified by a referendum, it is often felt necessary to repeat the same exercise of popular approval for the new constitution. In the case of Kenya, a ratifying referendum was deemed necessary by court decision.

4. Additional considerations



A number of factors that are usually considered when dealing with post-conflict elections are also critical when thinking about election and constitution-building processes together, i.e. security, resources (both human and financial), local capacity and strong political parties. There are a number of additional issues decision makers should bear in mind when designing the political settlement process. For instance, a clear, carefully considered roadmap based on a consensus among the key actors is another factor which can promote a successful process, although the experience with timelines is varied. In many cases, timelines have been unrealistic and deadlines have been missed.

While the technical details of electoral systems can be crucial, it is also important to recognize that the design of elections and referendums is a political and never purely technical process. Designing an appropriate system for the context is crucial, also taking into account the various incentives of voters, political leaders and political parties.

In the case of double differentiation, where elections are held for separate legislative and constituent bodies (Arato 2016: 117), it would be important to clearly define the mandate of each body and the reason for separate elections. Libya was the only case study discussed where this took place, and it also seemed an unlikely case for two parallel elected bodies given the dearth of political parties and the absence of elections for many years.

Civic education for referendums can help to educate voters on the consequences of their vote and should be taken seriously but can never completely overcome the challenges raised in the section above regarding referendums.

5. The international assistance community



As was mentioned above, the international community may often require elections to provide legitimate partners for the donor and assistance community to work with. In the past, international stakeholders saw elections as signalling the end of a transitional governance period and the start of their exit strategy. It appears now that the international community might slowly be shifting priorities, as well as deepening its understanding of elections as part of the broader political settlement process that only ends with the full implementation of the (new/amended) constitutional framework. Based on the latter, elections do not inevitably mean the start of the international community's exit strategy but rather the start of a much deeper involvement in the political development of the country in question.

Until now, however, the main critique of the international community has been the lack of a holistic vision of the post-conflict political settlement process. The international assistance community has divided itself into specialized, epistemic communities that work separately on electoral, constitution-building and peace processes often through different institutions, actors and mechanisms. Even where a single actor has had a mandate and view of the entire process, the case studies revealed a lack of understanding of how the different elements of the process relate to each other.


On the other hand, international actors have often played an additional legitimization role through recognition of parties, processes and outcomes. In situations where elections are not possible, the recognition and support of the international community is critical in maintaining the legitimacy of the political leadership, although there is an inevitable counter-current that deems political leaders *illegitimate* precisely because they are reliant on international support, and perhaps overly subject to international influence.

6. Next steps



Based on this report and additional research, International IDEA, together with the Edinburgh Centre for Constitutional Law, will prepare a Policy Paper on the interactions between elections and constitutions in transitions in fragile and conflict-affected states. This publication will include key insights as to the type and timing of elections within the constitution-building process, aiming for both a legitimate political framework and sustainable peace. It will also include recommendations for dissemination within the broader conflict-mediation and democracy-building communities. The next (fifth) Edinburgh Dialogue will be held in December 2018.

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Annex A. Agenda

4 December 2017

Time	Location	Session
9:00 – 9:30	Raeburn Room, Old College	Registration and Coffee
9:30 – 10:00	Raeburn Room, Old College	Welcome and Introduction
10:00 – 12:00	Raeburn Room, Old College	<p>Session I: Introduction to the conceptual framework on the interaction between elections and constitution-building processes in fragile and conflict-affected countries</p> <p>Moderator: Kimana Zulueta-Fülscher</p> <p>Panellists: Christine Bell, ‘Sequencing and timing of elections and constitution-making within the overall political settlement process’ Andrew Ellis, ‘Electoral systems for Constitution Making Bodies’ Stephen Tierney, ‘Constitutional referendums – their use and their effects on the constitution making process’</p>
12:00 – 13:00	Carstares Room, Old College	<i>Lunch and Discussion with Lord McConnell of</i>
13:00 – 15:00	Raeburn Room, Old College	<p>Session II: From peace agreements to constitutional adoption: role and timing of elections <i>Elections might have a critical role in legitimizing the new constitutional dispensation when the latter follows directly from a ceasefire/peace agreement, without interim stages in between. This session will interrogate the role of elections in this political-settlement sequencing pattern, and factors contributing to a specific timing and sequencing of elections and constitution-building in these settings.</i></p> <p>Lead moderator: Christine Bell</p> <p>Case studies: Mozambique (Carrie Manning) Tunisia (Jawhara Ettis)</p> <p><i>Note:</i> While Tunisia is not a conflict-affected state, and did not have a ceasefire/peace agreement as part of the broader political settlement process, it is an interesting case in terms of the sequencing of elections in the broader political-settlement process.</p>
15:00 – 15:30		Break



Time	Location	Session
15:30 – 17:00	Raeburn Room, Old College	<p>Session III: From transitional political arrangements to a final constitution: role and timing of elections <i>When the process includes a transitional political arrangement, short of an interim constitution, in advance of a new constitutional dispensation, elections are often left for after the adoption of the new constitution. This session will explore the timing of elections and whether elections in these types of settings can or should be otherwise sequenced to enhance the legitimacy of the new constitutional framework.</i></p> <p>Lead moderator: Asanga Welikala</p> <p>Case studies: Cambodia (Louis Aucoin) Kenya (Christina Murray) Bougainville (Ciaran O'Toole)</p>
17:30 – 19:30		Reception and Movie Screening Screening of the film <i>A Revolution in Four Seasons</i> (2016)
20:00		Conference Dinner

5 December 2017

Time	Location	Session
09:30 – 11:00	Raeburn Room, Old College	<p>Session IV: Interim constitutions preceding the adoption of a new constitutional dispensation: role and timing of elections <i>In the absence of a legitimate constitutional framework, oftentimes an interim constitution leads the way to a new constitutional dispensation. Taking the example of South Africa, interim constitutions oftentimes set the stage for elections of the constitution-making body, attempting to legitimize the latter and hence the resulting constitutional framework. This session will explore the necessary factors for such a process to be successful in actually legitimizing the new constitutional dispensation, as well as managing any future conflict.</i></p> <p>Lead moderator: Christina Murray</p> <p>Case studies: Nepal (Dipendra Jha) Somalia (Shirwa Jawa) Libya (Mariem Masmoudi and Zaid Al-Ali)</p>
11:00 – 11:15		Break
11:15 – 13:00	Raeburn Room, Old College	<p>Session V: Staging the process from transitional political arrangements to interim constitutions in advance of the new constitutional dispensation: role and timing of elections <i>The fourth political-settlement sequencing pattern involves a highly staged approach that includes peace agreements/transitional political arrangements and interim constitutions in advance of the new constitutional dispensation. This session will interrogate the factors that contribute to specific timing and sequencing of elections in the broader political-settlement process aiming at legitimizing not only the constitution-making process, but also the resulting constitutional framework.</i></p> <p>Lead moderator: Tom Ginsburg</p> <p>Case studies: Burundi (Fink Haysom) Afghanistan (Scott Worden) Iraq (Zaid Al-Ali)</p>
13:00 – 14:00	Carstares Room, Old College	Buffet Lunch
14:00 – 15:00	Raeburn Room, Old College	Session VI: The role of the international community in supporting elections and constitution-building processes

Time	Location	Session
		<p><i>The international community once saw elections as the ultimate peace- and state-building milestone before exiting a post-conflict country. The sense that elections are perhaps only part of the state-building process, however, is becoming the new consensus. This session will explore ways in which the international community has combined its assistance to electoral and constitution-building processes aiming at legitimizing not only the process but also the constitutional framework and its implementation.</i></p> <p>Moderator: Jason Gluck</p> <p>Panellists: Rohan Edrisinha, on the role of inter-governmental organizations in changing the peace- and state-building agenda towards a better understanding of the interlinkage of electoral and constitution-building processes. Andrew Ladley, on ways in which the aforementioned change impacts the work of the mediation community in negotiating parameters for ceasefire/peace agreements.</p>
15:00 – 15:15		Break
15:15 – 16:30	Raeburn Room, Old College	<p>Session VII: Conclusion and Next Steps <i>The final session will focus on what policy recommendations might emerge from the discussions. Each of the panellists from the opening session will reflect on how the cases dealt with the key issues and questions raised in their initial presentations.</i></p> <p>Moderator: Sumit Bisarya</p> <p>Panellists: Christine Bell Andrew Ellis Stephen Tierney</p>

Annex B. Questions for country case-study experts



To assist discussions during the Dialogue—and to briefly set out relevant constitutional issues, historical background and political context—country case study experts were invited to provide written answers to a series of questions. These responses were then circulated to all participants in advance of the workshop in order to proceed directly to the discussion questions in each session, without expending time on setting out background and context.

1. What was the overall sequence of events in the transition being discussed?
2. How was the sequencing of the transition—vis-à-vis elections and constitution-making specifically—determined? Was this contentious and if so, why?
3. How did the sequence affect incentives in the constitution-making process in terms of constitutional design choices, as well as the legitimacy of the process/text as a whole?
4. How did the sequence affect electoral expectations and results?
5. Where the elections preceded the constitution-making body, was there a separate legislature or did the same body serve both functions? What implications did this have for constitution-making? For interim governance?
6. Where the constitution-making body was elected, how was the electoral system chosen? What was its effect on the composition of the body, its ability to make decisions and its inclusivity?
7. Where the constitution-making body was not elected, how did this affect its legitimacy? What was the reason for not holding elections? How was the body selected?
8. How was the decision on whether to hold a ratifying referendum determined? What effect did this have on the constitution-making process in terms of the design of the constitution and its overall legitimacy? Did the referendum produce tensions among particular communities? Where there was no referendum, how did this affect the overall legitimacy of the process?

Annex C. List of participants



1. Zaid Al-Ali
2. Sead Alihodzic
3. Louis Aucoin
4. Christine Bell
5. Sumit Bisarya
6. Amanda Cats-Baril
7. Tom Daly
8. Jessie Deeter
9. Rohan Edrisinha
10. Andrew Ellis
11. Jawhara Ettis
12. Tom Ginsburg
13. Jason Gluck
14. Nicholas 'Fink' Haysom
15. Dipendra Jha
16. Andrew Ladley
17. Carrie Manning
18. Mariem Masmoudi
19. Michael Meyer-Resende
20. Christina Murray
21. Ciaran O'Toole
22. Cecile Pentori
23. Annamari Salonen
24. Stephen Tierney
25. Nicole Töpperwien
26. Will Underwood
27. Asanga Welikala
28. Scott Worden
29. Kimana Zulueta-Fülscher

About International IDEA



The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What do we do?

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work. We provide analyses of global and regional democratic trends; produce comparative knowledge on good international democratic practices; offer technical assistance and capacity-building on democratic reform to actors engaged in democratic processes; and convene dialogues on issues relevant to the public debate on democracy and democracy building.

Where do we work?

Our headquarters is located in Stockholm, and we have regional and country offices in Africa, the Asia-Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

<<http://www.idea.int>>

On 4–5 December 2017 International IDEA—together with the Edinburgh Centre for Constitutional Law, the Global Justice Academy and the Political Settlements Research Programme at the University of Edinburgh hosted the fourth Edinburgh Dialogue on post-conflict constitution-building.

The topic of the Dialogue was ‘The Quest for Legitimate Stability: Understanding the Interactions between Elections and Constitutions in Fragile and Conflict-affected State Transitions’.

This report summarizes the issues discussed during the Dialogue, including the interaction and sequencing of elections, interim constitutions, final and amended constitutions, and referendums.