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Peacemaking and Constitution-drafting, a Dysfunctional Marriage

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Peacemaking and Constitution-drafting, a Dysfunctional Marriage
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A recent trend in conflict resolution is to use the process of constitution-drafting as a peacemaking tool and the end-result constitution as a peace treaty, such as in Iraq, Afghanistan and Nepal. Historically, peacemaking and constitution-drafting were separate processes; today, warring parties and/or peace-makers often demand their merger. Rarely does the literature on constitution-drafting during conflict question whether this merger is appropriate. Instead, it typically adopts a comparative constitution-making approach, examining different countries' experiences to locate variables that affect the success of this tool. Champions of constitution-making as a tool for peace seem to simply assume the compatibility of the two processes. This assumption, however, must be challenged to ensure that promoting the combined process does not inherently risk the failure of both peacemaking and constitutional goals. This Article specifically questions whether too much pressure is being placed on constitution-drafting by expecting it to create peace while designing a stable foundation for the state.


In fact, often the literature simply lumps constitution-drafting during conflicts into the analysis of post-conflict constitution-drafting and shifts from authoritarian to democratic political systems. Samuels, supra note 2 at 667. But see Horowitz, supra note 2; Kim Lane Scheppele “A Constitution between Past and Future” 49 Wm. & Mary L. Rev. 1377 (2008); But see, Jackson, supra note 2.

4 See footnote 1 above.
The analysis focuses solely on constitution-drafting as a tool to stop on-going violence and its predicted outcome; it does not examine constitution-drafting as a post-conflict measure to prevent further violent outbreaks.\(^5\)

Part I(A) of this Article explains the theoretical support for constitution-drafting and constitutions as a major tool for peacemaking. Part I(B) then discusses the differing goals of peacemaking and constitution-drafting, describing theoretical efforts to harmonize them. Part II tackles more practical issues, scrutinizing the intrinsic tensions that arise from the merger of the two processes. Many of these tensions have been examined elsewhere as potential pitfalls in the constitution-drafting/peacemaking process, but not as an inherent threat to the merged process caused by nothing more than the differing goals of the two processes and their sometimes contradictory needs. Part II also describes the potential consequences if the combined process fails. It ultimately concludes that the assumption of compatibility of the peacemaking and constitution-drafting processes is inappropriate. While theoretically the goals of the two processes can be harmonized, in practice peacemaking needs are likely to subordinate constitution-making goals. The subordination of one set of goals to the other risks the sustainability of peace and weakens the foundation of the state.

Part III concludes this Article by examining whether constitution-drafting as a peacemaking tool can be salvaged when warring parties refuse other types of peacemaking efforts. Peace-makers cannot overlook combatant demands but the process design must be handled carefully if it is to be successful. Part III concludes that

\(^5\) This latter situation is very different from constitution-drafting during conflict as ongoing violence is less likely to threaten the process and where efforts at reconciliation are likely to be greater. By incorporating both circumstances into one analysis, authors can avoid having to question the underlying assumption of compatibility. Having highlighted the need to separate conflict from post-conflict, the dividing line between these types of situations will not always be clear.
undertaking a multi-stage constitutional process that establishes an interim constitution may be able to overcome the practical problems of merging constitutional and peacemaking goals. The drafting of a permanent constitution, however, must wait for more peaceful, secure and stable times.

I. Understanding Constitution-drafting as a Peacemaking Tool

Local and international demands underlie the drive to use constitution-making as a peacemaking tool. Grassroots pressure for constitutional change commonly surfaces in identity conflicts in which historically excluded minority groups refuse to lay down arms until they receive binding protection for their rights. Alternatively, warring groups may demand a new constitution when the conflict arises over the existing design of the state. Either way, peace may be impossible to achieve without guaranteeing constitutional amendments or the drafting of a new constitution.

International support for the use of constitution-drafting as a peacemaking tool developed from a fairly recent view that sustainable peace can be achieved best through the process of peace-building. The goals of peace-building are to “consolidate peace in the short term; and, in the long term, increase the likelihood that future conflicts are resolved without violence.” A major component of peace-building is the process of

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6 See e.g. Workshop on Constitution Building Processes, Proceedings, Bobst Center for Peace & Justice, Princeton University, May 17-20, 2007, p. 25
9 Joakim Gundel, Book Review 15 J. Refugee Stud. 334, 334 (2002) (reviewing Elizabeth M. Cousens and Chetan Kumar, Karin Wermester Eds. Peacebuilding As Politics: Cultivating Peace In Fragile Societies (2001).) (based on the definition provided by the authors of the book review.) To achieve those goals, peace-builders seek to reconstruct the economic, political and social foundations of a conflict society; they operate development programs, drive political and legal reform efforts and establish social reconciliation projects. Fen Osler Hampson, Can Peacebuilding Work? Symposium Making Peace Agreement Work: The
state-building through which state institutions are reformed or strengthened to permit effective and, ideally, participatory governance, which in turn is expected to create stability and security.\(^\text{10}\) State-building demands the creation of a durable framework for good governance, strong institutions for peaceful conflict resolution and the development of or return to the rule of law.\(^\text{11}\) A constitution is an easily-identifiable symbol of and tangible step toward state-building and therefore peace-building.

More concretely, the constitution-drafting process is believed to offer conflicting parties the opportunity to sit together and hammer out a binding, mutually-acceptable document that responds to each party’s needs.\(^\text{12}\) Warring parties are expected to maintain a cease-fire during the drafting process, letting the drafting serve as a peaceful negotiation process. The constitution is then expected to settle underlying disputes while offering long-term stability, security and justice.\(^\text{13}\) The constitution-drafting process itself creates the initial peace, while the substance of the constitution maintains it. As Yash Ghai explains:

Agreement on national values, even national identity, and new institutions and procedures may not only consolidate peace but also provide for future co-existence and co-operation. Through the entrenchment of the settlement in a fundamental document not susceptible to easy amendment, it can bring an effective closure to the ‘conflict situation’.\(^\text{14}\)

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\(^\text{11}\) Brahimi, supra note 2 at 4; Samuels, supra note 2 at 663-664. There is some debate whether peace-building includes efforts to establish democracy and rule of law, as some believe inclusion of these goals creates unrealistic expectations. Hampson, supra note 9 at 701. However, most of the literature expects that these two goals remain important aspects of the state-building and peace-building processes.

\(^\text{12}\) See e.g. Samuels, supra note 2 at 667 (“The process of constitution-building can provide a forum for the negotiation of solutions to the divisive or contested issues that led to violence.”)


\(^\text{14}\) Id.
Support for using constitution-drafting processes and constitutions as a peacemaking tool seems logical, at least in theory. Part II examines whether this logic can hold-up under deeper scrutiny.

**II. A False Assumption**

The link between constitutional development and peace seems sound – a constitution that provides a strong foundation for the rule of law, peaceful conflict resolution and a representative government should secure peace. What is missing from the descriptions of the importance of peace-building through constitutional development is whether a merged process is likely to be successful. Proponents of constitution-drafting as a peacemaking tool simply assume the compatibility of the two processes.\(^\text{15}\) They fail to examine whether the goals of the two processes are complementary, whether the needs of the two processes are likely to clash, and the impact of the differing needs and goals of the two processes could have on the success of the constitution-drafting/peacemaking. Part II considers each of these issues in detail.

**A. Complementary Goals?**

The obvious and most important goal of peacemaking is to halt violence. At a minimum, maintaining peace, both in the short- and long-term, requires establishing immediate physical security, stabilizing a volatile situation, building trust between the warring groups and negotiating a consensus about how to achieve a peaceful social order. The culmination of peacemaking is a peace treaty. A peace treaty can take any number

\(^{15}\) See footnote 1.
of forms, including that of a constitution. Regardless of form, it is expected that a peace treaty will declare a cease-fire, establish a process for demobilizing and disarming warring parties and design the processes for a transition to peaceful conflict resolution. Some peace treaties also include extensive provisions for new or refurbished political and legal institutions and for transitional justice mechanisms. While these more extensive agreements reflect peace-building goals, ending violence immediately always remains the peace treaty’s primary aim. Many conflicts generate numerous peace-treaties that build upon each other as peacemakers attempt to maintain momentum toward peace by resolving continuing and developing issues through newer agreements.

Constitution-drafting traditionally serves different goals than peacemaking. The drafting process is expected to develop a document that creates the foundation of the state by developing a framework for governance. Constitutions are generally forward-looking, anticipating the long-term needs and desires of the constituencies they serve. They set the stage for the smooth operation of the government and for peaceful relations between and within the government and its constituents, creating security and stability. They also reflect national values, norms and identity. Constitutions accomplish these goals by providing for mechanisms and rules that:

- Establish a state-monopoly on the use of force;

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16 The form of a peace treaty is particularly relevant to determining its binding nature. Christine Bell, Peace Agreements: Their Nature and Legal Status 100 Am. J. Int’l L. 373 (2006).
17 Id. at 374.
18 Id. But see, Ashraf Ghani, Clare Lockhart, Michael Carnahan, An Agenda For State-Building In The Twenty-First Century 30-WTR Fletcher F. World Aff. 101, 109 (2006)(describing that peace agreements should be about halting violence, while establishing functioning dispute-resolution mechanisms should be left to political agreements.).
19 Ghai and Galli, supra note 7 at 8; Ruti Teitel, Transitional Jurisprudence: The Role Of Law In Political Transformation 106 Yale L.J. 2009, 2053 (1997)(describing the classical view of the role of constitutions.).
20 Teitel, supra note 19 at 2057-2058(describing the classical view of the role of constitutions.) But see, Jackson, supra note 2 at 1280 (“without a link to some imagined past, constitutions could not do the work of helping to constitute a community”).
21 Ghai and Galli, supra note 7 at 8.
• Establish institutions of governance;

• Limit state power through human rights protections;

• Provide for a smooth transition when governments change;

• Permit participation and representation of the population; and

• Establish institutions for peaceful dispute resolution.\(^{22}\)

Drafters typically make it difficult to amend provisions of the constitution to protect them from short-term political whims and maintain political order and stability.\(^ {23}\)

Constitutions are expected to preserve peaceful relations between constituents of a state as well as between the constituents and the government, a goal that presupposes security, stability and a common vision for the future. Constitutions anticipate potential points of friction and draw boundaries around the permissible behavior of citizens and the government to protect people’s rights and limit their discontent. Constitutions also establish a legal system to enforce those boundaries, which includes mechanisms to address complaints when those boundaries are breached. Classically, “it is not the vocation of law or constitution to stabilize social order and to form political consensus. Instead, a constitution is an end-result, a codified document of social and political consensus.”\(^ {24}\) Traditionally, constitutions deflect an abstract, future potential for anarchy or government oppression rather than the very concrete threat of or existing violence that peace treaties target.

Conceptually, peacemaking and constitution-drafting intend to accomplish different goals. At their essence, peacemaking concentrates on stopping violence, while

\(^{22}\) Id.

\(^{23}\) See e.g. Bell, supra note 16 at 392.

\(^{24}\) Jiunn-Rong Yeh and Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism*, Bepress Legal Series Year 2006 Paper 1815, p. 6-7 (2006).
constitutional-drafting focuses on establishing a functioning and ordered state. Peace-treaties reflect the immediate changes and compromises necessary to end violent conflict, while constitutions codify an existing consensus on national identity and values and on how society wishes to be governed, anticipating future threats to peaceful relations. A peace-treaty may adopt measures that radically change the government and politics in a conflict zone, while traditionally constitutions create stability by protecting against such changes.

Can these differing goals be harmonized? Theorists argue that using constitution-drafting as a peacemaking tool has created a new type of constitution - the transitional constitution. The transitional constitution adapts the classic roles and functions of constitutions to respond to the peacemaking needs of conflict and post-conflict societies. This new style of constitution is intended to respond to the conceptual “tension between [the] radical political change [required to end a conflict] and the constraints on such change that would appear to be the predicate of constitutional order.”

The dominant set of theorists views the transitional constitution as causing a revolution through the act of creating a new political order for the state. It is the final act of breaking from the past and signifies the end of or solution to the conflict. The role of the transitional constitution contrasts directly with traditional notions that a

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25 See e.g. Teitel, supra note 19; Samuels, supra note 2.
26 See e.g. Id.
27 Teitel, supra note 19 at 2053.
28 Id. at 2053-2056 (1997)(Ackerman, one of the modern theorists, does not limit transformative constitution-making to revolutions but allows for the possibility of change to this type of “higher law” under other circumstances.). The most common example of this type of constitution is the American constitution.
29 Id. at 2053.
constitution protects against such dramatic political change. Like the “traditional” constitution, transitional constitutions are forward-looking, establishing an ideal foundation for the state that permits the population to “put the past behind and . . . move to a brighter future.” Effectively, however, the dominant position maintains the foundational role and permanent structure that epitomizes traditional constitutions.

A school of thought espoused by Ruti Teitel diverges from this view, theorizing that transitional constitutions permit the revolution rather than complete it. The transitional constitution in her conception “mediates the process of political change,” reflecting a consensus on how political change should occur rather than what that change will be. The transitional constitution is continually subject to development and in some instances is intended only as an interim measure. Teitel describes the transitional constitution-drafting process as gradual, moving in “fits and starts,” rather than as the finishing act. For her, ultimately the new foundation created by peacemaking/constitution-drafting process responds directly to past injustices; the process and constitution therefore not only look forward but reflect on the past.

Vivien Hart advocates for a new type of constitutionalism similar to Teitel’s theory of transitional constitution, explaining:

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30 Id. at 2053-2056.
31 Id. at 2056. Others argue that the dominant style of transitional constitutions also reflect on the past as history to determine the priorities and needs of the population. Scheckelee, supra note 3.
32 Teitel, supra note 19 at 2057.
33 Id. at 2058. See also, Samuels, supra note 2 at 664; Jackson, supra note 2 at 1255 (“transitional constitutions . . . offer the possibility of a new genre of constitution-like instruments whose goals is not to entrench but to disentrench and to provide ongoing opportunities for “unsettlement” of power relations.”)
34 Teitel, supra note 19 at 2057. South Africa’s Interim Constitution, as described in Part III(A), is an example of Teitel’s transitional constitution.
35 Id. at 2057-2058.
36 Id. at 2052. Teitel appears to envisage an eventual final constitution or a process that leads to a final constitutional solution, a position with which Jackson does not necessarily agree. Jackson, supra note 2 at 1288-1289. The experience with constitution-drafting in Lebanon as described in Part II(B)(1)(a) showed that Jackson’s position may be dangerously correct.
Traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure. Citizens who actively reject a final act of closure seek instead assurances that constitution making will not freeze the present distribution of power into place for the long term, nor exclude the possibility of new participants and different outcomes. . . The constitution of new constitutionalism is . . . a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.\textsuperscript{37}

Hart describes the challenge of the new constitutionalism as finding a balance between the traditional goals of constitution-making, including building a stable and secure foundation for the state, and the flexibility necessary to mediate conflict and divisions.\textsuperscript{38}

Transitional constitutions, regardless of the differences between theorists, serve both peacemaking and constitution-drafting goals. Proponents of transitional constitutions list a variety of benefits of the process and the document it creates. One of the main benefits is that the process offers society the opportunity to reflect on the past to create a new future and, by doing so, solves the causes of the conflict.\textsuperscript{39} The process and document serve to de-legitimize past injustices and draw new boundaries for what behavior is permissible.\textsuperscript{40} It is also expected that the constitution will “jumpstart” political change by creating stable institutions.\textsuperscript{41} It will set the foundation for the rule of law that could re-legitimize the government.

Most importantly, perhaps, the constitution as a peace treaty could be viewed as a social contract to keep the peace.\textsuperscript{42} Since the warring parties are typically included as constitution-drafters, their support could be viewed as an agreement to use the peaceful

\textsuperscript{37} Hart, supra note 2 at 3. See also, Jackson, supra note 2 at 1249-1250, 1251.
\textsuperscript{38} Id. at 3.
\textsuperscript{39} Samuels, supra note 2 at 664.
\textsuperscript{40} Teitel, supra note 19 at 2052.
\textsuperscript{41} Id. at 2059.
\textsuperscript{42} See e.g. Bell, supra note 16 at 392.
mechanisms of dispute resolution they designed rather than resort to violence when conflicts arise.\textsuperscript{43} The binding nature of a constitution may create more incentive for the participants to follow the principles and provisions of the constitution they drafted.\textsuperscript{44} The hope is that the constitution will provide the opportunity to change the political culture, including behavior, expectations and norms, so that the constituency comes to depend on peace.\textsuperscript{45}

The concept of transitional constitutions harmonizes the very different goals of peacemaking and constitution-drafting, at least theoretically. As this section shows, its supporters can list numerous benefits to relying on constitution-drafting and constitutions as a peacemaking tool, which makes this option appealing. The remainder of Part II challenges whether the goals and needs of the two processes can be so cleanly synchronized.

\textbf{B. The Inherent Tensions in Constitution-drafting as a Peacemaking Tool}

Policy-makers often merge constitution-drafting and peacemaking without considering the deep and inherent tensions that arise from the conflicting goals and needs of the two processes. They describe the consequences of these tensions as pitfalls to be avoided but rarely examine why they emerge.\textsuperscript{46} By avoiding the deeper analysis, policy-makers are able to simply assume they can be sidestepped, albeit with some maneuvering. Once the pitfalls are recognized as arising directly from the intrinsic conflicts between the goals and needs of peacemaking and constitution-drafting, it

\begin{footnotes}
\item[43] Ghai, supra note 13.
\item[44] Bell, supra note 16 at 386 (2006).
\item[45] Samuels, supra note 2 at 667.
\item[46] See footnote 1; \textit{but see Workshop}, supra note 6 at 26.
\end{footnotes}
becomes impossible and possibly even reckless to assume the compatibility of the two processes.

The tensions inherent in a merged constitution-drafting/peacemaking process fall into four general categories: (1) sequencing tensions; (2) timeframe tensions; (3) tensions between short- and long-term goals; and (4) tensions over participation in constitution-drafting.\(^{47}\) Part II(B) examines each of the tensions in turn, highlighting the practical problems they create that may be impossible to overcome. This Section does not identify all of the problems that may emerge in a merged process or search for the variables that play a role its success; rather it focuses solely on describing the inherent tensions of a combined process and assessing their threat to the success of either or both constitution-drafting and peacemaking goals. Further, it does not argue that each and every tension will necessarily erupt every time constitution-drafting is used as a peacemaking tool, but simply that the likelihood some or all will emerge is so great as to send out a warning to all considering such processes.

Different people use different measures to determine the success of constitution-drafting and constitutions as a peacemaking tool.\(^{48}\) For example, some measure success by whether parties lay down arms in favor of solving disputes through the institutions created by the constitutions.\(^{49}\) Others consider whether the constitutions achieve “constitutional patriotism;”\(^{50}\) warring parties, the government and society must be “patriotic” to the terms of the constitutions by implementing and following them.

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\(^{47}\) There may be other categories of tensions, but these predominate in the literature on and experiences with conflict.
\(^{48}\) See e.g. Workshop, supra note 6.
\(^{49}\) Id. at 7-8.
Another group measures success by whether the population can unite under a national identity, accept national values and work within national institutions, particularly in conflicts involving minority groups or sectarian divisions.\(^{51}\) Still others look not only at whether the constitutions maintain peace, but at whether they create representative governments that protect human rights.\(^{52}\) At a minimum, underlying all of these measures of success seem to be the criteria that: (1) the violence ends; (2) the population has a solid basis for unifying; (3) the substance of the constitution addresses the current and future needs and interests of the whole population;\(^{53}\) and (4) the constitution is accepted as legitimate by the parties to the conflict and the general population.\(^{54}\)

It is important to keep these underlying criteria for success in mind throughout the examination in subsections 1 through 4 of the practical tensions created when peacemaking and constitution-drafting processes are merged. As Part II argues, these tensions are difficult to resolve and their resolution can lead to the sacrifice of either peacemaking goals or, more often, the goals of drafting a constitution strong enough to serve as the foundation of the nation and visionary enough to survive in the long-term. Sacrificing any of the goals of either process could make it unlikely if not impossible that constitution-drafting as a peacemaking tool will meet the underlying criteria for success.

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\(^{51}\) Ghai, supra note 13.

\(^{52}\) See generally, Workshop, supra note 6.

\(^{53}\) On the one hand, the inclusion of the need for a constitution to represent the interests of the whole of the population seems to be value-laden. It shows a preference, to an extent, of a democratic need. The reason this is included within the criteria for success is that, as this paper argues throughout this section, the exclusion of the interests of a portion of the population could easily lead to continued, renewed or new conflict that is antithetical to the goals of a constitution-drafting/peacemaking process.

\(^{54}\) Noticeably missing from the list of factors determining success is the longevity of the constitution. Constitutions are often short lived and may accomplish both constitutional and peacemaking goals immediately and sufficiently to allow for later, appropriate constitutional development. Ran Hirschl, The "Design Sciences" and Constitutional "Success" 87 Tex. L. Rev. 1339, 1353-54 (2009) Another open question is by when do we need to see a constitution achieve each of these 4 criteria. An illegitimate constitution may gain legitimacy with time. While this may be true, it would be hard to view a constitutional process as successful in a conflict situation if society is continually pulled back into violence until that legitimacy is achieved.
There may be times when there is no choice but to use this peacemaking tool and certainly there have been objective successes with it. The analysis in this section, however, shatters the assumption of compatibility of constitution-drafting and peacemaking processes and, in doing so, challenges the support for constitution-drafting as a primary tool for achieving peace. While the goals of constitution-drafting as a peacemaking tool are laudable, the consequences of its failure are potentially severe, a point raised in the final section of Part II.

1. Sequencing tensions

   a) Security as a Precondition

   The differing goals of constitution-drafting and peacemaking raise two important tensions related to the sequencing of the drafting process. The first tension is a chicken-and-egg question – which must come first, security or a constitution? The conceptual assumption, as described in Part I, is that the drafting will occur during a cease-fire, as parties will agree to stop fighting during constitutional negotiations. Unfortunately, reality often does not live up to theory. Constitution-drafting processes are frequently undertaken despite continued violence to placate warring parties and/or the international community. In these circumstances, the assumption is that a constitution must precede security and bring about an abrupt end to violence. As this section explains, achieving a legitimate constitution and a stable foundation for a state depends on security or a cease-fire. When constitution-drafting is adopted as the primary tool for peace a conundrum is created: peace cannot occur without a constitution and a successful constitution cannot be achieved without peace.

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55 See Part III below.
Continued violence builds numerous obstacles to developing a successful constitution, and therefore a successful peace treaty. The first, and perhaps most dangerous obstacle, is that the continued violence may simply be a rejection of the peacemaking process. It may be a sign that a warring party is unwilling to agree to any type of peace treaty or more specifically to a constitution as a peace agreement. Alternatively, violence may become a tactic of a warring party to ensure that concessions are made in its favor - if the warring group does not agree with draft provisions, it may wreak havoc to gain advantages in negotiation.\(^56\) Such bad faith makes it extremely difficult for constitution-drafting to achieve either peacemaking or constitutional goals.

Even where warring parties are interested in undertaking constitution-drafting as a peacemaking tool, security is a precondition to establishing a legitimate constitution. Without security, negotiators may find it difficult to participate in the drafting process; they may be subject to intimidation or may find it impossible to arrive at the negotiations.\(^57\) On-going violence also may limit the participation of the broader population.\(^58\) Popular participation currently is considered a requirement for establishing the legitimacy of a constitution, a point examined more fully in Part II(B)(4) below. Drafting the constitution/peace treaty without a cease-fire in place also may inhibit consensus in the drafting process. Insecurity and continued conflict could polarize the warring groups and harden uncompromising positions, all of which will only inflame the conflict and undermine both constitution-drafting and peacemaking goals.


\(^{57}\) See e.g. *Workshop*, supra note 6 at 33.

\(^{58}\) *Id.* at 26.
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Iraq provides the paradigmatic example of the failures that result when a constitution-drafting process is conducted without first establishing a cease-fire. Numerous Sunni groups in Iraq continued an insurgency against the Shiite and Kurdish populations and the US soldiers present in Iraq even after the US declared the successful end of its international war with Saddam Hussein’s Sunni-controlled government. Despite the continued violence, the Iraqi transitional government undertook the drafting of a permanent constitution. The US government heavily pressured the transitional government to proceed with the constitution-drafting process regardless of the violence, advocating that peace would follow a new constitution. 59

The failure to achieve a cease-fire prior to undergoing constitution-drafting set the process up for failure. From a security standpoint, meaningful participation was hampered by the insurgency. Drafters faced severe intimidation, including the murder of a Sunni participant. 60 The public had little access to the drafters and almost no opportunity to observe the process because of security fears. 61 Such lack of participation undermined the legitimacy of the drafting process. 62


61 As the United States Institute of Peace, an American government conflict resolution think tank that worked in Iraq with drafters and other participants, describes:

Every meeting of the Committee, the National Assembly, and the Leadership Council took place behind the blast walls, barbed wire, and gun turrets of Baghdad’s International Zone. Iraqi citizens could gain entry to the International Zone only after time-consuming and dangerous queuing and multiple body searches. Phone lines and internet connections were uniformly bad. The opportunity for Iraqis to communicate, either formally or informally, with their constituent representatives was practically nil.

Morrow, supra note 59 at 18.

62 Id.
Even more problematic, the continued violence represented the Sunni insurgents’ rejection of constitution-drafting as a peacemaking tool. A combination of a Sunni boycott of elections for a transitional government and violent intimidation of Sunni voters ensured that this group was severely underrepresented in the transitional government and therefore in the drafting process.\(^{63}\) It is hard to imagine how constitution-drafting as a peacemaking tool can work without the participation of the group primarily responsible for the on-going violence. As a concession to the need for their participation, 15 Sunni drafters and 10 advisers were added to the process one month before the draft was due. At this point, an estimated 70-80\% of the draft constitution was complete and the Shiites and Kurds resisted Sunni revisions fearing that their prior fragile compromises would fall apart.\(^{64}\) When the drafters could not reach an agreement on fundamental constitutional matters, the Sunni drafters were excluded from the informal discussions that ultimately resolved those issues.\(^{65}\)

The referendum required to pass the constitution reflects overall Sunni rejection of constitutional efforts to achieve peace and build a foundation for the state. A large number of Sunnis objected heavily to the constitution’s decentralization of the government, to the formula for sharing oil wealth, and to the role of Islam in the constitution, among other issues.\(^{66}\) 96.96\% of voters in the Sunni-dominated Anbar province – where the insurgency continued unabated - voted against the constitution and

\(^{63}\) *Id.* at 16. The US-imposed Interim Constitution did not seem to anticipate a continued insurgency or the Sunni-boycott.


\(^{65}\) United States Institute of Peace describes that: “The expectation was quite clear: the Shia and Kurdish parties would agree to a constitutional text, which would then be presented as a fait accompli to the Sunni Arabs, who would be asked to take it or leave it.” Morrow, supra note 59 at 9.

about 82% of Sunni-dominated Salahaddin province voted against it; in two other provinces 55% and 49% voted against the constitution.\(^67\) The constitution, however, was adopted despite apparent Sunni rejection of the text. These statistics led the United States Institute of Peace, the US government’s think tank on conflict resolution, to caution: “We should confront the reality that Sunni Arab opposition to the constitution that emerged during the negotiations will continue, and that a national “yes” vote may have consolidated Sunni Arab isolation.”\(^68\)

Six years later, while some measure of security has been achieved, USIP describes the situation in Iraq as follows: “Iraqi society is fractured. Profound distrust, sectarian animosity, and the desire for revenge run high, as communities come to grips with the effect of six years of war.”\(^69\) The constitution-drafting process did little to heal societal divisions or to achieve sustainable peace. Lakhdar Brahimi, a former Special Advisor to the Secretary-General of the United Nations who monitored post-conflict Iraq, blames this outcome in part on the failure to achieve a cease-fire as a precursor to constitution-drafting.\(^70\) He describes:

\[\text{[I]}t\text{ must be understood that a constitution cannot be rammed through too early in the process: people coming out of a conflict are hardly capable of building the national consensus required for the successful drafting of a constitution. This is more so if, as was the case with Iraq, conflict is still raging.}\]

\(^{67}\) Morrow, supra note 59 at 2.

\(^{68}\) Id. at 18. In fact, Sunni drafters warned that if the constitution passed despite Sunni objections, the violence would continue unabated. Knickmeyer and Finer, supra note 66.


\(^{70}\) Brahimi, supra note 2 at 8.

\(^{71}\) Id.
The Iraqi drafting process illustrates how continued conflict undermines both constitution-drafting and peacemaking goals, causing the merged process to fail.\textsuperscript{72} A constitution seeking to achieve immediate security also risks creating a far-from ideal political system. As Larry Diamond, a former senior advisor to the Coalition Provisional Government in Iraq, explains: “security trumps everything else. . . Without security, a country has nothing but disorder, distrust, desperation and despair. . . This is why a violence-ridden society will turn to almost any political force or formula that is capable of providing order, even if it is oppressive.”\textsuperscript{73} A war-weary population may be all too willing to exchange their rights for promises of security\textsuperscript{74} including by establishing a less than fully representative government if it appears more likely to secure the country. In a constitution, this exchange is most evident in constitutional provisions that grant the executive branch of government broad state of emergency powers and/or that allow fundamental rights to be arbitrarily and severely limited to protect national security.

The drafting of India’s Constitution provides an important example of how the exchange of rights for security is made in a conflict setting, although not in the context of a merged constitution-drafting/peacemaking process.\textsuperscript{75} Following the end of British colonialism, the violence of the contested partitioning of India and Pakistan, and a communist-led armed rebellion in Telangana, India seemed to be functioning in a “de

\textsuperscript{72} Failure here is judged according to the criteria for success listed in the introduction to Part II(B).
\textsuperscript{75} This example is useful despite the difference in context as it illustrates the problems innate to drafting constitutions during conflicts generally.
facto ‘state of emergency.’” Feeling insecure, the Constituent Assembly constitutionally protected preventive detention as an ordinary law enforcement tool. Preventive detention permits a person to be detained extra-judicially - without charge and without a finding of guilt - to prevent a future crime.

Although fully aware of how preventive detention was used as a tool for tyranny under British rule, the Constituent Assembly expressly rejected due process guarantees for detainees, seeing preventive detention with few safeguards as a necessary evil to combat threats to the new state. As one participant explained during the Assembly debates:

On occasions like this sympathies of most of us go out to the high principles which in the past we proclaimed from housetops. But there are other friends who occupy seats of authority and responsibility throughout the country. They warn us that the aftermath of war and partition has unchained forces which if allowed to gain upper-hand will engulf the country in anarchy and ruin. They therefore advocate, [sic] that Parliament must be able to pass laws arming. [sic] the Executive with adequate powers to check these forces of violence, anarchy and disorder... Many of us are not convinced that dire results would necessarily follow the adoption of the phrase "due process of law". But the difficulty is this, that even if we were- to stand for our own convictions there is no scope far [sic] experimenting in such matters.

With their excessive power, government officials have used preventive detention freely to suppress opposition; to intimidate vulnerable populations and to hold detainees

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78 South Asia Human Rights Documentation Centre, supra note 77.

indefinitely and without judicial review.\textsuperscript{80} The police use preventive detention to punish alleged criminals without having to give them their rights.\textsuperscript{81} The Supreme Court of India has described the overreliance on preventive detention as a threat to democracy, yet its hands are tied to prevent it by a constitution drafted amidst violence and security fears.\textsuperscript{82}

In the absence of security it also may be impossible to build or strengthen government institutions sufficiently to establish and maintain peace, as constitution-drafting as a peacemaking tool expects.\textsuperscript{83} For a constitution to be effective and the rule of law to be achieved, the government must determine when the use of force is legitimate. As long as the conflict rages, a government cannot protect the population from violence, maintain order and guarantee human rights despite constitutional promises. Implementing a new constitution without having achieved security then sets up the new government for failure, the violence overtly denying the legitimacy of the new constitutional institutions and limiting their efficacy.\textsuperscript{84}

Afghanistan provides an important example of the difficulty building constitutional institutions in the midst of conflict. Currently, Afghanistan’s constitution-
based, formal justice system is secondary to the informal, traditional mechanisms for resolving disputes – such as shuras and jirgas.\textsuperscript{85} The formal court system has been devastated by decades of violence, which has led a monitoring group to conclude that “Afghanistan’s justice system is in a catastrophic state of disrepair.”\textsuperscript{86} It is perceived as corrupt and inaccessible; it lacks resources and trained staff, making it unable to function in many areas; and it does not have sufficient security to work in others.\textsuperscript{87} The state-run judicial system also feels foreign when contrasted with the familiarity of traditional systems of justice.\textsuperscript{88} Evidencing a lack of faith even among government officials, a United States Institute of Peace report noted: “Executive officials in the provinces, provincial, district governors, police, and prosecutors tend to bypass the courts to settle difficult or important disputes, and many local court judges also refer disputes to community-based mechanisms for settlement. Research suggests that 80-90\% of disputes – criminal and civil – are resolved outside of the formal system.”\textsuperscript{89}

Resorting to informal systems of justice, however, is not without its drawbacks. Informal systems cannot guarantee equality under the law, and in Afghanistan are notable for excluding women and favoring the powerful.\textsuperscript{90} Military commanders have taken over

\textsuperscript{85} John Dempsey and Noah Coburn, Traditional Dispute Resolution and Stability in Afghanistan, United States Institute of PeaceBrief 10, 2(2010). See also Thomas Barfield, Neamat Nojumi, and J Alexander Thier, The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan, United States Institute of Peace 2 (2006) (“The justice system is relatively weak in the urban centers where the central government is strongest, and in the rural areas that house approximately 75\% of the population, functioning courts, police, and prisons are an exception.”)

\textsuperscript{86} International Crisis Group, Reforming Afghanistan’s Broken Judiciary Executive Summary And Recommendations, Asia Report N°195 Executive Summary (2010)

\textsuperscript{87} Dempsey and Coburn, supra note 85 at 2. The Taliban is responsible for “justice” in the areas under its control. Ibid.

\textsuperscript{88} Id. at 3.

\textsuperscript{89} Barfield, Nojumi, and Thier, supra note 85 at 3.

\textsuperscript{90} Dempsey and Coburn, supra note 85 at 2.
many of them, undermining their traditional character. As the primary justice system, the informal mechanisms cannot ensure rule of law as they are not accountable for applying the constitution or statutory law to disputes, let alone consistently.

The continuing violence directly hampers efforts to reform and promote the formal justice system in Afghanistan. Judges and law enforcement officials often are unwilling to serve outside Kabul where they feel insecure, leaving vast areas without a functioning court at all. Many Afghans have little choice but to turn to the Taliban to address their legal disputes in areas not under government control. The International Crisis Group, an independent monitoring group, links the lack of access to the justice system to the continuing conflict, reporting that “[f]estering grievances at the local level are reinforced by injustice, entrenching a culture of impunity that has become a key driver of the insurgency.”

A shift to rule of law, which can be made only through support for the formal justice system, is difficult generally, and made nearly impossible during Afghanistan’s internal conflict. As a result, many in the international community are advocating a formal role for these traditional systems of dispute resolution, despite the inability to guarantee fundamental rights, equality or the consistent application of the law.

The experiences in Iraq, India and Afghanistan illustrate that security is a precondition to drafting a constitution that establishes a stable and legitimate foundation for the state. Yet, constitution-drafting as a peacemaking tool reverses this order, basing

92 Id. at 24.
93 International Crisis Group, supra note 86 at 1.
94 Id.
the short-and long-term success of peacemaking on the finalization of a new constitution. This inherent sequencing tension destroys any assumption of the inherent compatibility of a merged constitution-drafting/peacemaking process.

b) National Identity Over Group Identity

Constitution-drafting during a conflict raises a second tension in the sequencing category, this time with respect to developing a national identity. For a constitution to achieve both peacemaking and constitutional goals, its constituents must be able to unify under a national identity that represents who they are as citizens and as a political community. The inherent tension crops up because constitution-drafting presupposes a unified national identity, but constitution-drafting as a peacemaking tool expects the constitution to build that national identity.\(^\text{96}\) Achieving a unified identity is extremely unlikely when sectarian or group divisions have erupted into ongoing violence.

Constructing a national identity requires some trust to act beyond immediate groups interests to protect longer-term national interests and sustain peace; yet, for example, “people might be unlikely to be able to think in non-ethnic or even cross-ethnic terms when only recently ethnicity might have been a matter of life and death.”\(^\text{97}\) The risk of drafting the constitution before unifying behind a national identity is that the threat of renewed conflict remains until the new identity receives popular support.\(^\text{98}\)

While the process of establishing a national identity does not require homogenizing the population, a weak consensus on that identity could entrench divisions

\(^{96}\) Ghai and Galli, supra note 7 at 7.

\(^{97}\) Bettina Scholdan, *Democratisation And Electoral Engineering In Post-Ethnic Conflict Societies*, Human And Ethnic Rights In Democratic Transition, Vol. 7 - 2000, No. 1, 30 (describing the difficulties of establishing democracy and elections in post-conflict societies.).

\(^{98}\) Lerner, supra note 50 at 7.
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based on ethnic, cultural or religious characteristics or other factors that helped create the conflict. In a divided political community, each group is likely to be working toward its interests alone rather than toward a communal vision of the future. In trying to accommodate peacemaking’s immediate needs, constitutions may entrench forms of power sharing that reflect those national divisions rather than any unity. In doing so, they may inadvertently “exacerbate fault lines, divisions, and tensions in society; entrench conflict-generating electoral or governance models, or provide a basis for contesting the government.”

Lebanon provides a particularly distressing example of this point. Twice it has undergone constitutional change in response to conflict without reaching any consensus on national identity, leading to civil war and the continuing risk of violence. The Ottoman Empire ruled Lebanon until its collapse during World War I. After France took control in 1926, a constitution was drafted to quell on-going sectarian violence. It adopted a power-sharing regime that divided power among the different religious sects, creating a confessional system to govern Lebanon temporarily until some type of national unity could be reached between the competing Christian and Muslim communities and the 18 different sects that form them. Power was split between the Maronite Christians, Sunni Muslims and Shi’ite Muslims, the three largest religious communities.

French control ended in 1943 with power-sharing in full force. Violence seemed likely as the Christian population, which at the time was in the majority, sought to

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99 Samuels, supra note 2 at 671.
101 See The Lebanese Constitution (1926, Article 95) as translated by Gabriel M. Bustros at http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/lebanon/lebann-e.htm; Zahar, supra note 100. This agreement, along with its successor, could be seen as a form of a transitional constitution or an interim constitution, as discussed further in Part III below.
maintain its links to France and the West, while the Muslim population was divided between Arab nationalism seeking to link Lebanon to Syria and Lebanese nationalism seeking an independent state. In 1943, the power-sharing agreement was renegotiated to avoid civil unrest. The National Pact, an informal constitution-like agreement, dictated the division of power in Lebanon that would last until the end of the 1975 civil war. It appointed a Christian President, a Sunni Prime Minister and a Shiite President of Parliament; it also apportioned parliamentary representation between the different sects based on a 1932 population census, which at the time showed a larger Christian majority. The National Pact favored the Maronite Christians, serving as a source of tension. Again, power-sharing was intended to be a temporary measure until the communities could unify under a national identity that permitted democratic governance.

The National Pact failed to achieve unity and the polarization continued. As the years passed, the Muslim population outnumbered the Christian population, making the National Pact formula for representation even less fair. Increasing socio-economic inequalities between the different communities, and interference from Syria, Palestinians and Israel in domestic affairs enflamed tensions until Lebanon burst into civil war in 1975.

The civil war concluded 15 years later in 1991 with the signing of the Ta’if Agreements, or the Charter of Lebanese National Reconciliation. The Ta’if Agreements included constitutional amendments to the power-sharing regime to adjust the balance of

102 Zahar, supra note 100.
104 Lebanon Political Profile Recent History and Relationship with Syria, International Debates 4 (2006).
105 Samir Makdisi and Marcus Marktanner, Trapped By Consociationalism: The Case Of Lebanon, American University of Beirut 2 (2009); Zahar, supra note 100.
106 See e.g. Harrington, supra note 103 at 229.
power between the Christian and Muslim populations.\textsuperscript{107} The power of the Christian president was curtailed and Christians and Muslims now have equal representation in the government, although the Muslim population is estimated to be almost 2/3 of the population.\textsuperscript{108} Again, the confessional system of power-sharing was intended as a temporary measure, yet the population has yet to unify sufficiently to establish a national identity that would make such divisions unnecessary. Instead, the gulf between the groups is deepening once more, increasing the risks of renewed violence. Civil war was narrowly averted in 2008 as Sunni groups grew insecure with the increasing Shiite power in the form of Hezbollah.\textsuperscript{109}

Critics of the Lebanese power-sharing agreements argue that they consolidate sectarian power and the power of the elites within them,\textsuperscript{110} creating a disincentive to a unified national identity.\textsuperscript{111} They also create a system in which “[c]itizenship does not exist independent of religious affiliation . . . [and] [b]asic rights could only be fully accepted within the religious community, as every community has to fend for itself on its own.”\textsuperscript{112} At the same time, these power-sharing agreements seem to be the only way to achieve immediate peace, placing Lebanon between a rock and a hard place. Blame for this conundrum falls on the failure of peace negotiations to confront directly the causes of

\textsuperscript{107} Makdisi and Marktanner, supra note 107 at 3; Harrington, supra note 103 at 226.
\textsuperscript{108} Lebanon Political Profile, supra note 104; Zahar, supra note 100.
\textsuperscript{109} Makdisi and Marktanner, supra note 107 at 4; International Crisis Group, \textit{Lebanon’s Politics: The Sunni Community And Hariri’s Future Current}, Middle East Report N°96 1 (2010) (“Of all, the most striking transformation in Sunni attitudes since 2005 has been the exacerbation of sectarian feelings and hostility toward Shites, nurtured by deepened regional sectarian divisions following the fall of the Iraqi regime.”).
\textsuperscript{110} See e.g. Zahar, supra note 100.
\textsuperscript{111} As one Sunni man describes: “to us, Lebanon remains an artificial construct with which we simply could not identify.” International Crisis Group, supra note 109 at 7.
\textsuperscript{112} While describing the impact of religious divisions within government, the quote applies wholly to the Lebanese situation. Dr. Muhamed Mugraby, \textit{The Declaration Abroad: A Comparative Perspective}, 11 Pace Int'l L. Rev. 177, 182 (1999)
the sectarian divisions. As long as those underlying causes of conflict remain, it may be impossible for groups to unify under a common national vision. Lebanon’s experience exemplifies how constitutional negotiations that fail to achieve a national identity not only fail to create lasting peace but also exacerbate community divisions and undermine the goals of constitutional governance.

Before embarking on constitution-drafting, it seems imperative that a level of peace be maintained. Security is necessary to build trust between conflicting parties. Increasing levels of security and trust then can serve as the basis for reaching a consensus on difficult decisions such as a national identity that will serve as the foundation for loyalty to the constitution and the political community as a whole and for sustainable peace. If constitution-drafting is pursued while the conflict continues to rage and without appropriate concern for building a national identity, then constitution-drafting as a peacemaking tool is likely to fail to meet two of the four criteria for success listed in the introduction to Part II(B): ending violence and creating a basis for the country to unify. The tension created by demanding constitutional change without any unity of national purpose and identity only further undermines the assumption of compatibility of peacemaking and constitution-drafting processes.

2. **Timeframe tensions**

A second category of tensions that emerges when using constitution-drafting as a tool for peacemaking results from the need for separate timeframes for accomplishing peace and for negotiating and writing a constitution. Stopping violence is an immediate need. The population and the international community expect that peace-makers will

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113 Zahar, supra note 100.
work to stop death and destruction within a short time span. In contrast, constitution-drafting is a longer-term process that cannot or at least should not be hasty. Drafters and the population need time to agree on national identity, how the government should function and a vision for the future. Once that is achieved, then they need time to carefully craft a document that implements that consensus.

On-going violence can pressure drafters to work quickly. A rushed process makes it less likely that drafters will have time to consider the impact of their decisions, which may have unintended consequences on the reconstructed state or place inappropriate limits on the substance of the constitution. It also could make it extremely difficult to reach a meaningful consensus on national identity, which, as the previous section explained, could lead to renewed conflict. Furthermore, harried and hurried drafters may adopt ambiguous or poorly worded provisions that could spark renewed conflict. If parties intended different interpretations of provisions that address the underlying source of conflict, the group disappointed with the government’s choice of interpretations may feel betrayed and compelled to return to violence.¹¹⁴

Again, the drafting experience in Iraq highlights how constitution-drafting during a conflict can all too easily fail to achieve peace or constitutional goals because of inherent tensions in the merged process. Iraqi drafters faced enormous US pressure to finish their drafting process according to the deadline set by the US-imposed Interim Constitution.¹¹⁵ As described above, Sunni drafters were added to the drafting process only a month before completion. While their participation was considered imperative, to

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¹¹⁴ See e.g. Workshop, supra note 6 at 32. See footnote 208 for a description of this phenomenon in Nepal.
¹¹⁵ Mona Iman, Draft Constitution Gained, but an Important Opportunity Was Lost, Peace Briefing, United States Institute of Peace (2005). Some commentators believe US pressure was driven by the effort to quell the insurgency, while others point to domestic US pressures to withdraw troops from Iraq as the impetus. See e.g. Online NewsHour, Iraq’s Constitutional Challenge, PBS, July 27, 2005.
meet their deadline, the Kurdish and Shiite drafters bypassed their Sunni counterparts on contested issues, conducting private meetings to finalize the draft. While ultimately, the constitution was adopted through a popular referendum, the vast majority of Sunnis rejected the draft. Their alienation in the drafting process is believed to have added to Sunni isolation and therefore the insurgency that raged for many years after. Mona Iman of the United States Institute of Peace expressly blames the “rushed constitutional process” for the constitution’s failure to achieve peace, describing:

Iraqi constitution-making always required a complex three-way negotiation in circumstances where nothing – not even a residual shared Iraqi identity – could be taken for granted . . . [t]he complexity of the negotiations, and the backdrop of increasingly sectarian violence in Iraq meant that the meetings increasingly resembled peace talks, where peace was clearly elusive, and would require additional time to achieve.

With more time, Iman argues, the drafting process could “have commanded greater Sunni Arab support, with consequent gains for governmental legitimacy and peace in Iraq.”

Because stopping violence will always take precedence over an amorphous need for reflection over constitutional provisions, pressure for a hasty constitution-drafting process is likely to be immense. A hasty process weakens the chances of ending violence, of establishing a unified identity and of creating a constitution that will meet the current and future needs and interests of the population, which are three of the four criteria needed for the success of constitution-drafting as a peacemaking tool, as described in the introduction to Part II(B). The inherent time-frame tension only further

116 Morrow, supra note 59 at 9.
117 Id. at 2.
118 Iman, supra note 115.
119 Id..
undermines the assumption of compatibility of a merged constitution-drafting/peacemaking process.

3. **Tensions between short- and long-term goals**

One of the biggest potential barriers to relying on constitution-drafting as a peacemaking tool is the tension it creates between the short-term goals of immediately stopping violence and the longer-term goals of constitutions.\(^\text{120}\) To accomplish the cessation of violence, peace-makers typically need to react crisis to crisis, solving immediate problems.\(^\text{121}\) These crisis-management solutions may limit the options open to negotiators to address the long-term needs or goals of the population. The conflict also may simply narrow the constitutional agenda as the underlying issues of the conflict will receive the most attention.\(^\text{122}\) These issues may be the most important to resolving the conflict but may not address vital matters related to establishing a stable foundation for the state.

A related concern is whether the constitution will be focused so heavily on crisis management and the particular circumstances of the conflict that the constitution will fail to address the fact that the constituency’s needs are likely to change once peace arrives.\(^\text{123}\) What drafters and society feel they need now may not be what they will want or need in the future once they can think beyond security matters.\(^\text{124}\) For example, as discussed in Part II(B)(1)(a), a besieged population is likely to trade rights for security.

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\(^{120}\) See *e.g.* Paris and Sisk, supra note 8 at 4-5; John Paul Lederach, *Article Summary of "Beyond Violence: Building Sustainable Peace"*, in Eugene Weiner, Ed., *The Handbook of Interethnic Coexistence* (1998); Bell, supra note 16 at 399.

\(^{121}\) Paris and Sisk, supra note 8 at 4-5; Andrew Reynolds, *Constitutional Medicine*, Journal of Democracy 16.1 (2005); Lederach, supra note 120.

\(^{122}\) Ghai, supra note 13; *Workshop*, supra note 6 at 25.


\(^{124}\) Ludsin, supra note 74 at 482.
Similarly, societies tend to grow more traditional during conflict, seeking comfort in tradition as a balance to the upheaval in their lives. As a result, a more conservative constitution could be adopted during a conflict than would be acceptable during peace. Societies also may grow more insular as they feel more insecure. In cases of conflicts involving identity, societal divisions are likely to make a drafting process more difficult or lead to a constitution that entrenches those divisions, a point stressed in Part II(B)(1)(b).

The tension between long-term and short-term goals and needs is particularly problematic for non-violent groups who are asked to put their rights and concerns aside in favor of a document that can serve as a peace treaty. For example, it is not uncommon for women to be forced to push aside their equality demands for the sake of other goals deemed more important – such as nationalism or ending a conflict. Tuning out the voices of non-violent groups can create new conflicts or result in continued harm to those groups. Constitution-drafting during a conflict, therefore, limits the likelihood that the constitution/peace treaty will respond to the needs and interests of the whole of the population.

The drafting process of Third Revised Draft Constitution of the State of Palestine (Draft Constitution), the most current draft, illustrates several of these problems, particularly the damage caused to longer-term constitutional goals. The US government pushed heavily for this draft as part of the process of peace as envisaged in the Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-

125 Id. at 482.
126 Id.
127 Workshop, supra note 6 at 25.
128 Id. at 25.
129 See e.g. Ludsin, supra note 74 at 467.
Palestinian Conflict or Roadmap for Peace. The Draft Constitution reflects the interests of the two dominant political parties in the Occupied Palestinian Territories (OPT) – the secular Fatah party, which controls the West Bank, and the fundamentalist Islamist group Hamas, which controls the Gaza Strip. At the time, both territories were under the control of the Palestinian Authority and Fatah leader Yassir Arafat.

Much of the Draft Constitution reflects the bargaining between the two parties, who were able to unite behind nationalist goals. This unity was fragile and the provisions of the final draft reflect the tense bargaining between these two parties to the exclusion of other groups. At the time of the drafting, Hamas increasingly was threatening Fatah’s power, forcing enormous compromises. Popular support for Hamas stemmed in large part from the apparent corruption of Fatah as well as Hamas’ stance against Israel, rather than from its religious views. Yet its religious views dominate the draft constitution as reflected in the extent of constitutional protection of Islam in governance.

Women had very little influence in the drafting process and have repeatedly been forced to subordinate their goal of equality to ensure the appearance of Palestinian unity. They suffer severe discrimination under Shari’a family law as interpreted in the

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130 Nathan J. Brown, *The Third Draft Constitution For A Palestinian State: Translation And Commentary* 7 (2003). While the drafting of a constitution is considered part of the Israeli-Palestinian peace process, the constitution itself is not a peace treaty. Despite this difference in context, it illustrates how this tension erupts in a conflict setting.

131 Since then, Hamas has ousted the Palestinian Authority from the Gaza Strip, controlling the area within the limits of occupation.

132 Ludsin, supra note 74 at 479 (2005).

133 Id. at 486.

134 Many Palestinians hope that political Islam can succeed where the secular movement has apparently failed - in ending the Israeli occupation and establishing a stronger economy and greater security.


136 Ludsin, supra note 74 at 476.

137 Hallie Ludsin, *An Analysis of the Third Revised Draft of the Constitution of Palestine from a Women’s Perspective*, Women’s Centre for Legal Aid and Counselling P. 49
OPT,\textsuperscript{138} yet the Draft Constitution expressly protects this law.\textsuperscript{139} While there are specific provisions seemingly securing women’s rights, the constitutional guarantee of religious control over personal status law potentially wholly undermines them. For example, under the reciprocal nature of Shari’a law, a woman is entitled to receive financial maintenance from her husband only as long as she is obedient to him.\textsuperscript{140} Obedience requires the wife to obtain her husband’s permission to leave her home.\textsuperscript{141} In the OPT, this requirement effectively has been interpreted to allow a woman to work and to travel only with the permission of her husband.\textsuperscript{142} The Draft Constitution guarantees the rights to equality under the law, freedom of movement and work,\textsuperscript{143} yet a woman could be punished for exercising those rights.

While there is little doubt that much of the Palestinian population supports Shari’a law’s domination over family law, that support may wane when occupation ends. Should this occur, the Draft Constitution effectively ties the hands of legislators who could adopt a secular personal status law only through a super-majority support for a constitutional amendment.\textsuperscript{144} By drafting a constitution during a conflict, women risk long lasting and severe harm that may have been averted if they had greater opportunity to participate in the process.\textsuperscript{145}

\textsuperscript{138} Id. at 29.
\textsuperscript{139} Third Revised Draft, supra note 135 at Article 7.
\textsuperscript{140} Ludsin, supra note 137 at 29.
\textsuperscript{141} Id. at 126.
\textsuperscript{142} Lynn Welchman, \textit{Islamic Family Law Text and Practice in Palestine}, Women’s Centre for Legal Aid and Counselling, 115 (1999); Ludsin, supra note 137 at 127.
\textsuperscript{143} Third Revised Draft, supra note 135 at Article 19 (Equality Before the Law); Article 31 (Freedom of Movement); Article 51 (Right to Work).
\textsuperscript{144} Ludsin, supra note 74 at 493.
\textsuperscript{145} It is, of course, wholly possible women would have been excluded from a post-conflict constitution-drafting process, but drafting during a conflict ensured their exclusion.
Using constitution-drafting as a peacemaking tool subordinates long-term constitutional needs and interests to short-term peace goals. In doing so, the process risks entrenching societal divisions, limiting the options for political change, establishing a weaker constitutional foundation and overall failing to address fully the current and future needs of the whole population. This inherent tension increases the risk that constitution-drafting as a peacemaking tool will fail to achieve the legitimacy of constitution, will build only a weak national unity, will fail to respond to the needs and concerns of the whole of the population, and will cycle society back into violent conflict. The increased risk of any of these outcomes underscores the dangers of simply assuming the compatibility of the goals and needs of constitution-drafting and peacemaking.

4. Tensions over participation in drafting

The last apparent tension created when constitution-drafting is used as peacemaking tool described in this Article arises from the conflict between the process requirements for sound constitution-drafting and the different needs of the process for establishing peace. It is difficult to overestimate the importance of process in constitution-drafting to a population’s acceptance of a new constitution. A faulty process could lead to lack of faith in the constitution and trust in the institutions it creates, undermining all of the goals of constitution-drafting. Process is all the more important in conflict situations as it could either achieve the peacemaking goals or ultimately lead to further polarization and violence. It:

- exercises both an indirect effect on violence, by shaping who has a voice in choosing the substantive terms, and a direct effect, by influencing senses of inclusiveness or levels of compromise, for

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146 Samuels, supra note 3 at Executive Summary.
example. Procedural choices help decide who has a chance to speak, the range of community interests taken into account, feelings of trust and inclusion, the balance between quiet persuasion and grandstanding, and the willingness to compromise.\textsuperscript{147}

If some or all of a population deems the drafting process illegitimate, the constitution is unlikely to achieve either peacemaking or constitution-drafting goals.

Perhaps the single-most important element of the process to determining whether a population and warring parties will accept constitution-drafting as a peacemaking tool and/or the constitution as a peace treaty is inclusiveness. Who serves as the negotiators, how they are chosen, whose interests are represented, who has the opportunity to participate or, conversely, who is excluded from the process, all determine the likelihood of success of the peacemaking/constitution-drafting process.\textsuperscript{148} A study of 12 constitution-drafting processes showed that:

An unrepresentative or imposed constitution created or aggravated dissent and political tensions, whereas a representative constitution building process provided a forum for the negotiation of solutions to the divisive or contested issues that led to violence, or for a negotiated transition from an authoritarian regime.\textsuperscript{149}

Inclusiveness is particularly sensitive in conflicts involving identity because the underlying source of conflict in large part is a minority group’s feeling of exclusion.\textsuperscript{150} The Iraqi example, described in Part II(B)(1)(a) and (B)(2), highlights this point. The exclusion of Sunni voices set up the drafting-process for failure, ensuring that the constitution would neither gain legitimacy nor serve as an effective peace treaty for the population engaging in the insurgency.

\textsuperscript{147} Widner, supra note 2 at 1.
\textsuperscript{149} Samuels, supra note 3 at 29.
Ideally, constitution-drafters should represent all segments and groups within society to ensure that most people’s interests are heard and discussed during the drafting stage. They should be elected or at least chosen by the democratic representatives of the population. Realistically, drafting during a conflict may severely limit the choice of drafters to negotiators representing the warring parties. While constitution-drafting requires broad participation to achieve constitutional goals and legitimacy, peace negotiations are generally restricted to leaders within the warring groups, as they are the ones needed to accomplish a cease-fire and security.

Using fighters from warring groups as drafters could damage both the substance and the legitimacy of the constitution without necessarily lessening the risk of violence. Fighters are unlikely to have the “expertise . . . or sometimes even the will necessary to design long-term constitutions and consequent institutional reform in all their value-driven complexity.” Their focus is much more likely to be on short-term political gains that make it worthwhile to relinquish the fight rather than on long-term political needs of a functioning, effective and representative state. The fear is that the constitution will reflect the balance of power between these warring parties or serve as a

151 See e.g William, supra note 148 at 4.
152 Workshop, supra note 6 at 30.
153 See e.g. Workshop, supra note 6 at 30 (“By definition, stopping violence gives primacy to groups that can organize military force.”).
154 Fighters are not alone in wreaking havoc in merged constitution-drafting/peace processes. Many of the examples provided in this Article highlight a pivotal role of international or foreign pressure in causing the tensions to erupt. While there is little question that such pressure is highly problematic, undo international interference is not necessarily inherent to constitution-drafting during conflict and therefore is not discussed in this Article.
155 Bell, supra note 16 at 398-399. See also Workshop, supra note 6 at 25 (“peace agreements are concluded by people who usually understand the immediate political context well but may not understand the longer-term legal ramifications of constitutional provisions they advocate.”).
156 Colombia provides a tragic example of this, as described below.
division of spoils between them.\textsuperscript{157} These concerns raise the possibility that the basis for the consensus between warring factions will stop far short of creating a fair and representative government and possibly spark new violence.\textsuperscript{158}

Relying on negotiators from warring factions as drafters also risks that the political extreme will be heard more loudly than more moderate groups. Their threats of violence may allow them to receive unfair constitutional concessions.\textsuperscript{159} Failure to make those concessions could renew or aggravate the violence. Additionally, new groups may enter the violent fray or threaten to do so to ensure a voice in the process.\textsuperscript{160}

The inherent distrust between warring parties also risks creating an inflexible constitution unable to meet society’s needs. Negotiators for warring groups will be inclined to draft detailed provisions to protect their interests as fully as possible.\textsuperscript{161} Detailed provisions are not always ideal as they may be too rigid to accommodate the long-term needs and interests of the broader population. When parties cannot reach a consensus, which is likely with respect to particularly contentious issues, drafters are prone to adopt ambiguous provisions whose substance ultimately will be determined by the legislature or the courts.\textsuperscript{162} On the one hand, ambiguous provisions may be the only way to break a dead-lock in negotiations.\textsuperscript{163} They may provide more time for a

\textsuperscript{157} Teitel, supra note 19 at 2052 (describing what Teitel considers the “realist” view of modern constitutions.); Samuels, supra note 2 at 670.
\textsuperscript{158} See e.g. Ghai and Galli, supra note 7 at 7.
\textsuperscript{159} Maley, supra note 56 at 686-687.
\textsuperscript{160} Workshop, supra note 6 at 25.
\textsuperscript{161} Bell, supra note 16 at 392.
\textsuperscript{162} See e.g. Workshop, supra note 6 at 32; Bell, supra note 16 at 398.
\textsuperscript{163} Id.
consensus to be reached between the groups in the future. On the other hand, these ambiguous provisions could do little more than delay the conflict.\textsuperscript{164}

The legitimacy of the constitution suffers greatly when drafters are drawn predominantly from the warring groups. Relying on fighters as drafters risks the impression that the negotiators are “unrepresentative, corrupt—or worse—criminal.”\textsuperscript{165} The excluded population is less likely to feel that the constitution protects warring group interests and rewards them for their violence.\textsuperscript{166}

The groups most in danger of exclusion are women, non-violent groups and traditionally powerless groups. Women historically have been excluded from most peace-processes, including constitution-drafting processes.\textsuperscript{167} They are less likely to serve as negotiators or drafters because of perceptions that they are not the leaders in the conflict and are not serving as fighters.\textsuperscript{168} The United Nations Security Council adopted Resolution 1325 to assert the importance of including women in peace processes,\textsuperscript{169} yet women continue to remain underrepresented as negotiators. The effect is that they struggle to have their voices heard as their country is being redesigned. Their concerns are “likely to be ignored or bargained away at the first step of the negotiation process,”\textsuperscript{170}

\textsuperscript{164} See e.g. \textit{Workshop}, supra note 6 at 32. See Part III(B) for a description of how this occurred in Nepal’s ongoing constitution-drafting process.
\textsuperscript{165} Paris and Sisk, supra note 8 at 5-6.
\textsuperscript{166} \textit{Workshop}, supra note 6 at 31. The discussion in Part III(B) of Afghanistan illustrates this point.
\textsuperscript{169} S/RES/1325 (2000)(“Reaffirming the important role of women in the prevention and resolution of conflicts and in peace-building, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution.”)
\textsuperscript{170} See e.g. Hunt, supra note 168 at 561 (2003).
in large part because of the perception that their concerns are not political. As described in Part II(C), often they are asked to put aside their concerns in favor of interests deemed more pressing. As the Palestinian example shows, the end result may be that women find that the constitution does not respond to their needs and interests, leaving them with few enforceable rights.

Non-violent groups also typically find themselves excluded from negotiations, although in the case of Iraq, the most violent minority group was excluded. These groups are likely to feel that the constitution imposes rules on them rather than represents their interests, resulting in the failure of the goals of constitution-drafting. It also can result in the failure of peacemaking goals as the exclusion of any group could trigger new violence involving different parties. A well-designed drafting process, therefore, requires “a careful balance . . . [to] be struck between bringing into the political process existing actors who control the means of violence and the gradual enfranchisement of other interest groups and broader society.” Unfortunately, nothing requires the warring parties to agree to an inclusive process and they are unlikely to do so if they think it will harm their interests.

Organizing true public participation in the process is also particularly difficult during a conflict. Public participation is necessary for creating a truly representative process and is crucial to the legitimacy of the constitution. Lack of security may make

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172 Id.
174 Gross, supra note 150 at 58.
175 Baldwin, Chapman and Gray, supra note 173 at 16.
176 Ghani, Lockhart, and Carnahan, supra note 18 at 109.
177 Ludsin, supra note 74 at 477.
it impossible for the public to sit in on discussions or voice their concerns. Security threats encompass the danger in moving from place to place as well as specific threats to anyone who speaks out against the interests of one of the warring groups. Exclusion of the public also misses a valuable opportunity to educate the population about the goals of constitutions and about the draft provisions themselves.\textsuperscript{178}

Colombia’s experience in the effort to use constitutional change to quell violence between its main political parties exemplifies the tension caused when drafters/negotiators are chosen predominantly from warring parties. Control over the Colombian government from the 19\textsuperscript{th} century until the mid-1940s was tensely divided between the Liberal and Conservative parties who typically won elections under the 1886 constitution.\textsuperscript{179} The political clashes between the two parties erupted into extreme violence during the period named “La Violencia” in the mid 1940s during which an estimated 180,000 - 200,000 people were killed in fighting.\textsuperscript{180} In a coup in 1953, the military took control of the government to end the conflict.\textsuperscript{181}

In 1957, the two parties were able to unite to avoid further military control and to prevent a growing threat to their hegemony from communist parties.\textsuperscript{182} They adopted the National Front to divide power between them.\textsuperscript{183} The National Front guaranteed that Colombia’s presidency would rotate between the Liberal and Conservative parties and

\begin{footnotes}
\item[178] Id. at 477.
\item[181] Easterday, supra note 180 at 63-64.
\item[182] Forrest Hylton, Evil Hour in Colombia 52-53 (2006).
\end{footnotes}
that the seats in the legislature would be evenly divided between them, excluding all other political groups, for a period of 16 years.\textsuperscript{184} They effectively formed a “monopoly of shared power”, guaranteeing their power as elites.\textsuperscript{185} The population voted in favor of the National Front and its consequent change to the 1886 constitution in hopes it would maintain some level of peace.\textsuperscript{186}

Excluded from this bargaining process were the poor, landless and communist parties dissatisfied with elite rule and its failure to address their socio-economic concerns.\textsuperscript{187} The excluded groups began a guerrilla war in the early-to-mid 1960s against the now politically aligned Liberal and Conservative parties:

While it [the National Front] secured peace between the two main political camps, it did so at the expense of other politics. The guerrillas identify themselves as a reaction to this restricted system . . . the National Front was at a minimum perceived as exclusionary and incapable of channeling these particular group demands.\textsuperscript{188}

According to a 2008 Amnesty international report, in the previous 20 year period 70,000 people had been killed and 3 to 4 million had been displaced; during the previous 40 years between 15,000 and 20,000 people had been forcibly disappeared; in the ten years prior to its report, 20,000 had been kidnapped or taken hostage\textsuperscript{189} because of the fighting between guerrillas, paramilitary “self-defense” groups, the military and drug cartels.\textsuperscript{190} Much of the violence has its roots in the La Violencia period and the failures of the

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\textsuperscript{184} Easterday, supra note 180 at 63-64; Benjamin Keen and Keith Haynes, \textit{A History of Latin America} 473 (2003).
\textsuperscript{185} Keen and Haynes, supra note 184 at 473.
\textsuperscript{186} Hanratty and Meditz, supra note 180
\textsuperscript{188} Esquirol, supra note 179 at 28-29.
\textsuperscript{189} Amnesty International, \textit{Leave us in Peace’ Targeting Civilians in Colombia’s Internal Conflict} 7 (2009)
\textsuperscript{190} International Crisis Group, \textit{Colombia Conflict History}, 1 (2005). The relationship between the drug cartels and conflict is complex as the drug trade is believed to be financing both paramilitary groups and the guerrillas. See \textit{e.g. Id.} at 1.
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Peacemaking and Constitution-drafting, a Dysfunctional Marriage

National Front settlement. Colombia provides a particularly tragic example of how allowing warring parties alone to draft constitutional change can lead to the appearance of division of spoils and renewed violence, this time with new combatants drawn from excluded political forces.

Overall, constitution-making during a conflict requires placing leaders of warring groups as negotiators/drafters of the constitution. Doing so threatens the legitimacy of the drafting process and the document it creates as some or all of the population may feel excluded by the process. It also risks creating an overly inflexible and/or ambiguous constitution that does not serve the needs and interests of the broader population and that could inflame tensions and therefore violence. The inherent tension caused by peacemaking needs for warring party participation in constitution-drafting could lead the merged tool to fail to meet all four criteria for success as it risks renewing violence, maintaining severe societal divisions, addressing only immediate concerns and depriving the new constitution of legitimacy.

C. What if the process fails?

The expectation for constitution-drafting as a peacemaking tool is that the drafting process and constitution will bring peace and stability to a nation in conflict by providing warring parties with a forum to negotiate a binding document that creates a foundation for a peaceful, stable state. A closer examination of the tensions caused by the differing goals and needs of constitution-drafting and peacemaking undermines this expectation. Drafting a constitution during a conflict risks a document that is hastily drafted; reflects a shallow basis for unity; serves mostly short-term peace interests; is reactionary or

191 Amnesty International, supra note 189 at 5; Diaz, supra note 180; Springer, supra note 180 at 1.
inappropriately conservative; entrenches religious, cultural or ethnic divisions; does not fully protect human rights; lacks legitimacy; and ultimately sparks renewed violence. These risks are inherent in a merged constitution-drafting/peacemaking process, although the negative outcomes are not necessarily inevitable. By any measure of success and certainly by using the four criteria that seem to underlie most measures, if any of those negative outcomes arise constitution-drafting and the constitution cannot succeed fully if at all at their peacemaking or constitutional goals.

This raises the next question: what are the consequences if the process and constitution fail to attain national unity, legitimacy and/or adherence to peaceful dispute-resolution mechanisms or does not address the current and future needs and interests of the whole population? At its mildest, failures in the process and/or constitution could mean that some or all of a population suffers under a constitutional regime it does not support. In some instances, different groups will be deprived of their rights or suffer from an exchange of security for rights, as in India or as is likely in the Palestinian Territories. Alternatively, poorly drafted or weak constitutional provisions could create a paper constitution, which means that some or all of the constitution will not be fully enforced.

Any of these outcomes could have a detrimental effect on the growth of constitutionalism in the conflict-plagued country. Constitutionalism is society’s acceptance of the rule of law under the constitution. It establishes constitutional supremacy in setting rules for governance and for protecting human rights. Richard A. Rosen,


Rosen identifies constitutionalism as perhaps the key ingredient to the success of a constitution: “If constitutionalism is sufficiently imbued in a society, even a faulty constitution can survive, by amendment or adaptation. If it is absent, the most carefully crafted constitutional document is virtually worthless.” A failed constitution-drafting process and/or constitution could create skepticism about constitutions generally, grossly undermining later attempts at peace-building and at creating a stable, rights-based government.

More extreme, lack of faith in constitutionally-created government institutions could increase tensions and bitterness between conflicting groups, making consensus and unification of the population extremely difficult. These failures could cycle society back into a conflict. In Iraq, “[c]onstitution, and constitution-making, instead of becoming tools of crisis management, and symbols of future political stability and identity, have become instead sources of special grievance for the excluded, a significant part of the fuel for the fires of a civil war.”194 All of these outcomes are unacceptable.

The tensions that are likely to erupt when constitution-drafting and peacemaking merge along with the potentially harsh consequences of a failed constitution negate the assumption of compatibility of peacemaking and constitution-drafting processes. Whether the merger of the two processes can be salvaged is the subject of Part III.

III. Salvaging the Merger of Peacemaking and Constitution-Drafting Processes

Part II showed that using constitution-drafting as a peacemaking tool without first stabilizing and securing the state sets up the process and constitution for failure and could

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194 Arato, supra note 3 at 555. See also, Samuels, supra note 2 at 671.
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renew or increase violence. Yet the nature of many conflicts and the parties to them often demand some type of constitutional change to secure peace, making it impossible to simply abandon this peacemaking tool. The best hope for salvaging constitution-drafting as a peacemaking tool in these circumstances is to embark on a multi-stage or interim constitutional process that drafts an interim constitution before completing a final constitution. The interim constitution adopts the initial constitutional change necessary to establish security and the increased security enhances the chances that the final drafting process and constitution will achieve both peacemaking and constitution-drafting goals. In this sense, Teitel’s vision of a transitional constitution that mediates the process of constitutional change offers the best opportunity for tackling immediate peacemaking needs without compromising constitutional goals.¹⁹⁵ As Part A below describes, a multi-stage constitutional process could resolve many of the inherent tensions created when peacemaking and constitution-drafting are merged. Part B, however, points out that such resolution is not inevitable but will depend heavily on the context of the internal conflict and the will of the warring groups.

A. The Potential

A multi-stage constitutional process offers the best opportunity to salvage constitution-drafting as a peacemaking tool when warring parties demand constitutional change to achieve peace – essentially when there is no choice but to undertake constitution-drafting. The first step in an interim process is to establish the procedure for drafting an interim constitution; this step does not require a cease-fire agreement although obviously one is preferable. Warring parties then will negotiate an interim constitution as

¹⁹⁵ See Part I(B).
a temporary document to serve as an immediate peace treaty and to govern the state during a transitional period away from conflict. The adoption of an interim constitution is the second step in a multi-stage interim constitutional process. A cease-fire becomes mandatory only at this point.

Interim constitutions establish a government and institutions to bring back stability and order to the country, which ideally are governed by human rights provisions contained in the text. Interim constitutions also detail the process for drafting a final constitution. They may set at least some boundaries on the substance of the permanent constitution through constitutional principles that must be followed to maintain peace. Numerous agreements may be required to achieve an interim constitution and amendments to it may be necessary to maintain momentum towards peace.

The primary advantage of a multi-stage process is that an interim constitution can secure the immediate constitutional changes necessary for a cease-fire without rushing into a final drafting process and sacrificing long-term constitutional goals. An interim process allows negotiators room to address immediate crises without entrenching provisions for governance that would be inappropriate for a stable and representative state. Whether the interim constitution favors peacemaking at the expense of constitutional goals or the process is less than fully representative is mostly irrelevant at the interim stage. No final decisions are being made on elemental matters such as the design of the state, the relationship between the people and the government and national

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197 Bell, supra note 16 at 398-99.
198 See e.g. Workshop, supra note 6 at 25
identity. At the end of the process, the only real concern is whether the permanent constitution is seen as legitimate.

The temporary nature of an interim constitution also should make it easier for warring parties to compromise during its drafting.199 Interim debates are likely to be less polarizing when parties know they will have another opportunity to argue their points. Negotiators will not need to fight as hard for favorable provisions and language if they know that they can change these provisions later if their concerns remain.200 By easing compromise, interim processes may allow a cease-fire to be reached more quickly.

Nepal provides one example of how an interim constitutional process can more easily secure peace than jumping straight to a final process. Nepal embarked on the multi-stage process following a 10-year insurgency lead by the Communist Party of Nepal_Maoist (Maoists)201 that demanded the end of Nepal’s monarchy and greater economic and social equality.202 The Maoists refused to enter the democratic reform process that had been crawling along from the early 1990s until the monarchy was constitutionally abolished.203 In April 2006, under enormous popular pressure, Nepal’s King relinquished his governing power to the Seven-Party Alliance (SPA) and the existing parliament.204 In anticipation of future agreements with the Maoists, one of the first acts of the SPA was to end monarchical rule. In June 2006, the SPA and the Maoists reached an initial agreement to draft an interim constitution to establish a process for the

199 Jackson, supra note 2 at 1252.
200 Bell, supra note 16 at 398-399.
201 The Communist Party of Nepal_Maoist must be distinguished from the Communist Party of Nepal _ Unified Marxist Leninists, who were not part of the insurgency and participated in regular politics.
202 Nepal is severely divided along ethnic, caste, class, religious and regional lines that have led to deep inequalities, sparking the Maoist insurgency. Donna Lyons, Maximising Justice: Using Transitional Justice Mechanisms To Address Questions Of Development In Nepal, 13 Trinity C.L. Rev. 111, 112 (2010).
election of a constituent assembly that would be responsible both for drafting a new constitution and acting as a transitional parliament.  

The Maoists initially demanded that the interim constitution guarantee a federal state under the permanent constitution. The dominant parties of the SPA rejected explicit references to federalism. Both groups were able to compromise quickly by adopting Interim Constitution Article 138 that describes state transformation from a “centralized and unitary” government to a “progressive, democratic” state. In November 2006, two months prior to the official adoption of the Interim Constitution, the Maoists signed the Comprehensive Peace Accord formally ending the insurgency that killed an estimated 16,000 people. The Maoists were satisfied with less than an explicit reference to federalism in the temporary constitution, which they considered to be implied in Article 138, allowing them to move forward in the peace process.

Overall, the Interim Constitution has been amended at least 5 times to respond to demands that left unmet could have cycled Nepal back into war. This fact underscores how the temporary nature of an interim constitution can permit immediate crisis management responses without risking the stabilizing and foundational goals of a final constitution. Nepal’s Interim Constitution generally and its subsequent amendments also have permitted a longer-term final constitution-drafting process. Nepal, however, serves as only limited example of the potential of interim constitutional processes. As Part III(B) describes, while the Interim Constitution so far can be considered a success, the

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205 Id.
207 International Crisis Group, supra note 204.
208 Ultimately, popular protests in the south plains of the Terai just after the Interim Constitution came into force compelled the Constituent Assembly to amend the Interim Constitution to guarantee a federalist structure for Nepal in the future constitution; however the failure to do so initially did not prohibit a peace agreement. International Crisis Group, supra note 206 at 8 and ftnt 57 and accompanying text.
final drafting process has repeatedly stalled, threatening peace and illustrating the limitations of multi-stage constitutional processes.

The third stage of the interim process is the drafting of a permanent constitution. For an interim process to resolve the tensions that inhere when merging peacemaking and constitution-drafting, the final drafting process must begin only after a cease-fire is achieved and an interim constitution is in place.\(^{209}\) Having stopped the violence through the interim constitution, which fulfills the goals of peacemaking, the final process can focus on achieving the constitution-making goals listed in Part I(B) above. To be legitimate or “constitutional” the process must follow the directives contained in the interim constitution.

If the conflict continues unabated or if the conflict re-ignites after a respite despite the adoption of an interim constitution, then it is clear that there is something wrong with the interim formula for governance/peace. Parties then have the opportunity to continue negotiations without damaging the permanent constitution and the growth of constitutionalism. There is less at stake in such situations as the constitution does not fail, only the interim constitution/peace treaty.

If the cease-fire holds, then some measure of security can be achieved prior to the drafting of a permanent constitution. As Part II(A) shows, security is a precondition to using a constitution-drafting process as tool for achieving both constitutional and peacemaking goals. Security provides society the space to consider its long-term needs and interests, not just the immediate need to stop violence. A secure society will be less likely to sacrifice their human rights for security. It also will have less need to draw on

\(^{209}\) Workshop, supra note 6 at 27.
identity and tradition to feel safe, which lessens the points of societal friction and broadens constitutional opportunities for women, minority groups and non-conformists.

If all sides to an internal conflict adhere to the terms of the interim constitution/peace-agreement, then they have built the foundation for additional compromises. As levels of trust increase, so do the chances society and the drafters will reach a meaningful consensus on a national identity, national values and a governance framework for the state ahead of or during the final drafting process. Since the interim agreement will have dealt with many of the most immediate tensions, what remains to be decided in the final drafting process is how to accomplish a sustainable, peaceful coexistence. As trust increases, groups may be able to look past their immediate interests and design a state based on the needs of the citizenry as a whole. An interim process that permits the growth of trust and security is less likely to entrench group divisions that perpetuate ethnic conflict.

In this multi-stage process, peace negotiations/constitution-drafting continue even as the interim constitution is being implemented and is building a foundation for stable governance. Interim constitutions buy weak institutions the time to develop and stabilize without too much pressure being placed on them. If the population is discontent with the interim institutions, the drafters have the time and opportunity to make meaningful changes to them in the final constitution. They also have the opportunity to reconsider interim power relationships and structures.

For interim processes to achieve their goals to the fullest, the final constitution-drafting timeline must account for the need to build trust, stability and security before reaching a consensus on the future of the state. Reaching a cease-fire before beginning a

\[210\] Hart, supra note 2.
final drafting process should allow for a longer time-frame for drafting. A more relaxed timeline is likely to give drafters the opportunity to craft a constitution to suit society’s current and future needs and based on a unified national identity and national values. The final drafting is less likely to be sloppy or result in unintended consequences since drafters and society will have time to reflect on the meaning of each provision. With more time and increased trust, the need for potentially conflict-causing ambiguity or extreme rigidity should lessen.

The multi-stage interim process also could ease the problem of inclusiveness in the drafting process. Ideally, the fighter-negotiated interim constitution will set up a democratic final drafting process that represents all members of society and allows for substantial public participation. By doing so, the interim constitution could address the concerns that warring groups will be the primary beneficiaries of a constitution-drafting process and that current power relations will be entrenched in the governance framework. It also could mean that drafters will be chosen based on their skill and will to reach a long-term consensus rather than because of their affiliation with a warring party. Assuming that the interim process dealt with the immediate needs and concerns of the parties in the conflict, drafters can respond to a broader range of societal groups. Non-violent groups and women are more likely to be heard since there will be less pressure for them to thrust aside their concerns for the sake of peace. Practically, drafters will no longer risk their lives simply to accomplish their jobs.

Additionally, the combination of a cease-fire and a longer timeframe for drafting provides the public with greater opportunity to participate in the final drafting process.

211 William, supra note 148 at 32.
212 Workshop, supra note 6 at 31.
The interim drafters can design a final process with a lengthy public participation component when a cease-fire has already been achieved and when it is more secure for the drafting bodies to reach the public and the public to reach the drafters. Public participation and a representative drafting process ease conflict-causing tensions and increase the chances society will accept the final constitution as legitimate.\(^{213}\)

South Africa set the precedent for a successful interim constitutional process. Leaders of the Apartheid regime headed by the National Party and the African National Congress (ANC) were able to find a way to accomplish the transition from authoritarian, minority party rule to liberal democracy without descending into a much anticipated civil war.\(^{214}\) Exactly this accomplishment, however, makes South Africa an imperfect example of multi-stage constitutional processes in conflict settings. While the Apartheid government and the ANC considered themselves at war,\(^{215}\) ending violence was one among many reasons the negotiations started.

Multiple factors encouraged South Africa’s constitutional negotiations including, most prominently, economic and diplomatic sanctions and widespread political violence that weakened the Apartheid government and the collapse of the Soviet Union, which had been funding the ANC and whose ideology threatened white South Africans and their economic base.\(^{216}\) By the late 1980s, the Apartheid leadership recognized that at some

\(^{213}\) See e.g. Samuels, supra note 3 at 29.

\(^{214}\) The Inkatha Freedom Party, a Zulu-based party headed by Mongosuthu G. Buthelezi, also played an important role both as an ally to the National Party and as a potential spoiler of the constitutional process. Relations between the ANC and the Inkatha were violent as each sought to end the power of the other. Eventually, the National Party and the ANC managed to sideline Inkatha. Stephen Ellis, *The Historical Significance of South Africa’s Third Force*, J S Afr Stud Vol. 24, No. 2 286-270, 290 (1998)

\(^{215}\) 14,000 people were killed in South Africa between 1990-1994. *Id.* at 263. See also, Vincent Maphai, *Prospects for a Democratic South Africa*, International Affairs (Royal Institute of International Affairs 1944-), Vol. 69, No. 2 226 (1993).

point, the majority population was no longer going to accept minority rule. It chose to negotiate the end of the regime at a time when it still retained some power to control the outcome of constitutional negotiations and before the country exploded into civil war. The ANC entered negotiations recognizing it did not hold sufficient power to defeat the Apartheid government in a military battle. Because South Africa simply feared a full-fledged civil war and did not face one, its transition falls somewhere between a transition from authoritarian rule and a peacemaking process. The fact that there was no out and out civil war in any part of the country gave South Africa an advantage in maintaining a reasonable level of physical security over other examples in this article. Despite this advantage and the murkiness in the type of transition underway, negotiations at pivotal points were driven by the need to lower the risk of civil war, which makes South Africa’s experience an appropriate example for constitution-drafting during conflict.

The ANC, the National Party and numerous other groups formed the Convention for a Democratic South Africa (CODESA) to determine how to peacefully end Apartheid rule. South Africa’s interim constitutional process developed as a crisis management solution. The National Party sought a one-stage constitutional process where it felt it could gain significant advantages for the white population, refusing a democratic process. The ANC rejected an elite driven drafting process, demanding a democratic

217 Id.
218 Id.
220 See e.g. Jeffrey Herbst, *Creating a New South Africa*, Foreign Policy, No. 94 130 (1994); O’Flaherty, supra note 219 at 126; Ellis, supra note 214 at 294.
221 Hermann, supra note 216.
222 Id.
223 Sachs, supra note 223 at 1254-1255; Murray, supra note 196 at 813.
constitutional assembly as part of its fight for self-determination. The negotiations deadlocked over how the constitution would be drafted.

Shortly thereafter, South Africa entered a crisis period. The ANC withdrew from CODESA following the killing of more than 40 people in Boipatong believed to have been carried out by government forces. The ANC then organized mass anti-Apartheid protests, including in the Ciskei (tribal) homeland of South Africa whose black government continually suppressed the ANC. The ANC assumed the loyalty of people within the homeland and were surprised when Ciskein security forces killed 28 ANC protestors.

As the points of friction increased, both sides recognized they could not defeat the other. Seemingly brought to the brink of civil war, the ANC and the National Party reached an agreement that permitted the ANC to return to CODESA where the parties established a multi-stage constitutional process.

The pivotal compromise reached by CODESA was that in exchange for a two-year long democratic final drafting process, the interim constitution that would contain constitutional principles that must be followed in the final document. The final constitution would not become law until the Constitutional Court established by the Interim Constitution certified that it fulfilled those principles. Fearing that the black majority would use its power to retaliate against the white minority, the National Party demanded democratic guarantees of freedom of association and minority language and

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224 Murray, supra note 196 at 813.
226 Ellis, supra note 214 at 289.
227 Id. at 289-290.
228 Hermann, supra note 216.
229 Murray, supra note 196 at 815; Sachs, supra note 196 at 675.
230 Sachs, supra note 196.
religious rights in these principles. The ANC sought to limit the principles to avoid unfair concessions to the white minority, such as a white veto or overrepresentation of National Party. Albie Sachs, a South African Constitutional Court judge and participant in the constitutional negotiation explains: “We ended up with thirty-four principles. Some of them read very, very oddly. You will find no clear logic to the whole set of principles, except the logic of being as inclusive as possible to make everybody feel protected in the process.” This compromise allowed the National Party to guarantee protection for its minority constituency without wholly undermining the ANC’s demand for a democratic drafting process. At this point, violence continued throughout South Africa, but it had not reached the level of a civil war, which allowed for longer time frames for accomplishing constitutional goals.

South Africa completed its constitution-drafting exercise in May 1996. The Constitutional Assembly took full advantage of the two years it had for drafting to educate the population about the constitutional debates and to embark on public consultations. Polls showed that the public consultation process and education campaign had reached nearly ¾ of South Africa’s population and that the Constitutional Assembly had received more than 2 million submissions from the public. The Constitutional Court initially did not certify the constitution, finding provisions in conflict with the constitutional principles. After revisions, the Constitution of South Africa came into force in February 1997.

231 Sachs, supra note 223 at 1255; Sachs, supra note 196 at 672; 232 Hermann, supra note 216; Sachs, supra note 196 at 670-671. 233 Sachs, supra note 223 at 1255. 234 Sachs, supra note 196 at 670-672. 235 Murray, supra note 196 at 817.
South Africa’s success at staving off an all out civil war and creating a stable foundation for the state lies in large part in a multi-stage process carefully negotiated so that everybody felt that their interests were protected even as they were forced to compromise. All the parties to CODESA had a stake in the interim process and the interim institutions, which kept the country from bursting into civil war. The long process of negotiations that started in 1990 further permitted some trust to build between the parties, which allowed each to make concessions important to the other. Both sides managed to find common ground in their support for a democratic political system that offered some guarantees to minority groups, which established the basis for a national identity. Furthermore, the longer time-frame for drafting permitted an inclusive process, both through the democratically elected Constitutional Assembly and public consultation, which gave the final constitution strong democratic legitimacy and provided a strong foundation for the future.

B. No Guarantee

Despite the rosy picture painted here of an interim constitutional or multi-stage drafting process, such an undertaking does not guarantee success in both constitutional and peacemaking goals. Rather it offers the greatest opportunity to harmonize those goals. The tensions that arise when drafting a permanent constitution as a cease-fire/peace-agreement are inherent to a one-step process. In an interim process, those tensions are no longer inherent but could still erupt easily.

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236 Herbst, supra note 220 at 121.
237 Sachs, supra note 196 at 672.
238 Murray, supra note 196 at 817.
Whether a conflict-filled country will benefit from the multi-stage process depends heavily on the will of the warring parties to compromise with each other and whether they design a final process that avoids these tensions. The more fragile the cease-fire and the more uneven the balance of power between conflicting parties, the easier it is for negotiators/drafters to design a process that undercuts the benefits of a multi-stage constitution-drafting/peacemaking process. For example, where the potential for renewed violence is great, peace-makers are more likely to push for a quick final drafting process. The hope is that the final constitution will succeed where the interim one failed. The rushed final process then causes the inherent tensions described in Part II to resurface as security, stability and trust do not have time to develop sufficiently to allow for great compromises or the building of national values and identity.

Iraq’s experience with an interim constitution illustrates how a multi-stage process will not always save a constitution-drafting or peacemaking, particularly when the expected cease-fire following the adoption of the interim constitution never materializes. The United States government and the Iraqi Interim Governing Council drafted the Transitional Administrative Law (TAL) in March 2004 to serve as Iraq’s interim constitution.\textsuperscript{239} The TAL established an 8-month drafting period to follow the election of an interim National Assembly and permitted one 6 month extension of the process.\textsuperscript{240} The National Assembly delayed appointments to the constitution-drafting committee for more than 5 months, leaving drafters less than 3 months to complete a

\begin{footnotes}
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draft constitution. They then chose not to seek an extension for drafting despite mounting evidence that one was necessary both for establishing peace and meeting long-term constitutional goals. 241

While experiences elsewhere showed the need for a long drafting process in post-conflict situations, 242 the continued conflict with Sunni insurgents drove the US to seek a short drafting period as part of their plan for the “transfer of sovereignty” to the Iraqis. 243 Foreign governments who opposed the US invasion, ordinary Iraqis who wanted to see the end of the US occupation and Iraqi leaders who thought a quick drafting process would consolidate their current power also supported a short drafting period. 244 Self-interest and condemnation of the US-led war rather than concern for the needs and long-term interests of the Iraqi people drove the choice for a drafting timeframe. The same concerns, as well as fatigue on the part of Iraqis, led the US and the Iraqi leadership to reject any extension. 245 These mostly inappropriate considerations for a rushed constitution-drafting process directly undercut the benefits of an interim constitution and reinstituted the inherent tensions that arise from the merger of peacemaking and constitution-drafting processes. As described in Part II(B)(1-2), the resulting harm to the goals of both processes was enormous as the insurgency continued to rage, the population grew more polarized and the constitution failed to garner legitimacy.

Another possible stumbling block to a successful multi-stage process is if a group foresees a benefit in stalling the process. 246 If any negotiating group believes delaying

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241 Morrow, supra note 59 at 8-10.
242 Brown, supra note 240 at 1-2; International Crisis Group, supra note 139 at 1.
243 International Crisis Group, Iraq’s Constitutional Challenge, 6-7 (2003). But see Id. 6-7(describing Paul Bremer’s statement that a rushed drafting process would be dangerous.)
244 Id. at 6.
245 Brown, supra note 46 at 3.
246 Jackson, supra note 2 at 1289.
the process will lead to power gains, an interim process is far less likely to succeed at peacemaking or constitutional goals. Even when inadvertent, a delayed interim constitutional process that continually fails to achieve a meaningful consensus could undermine faith in peace efforts and constitution-drafting. It also could leave a power vacuum where there is no clear support for a particular government or until elections can ensure representation.247

Nepal’s final drafting process for a permanent constitution, initially discussed in Part III(A) above, underscores these points. The Interim Constitution established a Constituent Assembly (CA) elected on the basis of proportional representation to serve as the interim parliament and to draft the constitution. The Maoists won approximately 40% of the seats in a 2008 election, forming a coalition government with the Communist Party of Nepal, United Marxist-Leninst party (UML) and the Nepali Congress Party. The coalition government and constitution-drafting fell apart over the design of a federalist state and how to deal with the nearly 20,000-strong Maoist army.248 Drafters missed their May 2010 deadline over these issues and are set to miss their May 2011 deadline as well, as groups remain deadlocked. The Maoists in particular have been accused of subverting the drafting process for personal gain.249

247 Workshop, supra note 6 at 26. Nepal provides an important example of this point. Asian Development Bank, Nepal: Political And Economic Update, available at http://www.adb.org/documents/reports/validation/NEP/in324-10.pdf (last visited January 10, 2011) (“Nepal continues to experience a difficult political transition following the end of the decade long civil conflict in April 2006. The transition has been further complicated by the lack of a clear majority of any political party in the 601-member Constituent Assembly (CA) elected in April 2008 and delay in the constitution drafting process which was scheduled to be concluded by 28 May 2010.”). See also, Ishaan Tharoor, After Maoist Protests, Nepal Faces a Murky Future, Time May 12, 2010.


Equally problematic, the continued intransigence of the parties in the final drafting process and the absolute distrust between parties have left a power-vacuum in Nepal. Maoists with 40% of the CA seats have been unable to sustain a coalition government and so far have been unwilling to participate in one because of battles over the Maoist army. Numerous parties also have sought to exclude the Maoists from power. When the CA failed to meet the May 2010 deadline for a permanent constitution, two-thirds of the CA needed to vote to amend the Interim Constitution to change the deadline for constitution-drafting and extend the authority of the CA. Without Maoist agreement to such an extension, the CA and the peace process risked collapse. Ultimately, the Maoists agreed to the amendment but only if the existing coalition government resigned. This forced new Constituent Assembly elections for government posts, including the Prime Minister. For seven months Nepal was without a CA-elected prime minister. After 16 attempts to choose a new Prime Minister, in February 2011, the Maoists agreed to Jahalanth Khanal, a United Marxist-Leninist candidate, based on an agreement over the Maoist troops that satisfied the both parties. Whether the pact will hold or the Maoists will again withdraw from the government remains unclear.

Further complicating the peace/constitutional process is the withdrawal of the United Nations Mission in Nepal (UNMIN) that was responsible for monitoring the cease-fire agreements, for mediating the disarmament of Maoist troops and their integration into the regular Nepal army, as well as for monitoring the Nepalese

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251 Kiran Chapagain And Jim Yardley, Nepal Avoids Political Crisis With Broad Deal to Extend Parliament, New York Times May 29, 2010
army for abuses.\textsuperscript{254} UNMIN withdrew to force the end of the status quo and shake-up the negotiations between parties.\textsuperscript{255}

The risks to Nepal are high without clear leadership and consensus. This type of stalemate could easily cycle Nepal back into violence.\textsuperscript{256} The predominant fear at this point is that the general population, extremists on both sides, or historically unrepresented ethnic groups will grow sufficiently frustrated with the current constitutional process and resort to violence to end the deadlock.\textsuperscript{257} As this example shows, having an interim constitutional process is no guarantee that peace and a stable foundation for a state will be achieved.

Even where peace is seemingly less fragile, fighters could deprive a multi-stage process of a successful merger of peacemaking and constitution-drafting goals if they refuse to cede the final drafting process to the broader population or if they inappropriately protect their interests. The warring parties could agree to constitutional principles that entrench power imbalances as parties attempt to hold onto their negotiating power.\textsuperscript{258} Interim negotiators may insist on a power-sharing relationship that does not represent the interests of the broader population resulting in “a mere division of spoils between powerful players”.\textsuperscript{259} Crisis management may demand these compromises, permitting short-term peace goals to override long-term constitution-drafting goals.

\textsuperscript{254}Department of Public Information, supra note 253.
\textsuperscript{256}European Interagency Security Forum, supra note 252.
\textsuperscript{257}Rijal, supra note 248; Department of Public Information, supra note 253.
\textsuperscript{258}Samuels, supra note 3 at 24.
\textsuperscript{259}\textit{Id.} (describing constitutional processes during conflict generally).
Afghanistan provides an important example of how crisis management permitted warring parties and powerful interests to hijack the final drafting process to the detriment of peace and the constitution. Afghanistan has a long history of civil war between warlord-headed regional factions that independently controlled much of Afghanistan. Many of the warlords and their foot soldiers were known for committing severe human rights violations and terrorizing the populations within their control. The Taliban were able to reign in some of the regional conflicts through violence and co-option. During the US-led invasion to route out the Taliban and Al Qaeda from Afghanistan following the 9/11 attacks, the US depended heavily on many of these warlord-headed regional factions to provide fighters against the Taliban.

In December 2001 when it looked as though the US and its backers were succeeding at their mission against the Taliban, the US-aligned regional warlords along with an elite group of Afghans signed the Bonn Agreement to design a blueprint for achieving a stable Afghanistan. The Bonn Agreement did not end the conflict with the Taliban but rather presumes its defeat. One commentator describes that “the Bonn Agreement was not a peace agreement between belligerents, but a statement of general goals and intended power sharing among the victors of a conflict.” Although it is not an Interim Constitution, the Bonn Agreement functioned as one. It established the interim framework for governance by adopting a modified version of Afghanistan’s 1964 constitution; it sought to reform or strengthen existing and interim institutions in anticipation of a permanent constitution; and it outlined the process for drafting a

260 See e.g. Human Rights Watch, Killing You is a Very Easy Thing For Us, (2003)
263 Schneider, supra note 2.
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permanent constitution, which are the primary functions of one.\textsuperscript{264} For this reason, this Article treats Afghanistan's recent constitutional process as multi-stage.

Because the Afghan constitution was drafted during an ongoing conflict, the warlords heading the regional factions, who much of the population viewed as criminals, had undue influence. The US continued to back the warlords in order to continue their alliance against the Taliban. Further, many feared that without the Taliban a power vacuum would return Afghanistan to the pre-Taliban civil war state where these regional factions would start fighting each other for power.\textsuperscript{265} Policy makers hoped to co-opt the warlords into supporting a centralized government by bringing them into the transitional governance process.\textsuperscript{266} Crisis management demanded that the regional factions and their warlord leaders participate in the Bonn Agreement as well as in the constitution-drafting process.\textsuperscript{267}

With their power on the rise,\textsuperscript{268} the warlords were unwilling to cede the constitution-drafting process to the broader population. Short-term gains to end Taliban control and to achieve a modicum of peace in Afghanistan were allowed to prevail over long-term constitutional goals and the need for sustainable peace. There were two separate drafting periods. The first drafts emerged from a 9-member Constitution Drafting Committee appointed by Transitional President Hamid Karzai; the group

\begin{itemize}
\item \textsuperscript{264} See Part II(A) above.
\item \textsuperscript{266} Pan, supra note 262
\item \textsuperscript{267} Technically, warlords were not permitted to participate in the constitutional loya jirga, yet they managed to have numerous representatives elected to it and in a few instances the warlords themselves were elected. John Sifton, \textit{Afghanistan's Warlords Still Call the Shots}, The Asian Wall Street Journal December 24, 2003, republished by Human rights Watch at http://www.hrw.org/en/news/2003/12/23/afghanistans-warlords-still-call-shots
\item \textsuperscript{268} Testimony of Barbara Haig of the National Endowment for Democracy to the House Committee on Foreign Relations Nov. 19, 2003 (“The power of the warlords, who still command their own heavily armed militias, was greatly strengthened by their role in the 2001 war against al-Qaeda. Ever since Bonn, they have succeeded in sideling both the people and the central government, in large part by putting themselves ostensibly at the forefront of the antiterrorism campaign and the reconstruction process.”)
\end{itemize}
produced two separate drafts reflecting a split in the members.\textsuperscript{269} Karzai later appointed a 35-member committee to merge the two drafts and respond to public consultations.\textsuperscript{270} The larger committee was made up mostly of members of the regional factions\textsuperscript{271} causing some to accuse Karzai of choosing members based on “factional bargaining . . . without consideration of the public interest.”\textsuperscript{272} These same regional factions monopolized the constitutional loya jirga where their representatives formed a majority of the delegates that finalized and adopted the constitution in January 2004.\textsuperscript{273}

Although the mandate of the Constitution Drafting Committee (CDC) clearly stated there would be public consultations about the draft constitution,\textsuperscript{274} the CDC and United Nations Assistance Mission for Afghanistan (UNAMA), which assisted in the drafting process, restricted any meaningful public access to the draft constitution. In fact, they directly refused to release a draft in April 2003, ahead of the public consultation process, claiming that it would risk polarization of the population on particularly contentious issues\textsuperscript{275} and that it would create public confusion.\textsuperscript{276} According to J. Alexander Thier, who served as a legal advisor to Afghanistan’s Constitutional and Judicial Reforms Commissions, the Constitutional Drafting Commission and UNAMA wanted to limit public debate in large part to allow for an “elite compromise between

\textsuperscript{270} \textit{Id.} at 567; Schneider, supra note 2 at 192; International Crisis Group, supra note 261 at 15.
\textsuperscript{272} International Crisis Group, supra note 261 at 16.
\textsuperscript{273} Thier, supra note 269 at 570. See also, Human Rights Watch, \textit{Afghanistan: Constitutional Process Marred by Abuses}, (2004).
\textsuperscript{274} Schneider, supra note 2 at 189.
\textsuperscript{275} Thier, supra note 269 at 568; International Crisis Group, supra note 261 at 14-15.
\textsuperscript{276} International Crisis Group, supra note 261 at 14-15. The International Crisis Group charged that the latter justification is a “disingenuous concern that trades on an inaccurate and demeaning stereotype of rural Afghans who lack formal education.” \textit{Id.}
existing power-holders . . . and back-room dealing.”

The over-representation of warlords resulted in a constitution process perceived by many Afghans to illegitimate, causing observers to lament that “a manipulated constitutional loya jirga has undermined the constitution's legitimacy.”

The warlords were not the only ones with undo influence. Transitional President Hamid Karzai received immense US support as a potential reformer. The US pushed for a centralized, presidential system to consolidate Karzai’s power despite heavy objections from many Afghans who thought a parliamentary system would offer greater representation to the population and from the warlords who wanted to keep more local power. Karzai and the US won as the constitution adopted a centralized Presidential system.

Crisis management not only weakened the legitimacy of Afghanistan’s permanent constitution, it also failed at peacemaking. Again the Bonn Agreement assumed a Taliban defeat that was never realized. In fact, the Taliban seems to be gaining support at least in part from Afghans fed up with the warlords and US influence in the country. By assuming an eventual defeat, the Bonn process glossed over any need for Taliban participation in the constitution-drafting process. Now, the Afghan leadership is considering negotiations with it. Because the Taliban sees itself as negotiating from a

277 Thier, supra note 269 at 569 2006-2007. Thier concluded that although ultimately there was some public consultation, “the reluctantly gathered opinions of the public were swept under the carpet in last-minute backroom deal-making.”


282 Rubin, supra note 265 at 5, 8.
position of power, it will likely reopen constitutional negotiations to create a power-sharing regime and to adopt a greater role for Shari’a law, underscoring the shortsightedness and poor timing and procedure of Afghanistan’s multi-stage constitutional process.

An interim process also does not guarantee that societal groups will be able to locate a shared identity or that they will not more strongly identify and coalesce as separate groups. As Jackson explains: “moving from transitional to final may be particularly problematic in deeply riven societies . . . Interim agreements, to gain consent, may have the effect of reinforcing group cohesion.” The interim agreements in Lebanon did little more than delay the conflict. As Part II(B)(1)(b) describes, Lebanon repeatedly undertook constitutional changes to power-sharing arrangements considered temporary (and therefore part of a multi-stage constitutional process), at all times waiting until the population could unite behind a national rather than group identity. In the nearly century since the collapse of the Ottoman Empire and its control over Lebanon, these temporary arrangements have done little more than continually polarize the different groups and delay violent conflict.

Despite these risks, when conflicting parties demand constitutional change, interim constitutional measures provide a better opportunity for creating sustainable peace and achieving constitutional goals than a one-stage constitution-drafting/peacemaking process. Interim drafting and constitutions should be viewed as a mechanism for addressing immediate cease-fire needs and for providing concrete changes while putting the least amount of pressure on a constitutional process. If utilized

283 See e.g. International Crisis Group, supra note 261 at 3; United States Institute of Peace, Navigating Negotiations in Afghanistan, PeaceBrief 52 (2010).

284 Jackson, supra note 2 at 1289-1290.
appropriately, an interim constitutional process allows warring groups and society the
time and space to establish some level of security, trust and stability before embarking on
a drafting process for a final constitution. For this reason, interim constitutional
processes hold the potential to alleviate most of the tensions created by a merged
constitution-drafting/peacemaking process.

IV. Conclusion

Constitution-drafting has come under immense pressure as policy-makers have
sought to use it as a peacemaking tool. They have simply assumed the compatibility of
constitution-drafting and peacemaking processes. Put under deeper scrutiny, however,
the assumption proves to be false. Deep and inherent tensions surface during the merger
of these two processes. Peace requires immediate compromise between warring parties
to stop the violence, while constitution-drafting requires time, security, unity and popular
participation to create a strong and lasting foundation for a peaceful and stable state.
Peace requires often short-term, pragmatic solutions to the underlying causes of conflict,
while constitution-drafting requires an agreed to, and at least partially idealistic, vision
for the future. Because of the priority we place on protecting life, constitutional goals
will always be subordinated by peacemaking needs when those goals and needs conflict.

This undue pressure on the constitution-drafting process and the subordination of
constitution-making goals jeopardizes the success of both peacemaking and constitution-
drafting. Such pressure risks creating a poor governance framework, weakening human
rights protections; entrenching societal divisions; de-legitimizing the new constitution;
and renewing violence. Ultimately, using constitution-drafting to make peace sets up the
merged process for failure.
Practically, when warring parties demand constitutional change to achieve peace, it is impossible to abandon this peacemaking tool. A multi-stage interim constitutional process could be a compromise between these demands and the risk of failure of a constitution-drafting process undertaken during a conflict. An interim constitutional process can respond to the immediate pressure for constitutional change necessary for achieving a cease-fire while providing the opportunity to build trust, security and a national consensus necessary to achieve constitution-drafting goals in a permanent constitution. A multi-stage process can succeed only if security is achieved prior to the drafting of a final constitution. While the context of any conflict can undermine the benefits of an interim process, it offers a better opportunity for accomplishing peacemaking and constitution-drafting goals than a single-state process conducted during on-going violence.