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 resultant 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 peacemakers often demand their merger. Rarely does the literature on constitution-drafting during conflict question whether this merger is appropriate.[1] Instead, it typically adopts a comparative

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[1] *See, e.g.*, Lakhdar Brahimi, *State Building in Crisis and Post-Conflict Countries*, 7th Global Forum on Reinventing Government, Building Trust in Government, Vienna, Austria, 4 (June 26–29, 2007), *available at* http://unpan1.un.org/intradoc/groups/public/documents/un/unpan026305.pdf ("Constitution-drafting processes should be closely linked to the peace process, must not be rushed, and as far as possible, should be carefully aligned with existing legal provisions."); VIVIEN HART, DEMOCRATIC CONSTITUTION MAKING, SPECIAL REP. 107, U.S. INST. OF PEACE 4 (2003), *available at* http://www.usip.org/files/resources/sr107.pdf (describing participation in the constitution-making process as critical to creating and maintaining a peaceful society); Donald L. Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1231–32 (2008) (suggesting that changes to the constitution-making process, such as avoiding exclusion, might help achieve peace and contribute to the overall success of a constitution); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 664 (2006) (acknowledging that Haiti and Liberia's constitutions have had destabilizing effects, but generally supporting the tactic of merging participatory constitution-making with post-conflict peacemaking); Cornelia Schneider, *The International Community and Afghanistan's Constitution*, 7 PEACE, CONFLICT & DEV.: AN INTERDISC. J. 175 (2005), *available at* http://www.peacestudiesjournal.org.uk/dl/July05Schneider.pdf (arguing that constitution-drafting failed as a peacemaking tool in Afghanistan because the constitution-making process was

constitution-making approach, which examines different countries' experiences in order to locate variables that affect the success of constitutions.[2] Champions of constitution-making as a tool for peace seem to simply assume the compatibility of the two processes.[3] This assumption, however, must be challenged to

defective); Jennifer Widner, *Constitution Writing and Conflict Resolution*, UNU-WIDER (Research Paper No. 2005/51) 1 (2005), *available at* http://www.wider.unu.edu/publications/working-papers/research-papers/2005/en_GB/rp2005-51/ (recognizing that the relationship between constitution-writing and decreased levels of violence is not always successful, but never questioning the suitability of the merger between constitution-writing and peace-making efforts). *But see* Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1294 (2008) (explaining that if the timing and process of constitution-making is unsuitable, constitution-making in post-conflict situations may lead to weak, short-lived constitutions, and hence a return to instability); Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1493–95 (2008) (criticizing the perceived utility of inclusion in a given country's constitution-drafting process on the advice of foreign constitutional experts).

[2] *See, e.g.*, Brahimi, *supra* note 1, at 8 (attributing South Africa's successful constitution-making to variables such as public participation); Hart, *supra* note 1, at 7 (describing the history of constitution-making in countries such as Canada, Nicaragua, and South Africa); Andrew Arato, *Post-Sovereign Constitution-Making and its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 536, 536 (2007) (focusing on the history of failure of the constitution-making process in Iraq); Kirsti Samuels, *Constitution Building Processes and Democratization: A Discussion Of Twelve Case Studies*, Second Draft, INTERNATIONAL IDEA, http://www.idea.int/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf (last visited Oct. 16, 2011) (analyzing twelve cases of constitution-building that have taken place during times of transition); Schneider, *supra* note 1 (analyzing the variables involved in the constitution-making process in Afghanistan); Widner, *supra* note 1, at 5 (reporting preliminary findings on the effects of constitution-writing in over "194 constitution-writing cases carried out since 1975").

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. *See* Samuels, *supra* note 1, at 667 (stating "that *how* constitutions are made, particularly following civil conflict or authoritarian rule, impacts the resulting state and its transition to democracy[,]" yet never differentiating between the two political systems and their dissimilar needs). *But see* Horowitz, *supra* note 1, at 1231 (arguing that the constitution-making process is not uniform and should take into account wide-ranging scenarios); Jackson, *supra* note 1, at 1249 (arguing that there should be different approaches to constitution-making depending on the situation at hand). *See generally* Kim Lane Scheppele, *A Constitution Between Past and Future*, 49 WM. & MARY L. REV. 1377 (2008) (analyzing the relationship between a country's pre-constitutional history and post-conflict constitution-making).

[3] *See supra* note 1 and accompanying text.

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. The analysis focuses solely on constitution-drafting as a tool to stop ongoing violence and its predicted outcome; it does not examine constitution-drafting as a post-conflict measure to prevent further violent outbreaks.[4]

Part 1 of this Article explains the theoretical support for constitution-drafting and constitutions as a major tool for peacemaking. It then discusses the differing goals of peacemaking and constitution-drafting, describing theoretical efforts to harmonize them. Part 2 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 2 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 3 concludes this Article by examining whether constitution-drafting as a peacemaking tool can be salvaged when warring parties refuse other types of peacemaking efforts. Peacemakers cannot overlook combatant demands but the process design must be handled carefully if it is to be successful. Part 3

[4] This latter situation differs from constitution-drafting during conflict, as ongoing violence is less likely to threaten the process and 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.

concludes that 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.

1. 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.[5] Alternatively, warring groups may demand a new constitution when the conflict arises over the existing design of the state.[6] 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.[7] 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."[8] A

[5] *See, e.g.*, Proceedings, *Workshop on Constitution Building Processes*, Princeton University, May 17–20, 2007, Bobst Center for Peace & Justice, Princeton University, in conjunction with Interpeace and International IDEA, at 25 (describing the difficulty of convincing sectarian groups to compromise and participate in the constitution-making process).

[6] *See* YASH GHAI & GUIDO GALLI, INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, CONSTITUTION BUILDING PROCESSES AND DEMOCRATIZATION 7 (2006), *available at* http://www.idea.int/publications/cbp_democratization/upload/cbp_democratization_eng.pdf ("The new constitutional system has to be responsive to the concerns of the previously warring factions . . . .").

[7] *See* ROLAND PARIS & TIMOTHY D. SISK, INT'L PEACE ACAD., MANAGING CONTRADICTIONS: THE INHERENT DILEMMAS OF POSTWAR STATEBUILDING 1 (2007), http://www.ipacademy.org/media/pdf/publications/iparpps.pdf (describing state-building as "a crucial element in any larger effort to create the conditions for a durable peace and human development in countries that are just emerging from war").

[8] Joakim Gundel, Book Review, 15 J. REFUGEE STUD. 334, 334 (2002). To achieve those goals, peace-builders seek to reconstruct the economic, political, and

major component of peace-building is the process of 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.[9] 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.[10] 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.[11] 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

social foundations of a conflict-ridden society; they operate development programs, drive political and legal reform efforts, and establish social reconciliation projects. *See* Fen Osler Hampson, *Can Peacebuilding Work?*, 30 CORNELL INT'L L.J. 701, 702 (1997) (stating the different definitions of peace-building and the varying approaches to implementing it); Markus Kostner, Taies Nezam, Colin Scott & Nat J. Colletta, *From Civil War to Civil Society: The Transition from War to Peace in Guatemala and Liberia* 6 (The World Bank and The Carter Ctr., Working Paper No. 18990, 1997), http://www.cartercenter.org/documents/1200.pdf (describing the goal of peace-building as being attainable through confidence-building programs that "balance the quest for justice for the victims of violence with the need to get on with life as *one* society").

[9] *See* Charles T. Call & Elizabeth M. Cousens, *Ending Wars and Building Peace* 7 (Int'l Peace Acad., Coping with Crisis Working Paper Series, 2007), *available at* http://www.ipacademy.org/media/pdf/publications/cwc_working_paper_ending_wars_ccec.pdf (explaining the different ways in which successful state-building supports peace-building); *see also* Brahimi, *supra* note 1, at 5 (arguing that state-building can succeed only through strong state institutions).

[10] *See* Brahimi, *supra* note 1, at 4 (describing state-building as a central part of creating peace); Samuels, *supra* note 1, at 664 ("[A] successful political and governance transition must form the core of any post-conflict peace-building mission."). There is some debate on whether peace-building includes efforts to establish democracy and the rule of law, as some believe inclusion of these goals creates unrealistic expectations. *See* Hampson, *supra* note 8, at 701 (presenting different views on what should be the goal of peace-building). However, most of the literature expects that these two goals remain important aspects of the state-building and peace-building processes.

[11] *See, e.g.*, Samuels, *supra* note 1, 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.").

settle underlying disputes while offering long-term stability, security, and justice.[12] 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."[13]

Support for using constitution-drafting processes and constitutions as a peacemaking tool seems logical, at least in theory. Part 2 examines whether this logic can hold up under deeper scrutiny.

2. 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.[14] 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 the differing needs and goals of the two processes could have on the success of the constitution-drafting/peacemaking. Part 2 considers each of these issues in detail.

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[12] *See* Yash Ghai, *Toward Inclusive and Participatory Constitution Making*, Presentation at The Constitution Reform Process: Comparative Perspectives Kathmandu (Nagarkot) 2–3 (Aug. 3–5, 2004) (transcript *available at* http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf) (describing constitutions as tools of conflict resolution that can create peace through negotiations and dialogue).

[13] *Id.* at 3.

[14] *See supra* note 1 and accompanying text.

2.1. 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 on how to achieve a peaceful social order. The culmination of peacemaking is a peace treaty. A peace treaty can take any number of forms, including that of a constitution.[15] 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.[16] Some peace treaties also include extensive provisions for new or refurbished political and legal institutions and for transitional justice mechanisms.[17] 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.[18] Constitutions are generally forward-

[15] The form of a peace treaty is particularly relevant to determining its binding nature. *See* Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 383–84 (2006) (expressing the difficulty in deciding whether peace treaties are binding legal agreements and whether this matters).

[16] *See id.* at 377–78 (describing constitutions as an example of substantive/framework agreements which can serve as binding peace agreements in an otherwise unstable nation).

[17] *But see* Ashraf Ghani et al., *An Agenda for State-Building in the Twenty-First Century*, 30 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).

[18] *See* GHAI & GALLI, *supra* note 6, at 8 (discussing the role and impact a constitution plays in a democracy); 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).

looking,[19] 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.[20] Constitutions accomplish these goals by providing for mechanisms and rules that establish a state-monopoly on the use of force; 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.[21] 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.[22]

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."[23] Traditionally,

[19] *See* Teitel, *supra* note 18, at 2057–58 (characterizing the prevailing classical view of constitutionalism as distinct from the conception of transitional constitution-making, which is "ambivalent in its directionality"). *But see* Jackson, *supra* note 1, at 1280 ("Without a linkage to some imagined past, constitutions could not do the work of helping to constitute a particular community.").

[20] *See* GHAI AND GALLI, *supra* note 6, at 8 (describing the functions a constitution serves).

[21] *See id.* (listing specific ways that a constitution "contributes to democracy").

[22] *See, e.g.*, Bell, *supra* note 15, at 392 (commenting on the substantive differences between peace-agreement constitutions and those constitutions originating from "stable, democratic societies)").

[23] Jiunn-Rong Yeh & Wen-Chen Chang, *From Origin to Delta: Changing Landscape of Modern Constitutionalism* 6–7 (bepress Legal Series, Working Paper

constitutions deflect an abstract, future potential for anarchy or government oppression rather than the very concrete threat of existing violence that peace treaties target.

Conceptually, peacemaking and constitution-drafting intend to accomplish different goals. At its essence, peacemaking concentrates on stopping violence, while constitution-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.[24] The transitional constitution adapts the classic roles and functions of constitutions to respond to the peacemaking needs of conflict and post-conflict societies.[25] 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."[26]

The dominant set of theorists view the transitional constitution as causing a revolution through the act of creating a new political order for the state.[27] It is the final act of breaking from the past that

No. 1815, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=8667&context=expresso.

[24] *See, e.g.*, Teitel, *supra* note 18, at 2057–58 (arguing that the creation of new constitutional arrangements in periods of dramatic political change is informed by a "transitional conception of constitutional justice"); Samuels, *supra* note 1, at 667–68 (discussing the meaning of "transitional constitutionalism").

[25] *See* Teitel, *supra* note 18, at 2057 (exploring the concept of a "transitional constitution").

[26] *Id.* at 2053.

[27] 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 United States Constitution. *Id.* at 2054–56.

signifies the end of or solution to the conflict.[28] The role of the transitional constitution contrasts directly with traditional notions that a constitution protects against such dramatic political change.[29] 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."[30] 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.[31] 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.[32] The transitional constitution is continually subject to development and in some instances is intended only as an interim measure.[33] Teitel describes the transitional constitution-drafting process as gradual, moving in "fits and starts,"[34] rather than as the finishing act. For her, ultimately the new foundation created by the peacemaking/constitution-drafting process responds directly to

[28] *Id.* at 2053.

[29] *See id.* at 2053–56 (discussing the differences between the classical and modern views of constitutional theory).

[30] *Id.* at 2056. Others argue that the dominant style of transitional constitutions also reflects on the past as history determines the priorities and needs of the population. *See, e.g.*, Scheppele, *supra* note 2, at 1378–79.

[31] *See* Teitel, *supra* note 18, at 2057 (proposing "another account of a transitional constitutionalism, which better captures constitutional politics associated with transformative periods").

[32] *Id.* at 2058. *See also* Samuels, *supra* note 1, at 664 (noting that a constitution may take on aspects of both a peace agreement and a framework of rules detailing how that government will operate); Jackson, *supra* note 1, at 1255 ("[Transitional constitutions] offer the possibility of a new genre of constitution-like instruments whose goal is not to entrench but to disentrench and to provide ongoing opportunities for "unsettlement" of power relations.").

[33] South Africa's Interim Constitution, as described in Part 3.1, is an example of Teitel's transitional constitution. Teitel, *supra* note 18, at 2060.

[34] *Id.* at 2057.

past injustices; the process and constitution therefore not only look forward but also reflect on the past.[35]

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

> 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.[36]

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.[37]

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

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[35] *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. *See* Jackson, *supra* note 1, at 1288–89 (discussing "post-conflict constitutionalism" as a "continuous conversation"). The experience with constitution-drafting in Lebanon, as described in Part 2.2.1.2, shows that Jackson's position may be dangerously correct.

[36] Hart, *supra* note 1, at 3. *See also* Jackson, *supra* note 1, at 1249–51 (noting that creating a written constitution or labeling the process constitutional may be "antithetical" to the type of permanent and stable "constitutionalism that it seeks to promote").

[37] *See* Hart, *supra* note 1, at 3 ("The tension between the security and stability offered by the traditional ideal of constitutionalism and the flexibility called for by new circumstances is what places process at the heart of the new constitutionalism.").

opportunity to reflect on the past to create a new future and, by doing so, solves the causes of the conflict.[38] The process and document serve to de-legitimize past injustices and draw new boundaries for what behavior is permissible.[39] It is also expected that the constitution will "jump start . . . political change"[40] by creating stable institutions. 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.[41] Since the warring parties are typically included as constitution-drafters, their support could be viewed as an agreement to use the peaceful mechanisms of dispute resolution they designed rather than resort to violence when conflicts arise.[42] The binding nature of a constitution may create more incentive for the participants to follow the principles and provisions of the constitution they drafted.[43] 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.[44]

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

[38] *See* Samuels, *supra* note 1, at 664 (discussing what an "ideal constitution-making process" can achieve).

[39] *See* Teitel, *supra* note 18, at 2052 ("Transitional constitutionmaking responds to past repressive rule, through principles delimiting and redefining the prevailing political system.").

[40] *Id.* at 2059.

[41] *See, e.g.*, Bell, *supra* note 15, at 392 (explaining that such "social contracts" exist both vertically, between individuals and the state, and also horizontally between separate groups of individuals).

[42] *See* Ghai, *supra* note 12, at 2–3 (highlighting the "importance of the constitutional making to the peace process").

[43] *See* Bell, *supra* note 15, at 386 (discussing the importance of a constitution's binding nature, specifically noting that "parties to agreements take their obligations more seriously when they believe them to be legal").

[44] *See* Samuels, *supra* note 1, at 667 ("It can also lead to the democratic education of the population, begin a process of healing and reconciliation through societal dialogue, and forge a new consensus vision of the future of the state.")

constitutions as a peacemaking tool, which makes this option appealing. The remainder of Part 2 challenges whether the goals and needs of the two processes can be so cleanly synchronized.

2.2. 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.[45] 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 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.[46] Part 2.2 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 in 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

[45] *But see Workshop on Constitution Building Processes*, *supra* note 5, at 26 (describing how the goals of reform during the peace negotiations process differ markedly from those of the drafting or re-drafting of a constitution).

[46] There may be other categories of tensions, but these predominate in the literature on and experiences with conflict.

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.[47] For example, some measure success by whether parties lay down arms in favor of solving disputes through the institutions created by the constitutions.[48] Others consider whether the constitutions achieve "constitutional patriotism;"[49] warring parties, the government, and society must be "patriotic" to the terms of the constitutions by implementing and following them. 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.[50] Still others look not only at whether the constitutions maintain peace, but at whether they create representative governments that protect human rights.[51] 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;[52] and (4) the constitution is accepted as legitimate by the parties to the conflict and the general population.[53]

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[47] *See, e.g.*, *Workshop on Constitution Building Processes*, *supra* note 5, at 6–10 (enumerating different measures of constitutional success to include: constitutional durability; a reduction in violence; increased public awareness of the terms of the constitution; enfranchisement of the public; the presence of constitutional terms that respect political and civil rights; the promotion of political accountability; whether constitutional terms are implemented; and adaptability of the constitution).

[48] *See id.* at 7–8 (explaining what is meant by the success or failure of a constitution).

[49] *See* Hanna Lerner, The People of the Constitution: Constitution-Making, Legitimacy, Identity 15–16 (Apr. 30, 2004) (Department of Political Science, Columbia University), *available at* http://www.columbia.edu/cu/polisci/pdf-files/apsa_lerner.pdf (describing the concept of constitutional patriotism as loyalty to democratic procedures of the constitution rather than to a specific community, history, or language).

[50] Ghai, *supra* note 12, at 4.

[51] *See generally*, *Workshop on Constitution Building Processes*, *supra* note 5 (noting the increased prominence of human rights in contemporary constitutions).

[52] 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

It is important to keep these underlying criteria for success in mind throughout the examination in Sections 2.2.1. through 2.2.4. of the practical tensions created when peacemaking and constitution-drafting processes are merged. As Section 2.2. 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. There may be times when there is no choice but to use this peacemaking tool and certainly there have been objective successes with it.[54] 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 Section 2.3.

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.

[53] 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. *See* Ran Hirschl, *The "Design Sciences" and Constitutional "Success,"* 87 TEX. L. REV. 1339, 1353–54 (2009).

Another open question concerns when a constitution should achieve each of these four 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.

[54] *See infra* Section 3.

2.2.1. Sequencing Tensions

2.2.1.1. 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 Section 1, 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.

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.[55] 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

[55] *See* William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. INT'L L. 683, 686–87 (2006) (discussing the "spoiler problem" which plagues peace negotiations due to the fact that it is easier to be a disrupter than a builder in the peacemaking process).

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.[56] Ongoing violence also may limit the participation of the broader population.[57] Popular participation currently is considered a requirement for establishing the legitimacy of a constitution, a point examined more fully in Section 2.2.4.*infra*. 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.

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 U.S. soldiers present in Iraq, even after the U.S. 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 U.S. 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.[58]

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

[56] *See, e.g.*, *Workshop on Constitution Building Processes*, *supra* note 5, at 33 (discussing examples from Afghanistan, East Timor, and Columbia where specific measures were taken to reduce intimidation and facilitate the drafting process).

[57] *See, e.g.*, *id.* at 26 (noting how violence in Afghanistan's countryside limited levels of participation in constructing the country's constitution).

[58] *See* James Glanz, *U.S. Builds Pressure for Iraq Constitution as Deadline Nears*, N.Y. TIMES, Aug. 14, 2005 (describing how the United States pressured Iraqi political leaders to reach agreement on a constitution during continued insecurity); s*ee also* Jonathan Morrow, *Iraq's Constitutional Process II: An Opportunity Lost*, 155 U.S. INST. PEACE SPEC. REP. 4, 4 (2003) ("[C]ompletion of a permanent constitution would represent an important, perhaps critical, turning point in Iraq's fortunes").

murder of a Sunni participant.[59] The public had little access to the drafters and almost no opportunity to observe the process because of security fears.[60] Such lack of participation undermined the legitimacy of the drafting process.[61]

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.[62] 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, fifteen Sunni drafters and ten advisers were added to the process one month before the draft was due. At this point, an estimated seventy to eighty percent of the draft constitution may have been completed and the Shiites and Kurds resisted Sunni revisions fearing that their prior fragile compromises would fall apart.[63] When the drafters could not reach

[59] *See* Jusfiq Hadjar, *Iraq constitution panel members killed*, AL JAZEERA, July 19, 2005, *available at* http://www.uruknet.info/?p=13890 (reporting that three Sunni Arab members of the constitution drafting committee were shot dead in Baghdad).

[60] 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 [sic] 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 58, at 18.

[61] *Id.*

[62] *See Id.* at 6 (explaining that low Sunni voter turnout in elections preceding the drafting of the constitution excluded advancement of Sunni issues in the drafting process).

[63] *See* Nathan J. Brown, *Iraq's Constitutional Process Plunges Ahead,* POL'Y OUTLOOK (Carnegie Endow. for Int'l Peace, D.C.), July 2005, at 7 (detailing the lack of Sunni participation in the drafting process).

an agreement on fundamental constitutional matters, the Sunni drafters were excluded from the informal discussions that ultimately resolved those issues.[64]

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.[65] 96.96% of voters in the Sunni-dominated Anbar province — where the insurgency continued unabated — voted against the constitution and about 82% of Sunni-dominated Salahaddin province voted against it; in two other provinces 55% and 49% voted against the constitution.[66] The constitution, however, was adopted despite apparent Sunni rejection of the text. These statistics led the United States Institute of Peace, the U.S. government's think tank on conflict resolution, to caution: "[w]e 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 . . . ."[67]

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."[68] The constitution-drafting process did little to heal societal divisions or to achieve sustainable peace.

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[64] The 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." *See* Morrow, *supra* note 58, at 9.

[65] *See* Ellen Knickmeyer & Jonathan Finer, *Iraqis Submit Charter, but Delay Vote*, WASH. POST, Aug. 23, 2005, at A1 (summarizing Sunni objections to the constitution).

[66] *See* Morrow, *supra* note 58, at 2 (discussing Sunni opposition to the new constitution).

[67] *Id.* at 21. In fact, Sunni drafters warned that if the constitution passed despite Sunni objections, the violence would continue unabated. *See also* Knickmeyer & Finer, *supra* note 65 (underscoring the objections of Sunni constitutional delegates and the potential for civil unrest).

[68] *Iraq: The Current Situation*, UNITED STATES INSTITUTE OF PEACE, http://www.usip.org/node/4598 (last visited January 10, 2011).

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 ceasefire as a precursor to constitution-drafting.[69] He describes:

> [I]t 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.[70]

The Iraqi drafting process illustrates how continued conflict undermines both constitution-drafting and peacemaking goals, causing the merged process to fail.[71]

A constitution seeking to achieve immediate security also risks creating a political system that is far from ideal. As Larry Diamond, a former senior advisor to the Coalition Provisional Government in Iraq, explains: "[S]ecurity 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."[72] A war-weary population may be all too willing to exchange their rights for promises of security[73] 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

[69] *See* Brahimi, *supra* note 1, at 8 (discussing the importance of a successful peace process in order to form an effective constitution).

[70] *Id.*

[71] Failure here is judged according to the criteria for success listed in the introduction to Section 2.2.

[72] *See* Larry Diamond, *What Went Wrong and Right in Iraq*, *in* NATION-BUILDING: BEYOND IRAQ AND AFGHANISTAN 173, 176 (Francis Fukuyama ed., 2006).

[73] *See, e.g.*, Hallie Ludsin, *Putting the Cart Before the Horse: the Palestinian Constitutional Drafting Process*, 10 UCLA J. INT'L L. & FOREIGN AFF. 443, 482 (2005) (explaining that people are willing to sacrifice their rights in exchange for security during times of conflict or political instability).

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.[74] 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 facto" state of emergency.[75] Feeling insecure, the Constituent Assembly constitutionally protected preventive detention as an ordinary law enforcement tool.[76] 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.[77] 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

[74] This example is useful despite the difference in context as it illustrates the problems innate to drafting constitutions during conflicts generally.

[75] *See* Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 324 (2001) (detailing the enactment of laws authorizing preventive detention in India following World War I and II); *see also* Ramachandra Guha, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD'S LARGEST DEMOCRACY 31–32 (2007) (describing the period of hostility and displacement following India's independence).

[76] *See* INDIA CONST. art. 22, §3(b) (allowing law enforcement to preventively detain a person extra-judicially for up to one-year); *see also* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, NATIONAL SECURITY ACT: OBSCURING THE FLAWS IN INDIA'S CRIMINAL JUSTICE SYSTEM, HUMAN RIGHTS FEATURES (Nov. 30, 2010), http://www.hrdc.net/sahrdc/hrfeatures/HRF210.htm (highlighting the problematic ubiquity of preventive detention in India). Under international law, preventive detention is permissible only during a declared state of emergency. *See, e.g.*, Meenakshi Ganguly, "*Everyone Lives in Fear": Patterns of Impunity in Jammu and Kashmir*, HUMAN RIGHTS WATCH, Sept. 2006, at 64–103.

[77] *See* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 76 (emphasizing the constitutionality of India's preventive detention measures).

> 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, 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.[78]

With their excessive power, government officials have used preventive detention freely to suppress opposition, to intimidate vulnerable populations, and to hold detainees indefinitely and without judicial review.[79] The police use preventive detention to punish alleged criminals without having to give them their rights.[80] 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.[81]

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[78] B. M. Gupte, Representative (Bombay), Constituent Assembly of India – vol. IX, Sept. 16, 1949, *available at* http://parliamentofindia.nic.in/ls/debates/vol9p36a.htm (last visited March 17, 2010).

[79] *See, e.g.*, AMNESTY INTERNATIONAL, AMNESTY INT'L REPORT 2006 (2007) (arguing that minority groups like the *dalits* and *adivasis* are subjected to preventive detention and targeted disproportionately by law enforcement officials), *available at* http://www.amnesty.org/en/library/asset/POL10/001/2006/en/59ad70c9-d46f-11dd-8743-d305bea2b2c7/pol100012006en.pdf; *see also* HUMAN RIGHTS WATCH, *supra* note 76, at 64–103 (detailing human rights abuses by India's law enforcement personnel, with a focus on Jammu and Kashmir).

[80] *See* SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, *supra* note 76 (noting that preventive detention is regularly used against recidivists, criminally accused likely to be granted bail, and participants in organized crime).

[81] *See, e.g.*, Bhut Nath Mete v. State of West Bengal, (1974) 3 S.C.R. 315, 325.

> The potential executive tendency to shy at courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction is a danger to the democratic way of life. The large number of habeas corpus petitions and the more or less stereotyped

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.[82] 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. [83]

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*.[84] The formal court system has

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> grounds of detention and inaction by way of prosecution, induce us to voice this deeper concern.

Id.; *see also* G. Sadanandan v. State of Kerala & Anr, (1966) S.C.R. 44, 599.

> The tendency to treat [matters of preventive detention powers] in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded.

Id.

[82] *See* Robert I. Rotberg, *Discussion Draft: Creating Robust Institutions: Preparing Secure Governance Foundations*, Research Partnership on Postwar State-Building (2006); *see generally* Diamond, *supra* note 72 (detailing how nation-building efforts in Afghanistan have been thwarted by lapses in security).

[83] *See, e.g.*, Rotberg, *supra* note 82, at 2 ("Institutions such as a judiciary, a legislature, and even a thoroughly legitimized executive can be created or re-created in the aftermath of destructive civil war only when strong foundations are laid. Such institutions may exist, but never truly function, in the absence of widespread security.").

[84] *See* John Dempsey & Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan*, United States Institute of Peace: Peace Brief, 2 (2010) (underscoring the persistence of traditional tribal judicial avenues in Afghanistan); *see also* Thomas Barfield et al., *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, U.S. 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.").

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."[85] 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.[86] The state-run judicial system also feels foreign when contrasted with the familiarity of traditional systems of justice.[87] 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.[88]

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.[89] Military commanders have taken over many of them, undermining their traditional character.[90] 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

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[85] *See* INT'L CRISIS GROUP, *Reforming Afghanistan's Broken Judiciary*, ASIA REPORT NO. 195, Nov. 17, 2010, at i.

[86] *See* Dempsey & Coburn, *supra* note 84, at 2 (affirming that the Taliban defines the avenues of judicial recourse in the areas under its control).

[87] *Id.* at 3.

[88] Barfield et al., *supra* note 84, at 3.

[89] *See* Dempsey & Coburn, *supra* note 84, at 2 (detailing how tribal justice in Afghanistan perpetuates tribal values).

[90] *See* Neamat Nojumi et al., *Afghanistan's Systems of Justice: Formal, Traditional, and Customary*, FEINSTEIN INT'L FAMINE CTR. 38 (2004) (highlighting how Afghanistan's *jirgas* and other avenues of traditional dispute resolution have been hijacked in the past).

enforcement officials often are unwilling to serve outside Kabul where they feel insecure, leaving vast areas without a functioning court at all.[91] Many Afghans have little choice but to turn to the Taliban to address their legal disputes in areas not under government control.[92] 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."[93]

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,[94] 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 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.

2.2.1.2. 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

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[91] *Id.* at 24.

[92] *See* INT'L CRISIS GROUP, *supra* note 85, at 1 (detailing how the Taliban has frequently been empowered by the inefficacy of the formal judicial system).

[93] *Id.*

[94] *See, e.g.*, *Traditional Justice in Afghanistan*, UNITED NATIONS DEVELOPMENT PROGRAMME (Justice and Human Rights in Afghanistan), May 2010, http://www.undp.org.af/Projects/Justice/FactSheetTraditional%20Justice.pdf (exemplifying an international organization seeking to integrate traditional community actors into a formalized legal system).

and constitutional goals, its constituents must be able to unify under a national identify 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.[95] 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 group 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."[96] 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.[97]

While the process of establishing a national identity does not require homogenizing the population, a weak consensus on that identity could entrench divisions 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."[98]

Lebanon provides a particularly distressing example of this point. Twice it has undergone constitutional change in response to

[95] *See* GHAI & GALLI, *supra* note 6, at 7 (contending that constitutions must strive to build upon a political community by bringing diverse communities together).

[96] Bettina Scholdan, *Democratisation and Electoral Engineering in Post-Ethnic Conflict Societies*, 7 J. EUR. INST. COMM. & CULTURE 25, 30 (2000) (describing the difficulties of establishing democracy and elections in post-conflict societies).

[97] *See* Lerner, *supra* note 49, at 7 (pushing for intellectuals to focus on national identity in constitution-making for durable and viable constitutions).

[98] *See* Samuels, *supra* note 1, at 671.

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.[99] 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.[100] 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 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.[101] 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

[99] *See* CHARLES WINSLOW, LEBANON: WAR AND POLITICS IN A FRAGMENTED SOCIETY 65 (1996); Marie-Joëlle Zahar, *Power Sharing in Lebanon: Foreign Protectors, Domestic Peace, and Democratic Failure*, *in* SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS 219, 226 (Philip G. Roeder & Donald Rothchild, eds., 2005) (indicating that amidst "communal tensions," France helped draft a constitution aimed at ending a difficult six-year transition period).

[100] *See* CONSTITUTION OF LEBANON, May 23, 1926, art. 95 (Gabriel M. Bustros trans., Bureau of Lebanese & Arab Documentation 1973), *available at* http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/lebanon/lebann-e.htm (granting equal representation in ministerial and public posts to the communities); Zahar, *supra* note 99, at 226 (describing Article 95 of the 1926 constitution and its power-sharing regime). This agreement, along with its successor, could be seen as a form of a transitional constitution or an interim constitution, as discussed further in Section 3 below.

[101] *See* Zahar, *supra* note 99, at 227 (outlining three main nationalist players in the fight for independence including Christian nationalism for "French tutelage," Arab nationalism for Lebanon's integration into Syria, and Lebanese nationalism for independence).

Minister and a Shiite President of Parliament;[102] it also apportioned parliamentary representation between the different sects based on a 1932 population census, which at the time showed a larger Christian majority.[103] The National Pact favored the Maronite Christians, serving as a source of tension.[104] 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 inflamed tensions until Lebanon burst into civil war in 1975.[105]

The civil war concluded fifteen 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 power between the Christian and Muslim populations.[106] The power of the Christian president was curtailed

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[102] *See* Alexandra R. Harrington, *Resurrection from Babel: The Cultural, Political, and Legal Status of Christian Communities in Lebanon and Syria and Their Prospects for the Future*, 13 TULSA J. COMP. & INT'L L. 217, 229 (2006) (describing the religiously diverse composition of important government positions).

[103] *See Lebanon Political Profile: Recent History and Relationship with Syria,* INT'L DEBATES, Jan. 2006, at 4 (January 2006) (averring that the Christian-to-Muslim government composition was based on the 1932 census).

[104] *See* Samir Makdisi & Marcus Marktanner, *Trapped By Consociationalism: The Case Of Lebanon* 3 (Am. Univ. of Beirut Inst. of Finance and Economics, Lecture and Working Paper Series No. 1, 2008), *available at* http://wwwlb.aub.edu.lb/~webifeco/downloads/series%201_2008.pdf ("[T]he delicate sectarian balance led to the emergence of a weak state that failed to implement effective political and administrative programs" and led to "entrenched politico-sectarian special interests"); Zahar, *supra* note 99, at 228 (explaining that the National Pact created a "ratio of Christian to Muslim representatives in Parliament at six to five" favoring specifically Maronite Christians over Muslims and other Christian sects such as Greek Orthodox).

[105] *See* Harrington, *supra* note 102, at 229 (listing the numerous possible causes of the civil war that broke out in 1975).

[106] *See id.* at 226 (noting that the power-sharing regime changed, giving Muslims and Christians parity in Parliament); *see also* Makdisi & Marktanner, *supra* note 104, at 3 (also explaining that the sectarian power-sharing regime

and Christians and Muslims now have equal representation in the government, although the Muslim population is estimated to be almost two-thirds of the population.[107] 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.[108]

Critics of the Lebanese power-sharing agreements argue that they consolidate sectarian power and the power of the elites within them,[109] creating a disincentive to a unified national identity.[110] 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."[111] 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

changed in many ways including an equal number of Christian and Muslim representatives in Parliament).

[107] *See* Zahar, *supra* note 99, at 228 (contending that the Maronite control of the presidency was counterbalanced by giving Sunnis the office of the premiership and many cabinet posts); *Lebanon Political Profile*: *Recent History and Relationship with Syria*, *supra* note 103, at 5 (stating that, according to the CIA in 2005, Lebanon's population was approximately 3.8 million people, with Muslims comprising 59.7 percent of the population).

[108] *See* Makdisi and Marktanner, *supra* note 104, at 4 (tracing the influence of Hezbollah that nearly caused a civil war in Lebanon); s*ee also*, INT'L CRISIS GROUP., *Lebanon's Politics: The Sunni Community and Hariri's Future Current*, MIDDLE EAST REPORT NO. 96 at 1 (May 26, 2010) ("Of all, the most striking transformation in Sunni attitudes since 2005 has been the exacerbation of sectarian feelings and hostility toward Shiites, nurtured by deepened regional sectarian divisions following the fall of the Iraqi regime.").

[109] *See, e.g.*, Zahar, *supra* note 99, at 229 (criticizing the 1943 National Pact because "[t]he legislature turned into a private club as leaders promoted their protégés. The elites almost secured a monopoly of representation").

[110] *See, e.g.*, INT'L CRISIS GRP., *supra* note 108, at 7 (quoting a Sunni man confused about national identity who opined, "to us, Lebanon remains an artificial construct with which we simply could not identify").

[111] Michael Ellman et al., *The Declaration Abroad: A Comparative Perspective*, 11 PACE INT'L L. REV. 163, 182 (1999).

negotiations to confront the causes of the sectarian divisions directly.[112] 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 2.2: 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.

2.2.2. 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 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

[112] *See* Zahar, *supra* note 99, at 234–35 (contending that the lack of a "stable foreign protectorate" and sustained peace obviated the "transition to a nonconfessional democracy").

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.[113]

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.[114] As described above, Sunni drafters were added to the drafting process only a month before completion. While their participation was considered imperative, to meet their deadline, the Kurdish and Shiite drafters bypassed their Sunni counterparts on contested issues, conducting private meetings to finalize the draft.[115] While, ultimately, the constitution was adopted through a popular referendum, the vast majority of

[113] *See Workshop on Constitution Building Processes*, *supra* note 5, at 28, 31–32 (describing the difficulties in Nepal caused by the major conflict between different regions of the country, and discussing how ambiguity in a Constitution could lead to conflict and violence in the future).

[114] *See* Mona Iman, *Draft Constitution Gained, but an Important Opportunity Was Lost*, U.S. INSTITUTE OF PEACE: PEACE BRIEF, Oct. 2005 at 1 (describing the rushed constitutional process as contributing to the discontent in an already polarized Iraqi society); *see, e.g.*, *Iraq's Constitutional Challenge*, PBS ONLINE NEWSHOUR, July 27, 2005, *at* http://www.pbs.org/newshour/bb/middle_east/july-dec05/iraq_7-27.html (discussing the obstacles facing the creation of Iraq's Constitution including the time deadline, the effects of the insurgency, and the power division within federalism).

[115] *See* Morrow, *supra* note 58, at 9 (describing the minimal role Sunni politicians played in drafting the Iraqi Constitution).

Sunnis rejected the draft.[116] 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 . . . 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.[117]

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."[118]

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, establishing a unified identity, and 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 2.2. The inherent time-frame tension only further undermines the assumption of compatibility of a merged constitution-drafting/peacemaking process.

2.2.3. 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-

116 *See id.* at 2–3 (discussing the widespread opposition to the Constitution by Sunni Arabs).

117 Iman, *supra* note 114, at 3.

118 *Id.* at 1.

term goals of constitutions.[119] To accomplish the cessation of violence, peace-makers typically need to react crisis to crisis, solving immediate problems.[120] 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.[121] 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.[122] 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.[123] For example, as discussed in Part 2.2.1.1, a besieged population is likely to trade rights for security. Similarly,

[119] *See, e.g.*, PARIS & SISK, *supra* note 7, at 4–5 (discussing the potential conflict between addressing short-term needs, such as ending violence, and addressing long-term goals of state building); John Paul Lederach, *Beyond Violence: Building Sustainable Peace*, *in* THE HANDBOOK OF INTERETHNIC COEXISTENCE 239–40 (Eugene Weiner ed., 1998) (arguing that peace-building needs a design that takes into account immediate needs, while also considering the future); Bell, *supra* note 15, at 399 (discussing the value of precision in peace agreements for the short-term, and its limitations for the long-term).

[120] *See, e.g.*, PARIS & SISK, *supra* note 7, at 4–5 (discussing the tendency to address short-term goals first in order to end violence immediately); Andrew Reynolds, *Constitutional Medicine*, 16 J. DEMOCRACY 54, 59 (2005) (stating that drafters may fail to recognize that short-term solutions to a crisis may be detrimental in the long-term); Lederach, *supra* note 119, at 239 (discussing the emphasis solely on narrowly defined, short-term goals such as the cessation of violence during crises).

[121] *See* Ghai, *supra* note 12, at 3 (asserting that constitutions may end immediate violence but not solve the underlying reasons for conflict); *Workshop on Constitution Building Processes*, *supra* note 5, at 25 (stating the problems and risks associated with creating a constitution and resolving a conflict simultaneously).

[122] *See* Ivan Simonovic, *Post-Conflict Peace Building: The New Trends*, 31 INT'L J. LEGAL INFO. 251, 256 (2003) (explaining that people have different needs during conflict-resolution and peace-building stages versus non-crisis stages).

[123] *See* Ludsin, *supra* note 73, at 482 (stating that a constitution created by Palestinians now may not reflect their wants and needs in the future when their society is more stable and free from occupation and violence).

societies tend to grow more traditional during conflict, seeking comfort in tradition as a balance to the upheaval in their lives.[124] As a result, a more conservative constitution could be adopted during a conflict than would be acceptable during peace.[125] Societies also may grow more insular as they feel more insecure.[126] 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,[127] a point stressed in Part 2.2.1.2.

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.[128] 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 population as a whole.

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 U.S. 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-Palestinian Conflict, or Roadmap for Peace.[129] The Draft Constitution reflects the interests of the two

[124] *See id.* (explaining that society generally becomes more conservative and culturally traditional during times of crisis and upheaval).

[125] *See id.* (discussing how a constitution created before statehood would likely be more conservative than one that is created during times of peace because of society's belief that more security is needed).

[126] *See Workshop on Constitution Building Processes*, *supra* note 5, at 25 (discussing how insecurity causes people to draw inwards and communicate only with others who they know well).

[127] *See id.* (stating that, during insecure times, different groups become more divided and sectarianism increases).

[128] *See, e.g.*, Ludsin, *supra* note 73, at 467 (discussing the difficulty certain societies have in balancing nationalist and women's rights goals).

[129] *See* NATHAN J. BROWN, PALESTINIAN CENTER FOR POL'Y & SURV. RES., THE THIRD DRAFT CONSTITUTION FOR A PALESTINIAN STATE: TRANSLATION AND

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[130] and the provisions of the final draft reflect the tense bargaining between these two parties to the exclusion of other groups.[131] 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,[132] rather than from its religious views.[133] Yet its religious views dominate the draft constitution as reflected in the extent of constitutional protection of Islam in governance.[134]

Women had very little influence in the drafting process[135] and have repeatedly been forced to subordinate their goal of equality to ensure the appearance of Palestinian unity.[136] They suffer severe

COMMENTARY 1 (2003) (stating that the United States and President George W. Bush pressured the Palestinians to create a new constitution through public announcements during international debates). 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 tension often erupts in a conflict setting.

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

131 *See* Ludsin, *supra* note 73, at 479 (discussing how certain groups, such as women's rights groups and groups to the left of Fatah, were excluded in the constitution-drafting process).

132 *See id.* at 486 (stating that Hamas receives widespread support for its fight against corruption and Israel).

133 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.

134 *See* THIRD REVISED DRAFT CONSTITUTION OF THE STATE OF PALESTINE 2003, art. 5 (stating that Islam is the official religion of Palestine); *id.* art. 7 (declaring that the principles of Islamic Shari'a law will be used as a major source for legislation).

135 *See* Ludsin, *supra* note 73, at 476 (discussing the lack of female members on the Constitutional Committee and the little influence they have on the constitution drafting process).

136 *See* Hallie Ludsin, Women and the Draft of the Constitution of Palestine 49 (2007) (unpublished manuscript) (on file with author) (describing the common

discrimination under Shari'a family law as interpreted in the OPT,[137] yet the Draft Constitution expressly protects this law.[138] 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.[139] Obedience requires the wife to obtain her husband's permission to leave her home.[140] 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. [141] The Draft Constitution guarantees the rights to equality under the law, freedom of movement and work,[142] 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-

view that the struggle for women's rights is often seen as less important than the "nationalist agenda").

137 *See id.* at 29 (describing the unique problems Muslim women face in some societies, often stemming from the general requirement of obedience to their husbands).

138 See THIRD REVISED DRAFT CONSTITUTION OF THE STATE OF PALESTINE, *supra* note 134, art. 7 ("The principles of Islamic Shari'a are a major source for legislation.").

139 *See* Ludsin, *supra* note 136, at 29 (explaining how the requirement of obedience often results in wives having severely restricted mobility and employment opportunities).

140 *See id.* at 126 (describing the restrictions on movement for married women living under Shari'a law, and the particular importance of freedom of movement for Palestinian women).

141 *See* LYNN WELCHMAN, ISLAMIC FAMILY LAW: TEXT AND PRACTICE IN PALESTINE 115 (1999) (explaining restraints upon a wife's ability to work without her husband's explicit or implied consent); Ludsin, *supra* note 136, at 127 (explaining that, even in the face of eased travel restrictions, women need to obtain permission from their husbands, fathers, or brothers before using their passports).

142 *See* THIRD REVISED DRAFT CONSTITUTION OF THE STATE OF PALESTINE, *supra* note 134, art. 19 ("Palestinians are equal before the law."); *id.* art. 31 ("Citizens shall have the right to choose their place of residence and to travel within the state of Palestine."); *id.* art. 51 ("Employment is a right of all citizens.").

majority support for a constitutional amendment.[143] 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.[144]

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 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.

2.2.4. Tensions over participation in drafting

The last apparent tension created when constitution-drafting is used as a 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 a lack of faith in the constitution and a lack of trust in the institutions it creates, undermining all of the goals of constitution-drafting.[145] 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. As Widner explains, this process:

143 *See* Ludsin, *supra* note 73, at 492 (stating that two-thirds of the legislature would be needed to amend the Constitution and "remove power over personal status law from religious authority").

144 It is, of course, wholly possible that women would have been excluded from a post-conflict constitution-drafting process; nevertheless, drafting during a state of conflict ensured women's exclusion from the process.

145 *See generally* Samuels, *supra* note 2, at 4 (arguing that the process of constitution-drafting will ultimately make a dramatic impact on whether a democratic transition is successful).

> 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 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.[146]

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 in 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.[147] A study of twelve constitution-drafting processes showed that "[a]n 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."[148] 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.[149] The Iraqi example, described in Parts 2.2.1.1. and 2.2.2., highlights this point. The exclusion of Sunni voices set up the drafting-process for failure, ensuring that

146 Widner, *supra* note 1, at 1.

147 *See, e.g.*, PAUL R. WILLIAM, PUBLIC INT'L LAW & POL'Y GROUP., THE CONSTITUTION MAKING PROCESS 9, 30 (2006) (underscoring that the inclusiveness of the constitution-drafting process bears on its legitimacy).

148 Samuels, *supra* note 2, at 29.

149 *See* Aeyal M. Gross, *The Constitution, Reconciliation, And Transitional Justice: Lessons From South Africa And Israel*, 40 STAN. J. INT'L L. 47, 58 (2004) (contending that ethnic conflicts are often the result of exclusion, and that constitutions must rectify this shortcoming by enhancing participation and inclusion).

the constitution would neither gain legitimacy nor serve as an effective peace treaty for the population engaging in the insurgency.

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.[150] Realistically, drafting during a conflict may severely limit the choice of drafters to negotiators representing the warring parties.[151] 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.[152]

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.[153] 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."[154] 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.[155] The fear is that the constitution will reflect the balance of power between these

[150] *See, e.g.*, WILLIAM, *supra* note 147, at 4 (highlighting the need for constitution drafters to be representative of the population as a whole).

[151] *See Workshop on Constitution Building Processes*, *supra* note 5, at 30 (suggesting that "militarized factions will dominate" any agreements during conflicts).

[152] *See id.* ("By definition, stopping violence gives primacy to groups that can organize military force.").

[153] 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, undue international interference is not necessarily inherent to constitution-drafting during conflict and therefore is not discussed in this Article.

[154] Bell, *supra* note 15, at 399. *See also Workshop on Constitution Building Processes, supra* note 5, at 25 ("[P]eace 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.").

[155] Colombia provides a tragic example of this dynamic, as described below.

warring parties or serve as a division of spoils between them.[156] 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.[157]

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.[158] 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.[159]

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.[160] 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.[161] On the one

156 *See* Teitel, *supra* note 18, at 2052 (describing what Teitel considers the "realist" view of modern constitutions); Samuels, *supra* note 1, at 670 (arguing that constitution-building must be inclusive to avoid powerful factions splitting control over populations that may have been excluded in the process).

157 *See, e.g.*, GHAI & GALLI, *supra* note 6, at 7 (urging that political community must be created through consensus among diverse groups).

158 *See generally* Maley, *supra* note 55, at 686–87 (highlighting the existence of "spoilers" in the peace process who are unrelenting in their demands, resorting to destructive means when necessary).

159 *See Workshop on Constitution Building Processes*, *supra* note 5, at 25 (outlining the main risks in forming a constitution, including the possibility of new opposition groups emerging and demanding a voice).

160 *See* Bell, *supra* note 15, at 392 (suggesting that groups of individuals will often resort to detail-oriented constitutions to contract with one another instead of creating constitutions that involve a social contract between the individual and the state).

161 *See, e.g.*, *Workshop on Constitution Building Processes*, *supra* note 5, at 31–32 (observing that when "differences are intractable," negotiators will insert ambiguous language to "punt" to the courts and postpone the debate); Bell, *supra* note 15, at 398 (stating that constitution-drafters use ambiguity to reach agreement between opposing factions, citing cases in several countries).

hand, ambiguous provisions may be the only way to break a deadlock in negotiations.[162] They may provide more time for a 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.[163]

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."[164] The excluded population is likely to feel that the constitution protects warring group interests and rewards them for their violence.[165]

The groups most in danger of exclusion are women, nonviolent groups and traditionally powerless groups. Women historically have been excluded from most peace-processes, including constitution-drafting processes.[166] 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.[167] The United Nations Security Council adopted Resolution 1325 to assert the importance of including women in peace processes,[168] yet

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[162] *See* Bell, *supra* note 15, at 398 (explaining that the ambiguous language enables agreement and allows groups to agree to a constitution that may build identity and statehood).

[163] *See, e.g.*, *Workshop on Constitution Building Processes*, *supra* note 5, at 32 (concluding that eventually "down the road" opposing parties may feel "duped" and "[c]onflict may break out again"). *See infra* Part 3.2 for a description of how this occurred in Nepal's ongoing constitution-drafting process.

[164] PARIS & SISK, *supra* note 7, at 6.

[165] *See, e.g.*, *Workshop on Constitution Building Processes*, *supra* note 5, at 31 (advising drafters to be careful with sunset clauses that may make former warring groups appear to be "victors" waiting to take power again in the future); discussion *infra* Part 3.2 of Afghanistan.

[166] *See, e.g.*, U.N. DEV. FUND FOR WOMEN, WOMEN'S PARTICIPATION IN PEACE NEGOTIATIONS: CONNECTIONS BETWEEN PRESENCE AND INFLUENCE (Apr. 2009), http://www.realizingrights.org/pdf/UNIFEM_handout_Women_in_peace_processes_Brief_April_20_2009.pdf (showing that over the past eight years there has been little increase of participation by women in peace negotiations).

[167] *See* Swanee Hunt, *The Critical Role Of Women Waging Peace*, 41 COLUM. J. TRANSNAT'L L. 557, 557 (2003) (arguing that women are seen as victims in war and are left out of the negotiation process, resulting in men doing most of the fighting, as well as the negotiating for peace).

[168] S.C. Res. 1325, ¶ 5, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

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,"[169] in large part because of the perception that their concerns are not political.[170] As described in Part 2.3, often they are asked to put aside their concerns in favor of interests deemed more pressing.[171] 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.[172] 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.[173] It also can result in the failure of peacemaking goals as

> 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.

Id.

[169] Hunt, *supra* note 167, at 561.

[170] *See* Felicity Hill, *Women at the Peace Table*, *in* Conference On "Building Capacities for Peacekeeping and Women's Dimensions in Peace Processes": Joint European Union-Latin American and the Caribbean Conference in Santiago, Chile 87–88 (Nov. 4–5, 2002), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/40F62D296AAB8F2AC1256D17004688ED-geo-gender-nov02.pdf (stating that one of the challenges of allowing women to participate in peace negotiations is that they are not considered a political constituency and, therefore, that their issues are not political).

[171] *See id.* (highlighting that integration of women into the "culture and network of politics" would disrupt negotiations if women's "issues [were] considered at the decision making table").

[172] *See* CLIVE BALDWIN ET AL., MINORITY RIGHTS GRP. INT'L., MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION 16 (2007) (observing that concentrated groups "actively involved in armed conflict" have dominated peace negotiations, rendering most other groups largely unable to participate).

[173] *See* Gross, *supra* note 149, at 58 (arguing that engendering a "sense of sharing in the endeavor . . . and the actual creation of a constitution" is essential to "ensur[ing] that previously excluded groups will not feel the new [constitution

the exclusion of any group could trigger new violence involving different parties. [174] 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."[175] 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.[176] Lack of security may make 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.[177]

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 nineteenth century until the mid-1940s was tensely divided between the Conservative parties, who typically won elections under the 1886 constitution, and the liberal parties.[178]

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has] been imposed by the main power holders, but . . . instead emerged through a participatory process").

[174] *See* BALDWIN ET AL., *supra* note 172, at 5 (noting that minorities' exclusion from participating in the political process may push minority groups to resort to violence in order to obtain their needs).

[175] Ghani et al., *supra* note 17, at 109.

[176] *See* Ludsin, *supra* note 73, at 477 (contending that public participation in constitution drafting is vital to a constitution's standing as legitimate and a representation of the collective public will at large rather than the will of an individual ruler).

[177] *See id.* ("Public participation in drafting . . . [serves to] educat[e] society about the goals of the constitution and the individual provisions.").

[178] *See* Jorge L. Esquirol, *Can International Law Help? An Analysis Of The Colombian Peace Process,* 16 CONN. J. INT'L L. 23, 27–28 (2000) (describing the struggle for power between Conservatives, who typically controlled the

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.[179] In a coup in 1953, the military took control of the government to end the conflict.[180]

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.[181] They adopted the National Front to divide power between them.[182] The National Front guaranteed that Colombia's presidency would rotate between the Liberal and Conservative parties and that the seats in the legislature would be evenly divided between them, excluding all other political groups, for a period of 16 years.[183] They effectively formed a "monopoly of

government, and the Liberals, who often resorted to violence); *Polity IV Country Report 2008: Colombia,* CTR. FOR SYSTEMIC PEACE 2 (Mar. 1, 2011), http://www.systemicpeace.org/polity/Colombia2008.pdf (explaining that a two-party system pervaded Colombia from the mid-nineteenth century until sometime after the onset of the *La Violencia* period).

[179] *See* Jennifer S. Easterday, *Deciding The Fate Of Complementarity: A Colombian Case Study,* 26 ARIZ. J. INT'L & COMP. L. 49, 63–64 (2009) (estimating that 200,000 deaths resulted from the La Violencia period of 1948–1953); COLOMBIA: A COUNTRY STUDY 37–39 (Dennis M. Hanratty et al. eds., 1990) (documenting the period of La Violencia in Colombia); *see also* Catalina Diaz, *Colombia's Bid for Justice and Peace*, *in* BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE, AND DEVELOPMENT 469, 471 (Kai Ambos et. al. eds., 2009) (estimating that 180,000 persons died during La Violencia from 1946–1965); NATALIA SPRINGER, COLOMBIA: INTERNAL DISPLACEMENT—POLICIES AND PROBLEMS, 1 (2006) (estimating that 200,000 Columbians died as a result of La Violencia).

[180] *See* Easterday, *supra* note 179, at 64 (detailing how La Violencia concluded in a coup led by General Pinilla)

[181] *See* FORREST HYLTON, EVIL HOUR IN COLOMBIA 52–53 (2006) (noting that by 1957, the Conservatives and Liberals joined out of necessity and formed the National Front).

[182] *See* Sergio González Sandoval, *The Colombian Experience in the Area of Protection of the Freedom of Religion,* 2009 BYU L. REV. 651, 655–56 (2009) (noting that the bipartisan National Front agreement arose from "an atmosphere of reconciliation" between the Liberals and Conservatives to avert further rule by military dictatorship); *see also* COLOMBIA: A COUNTRY STUDY, *supra* note 179, at xxv (detailing the origins and structure of the National Front "power-sharing agreement" struck between the Conservatives and Liberals).

[183] *See* Easterday, *supra* note 179, at 64 ("Under the National front, the parties alternated control over the presidency and maintained parity in control over legislative and executive offices to the exclusion of other political parties."); *see also* BENJAMIN KEEN & KEITH HAYNES, 2 A HISTORY OF LATIN AMERICA 473 (2003) (detailing the origins of the National Front).

shared power," guaranteeing their power as elites.[184] The population voted in favor of the National Front and its consequent change to the 1886 Constitution in hopes that it would maintain some level of peace.[185]

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.[186] The excluded groups began a guerrilla war in the early-to-mid-1960s against the now politically aligned Liberal and Conservative parties:

> While [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 . . . . [T]he National Front was at a minimum perceived as exclusionary and incapable of channeling these particular group demands.[187]

According to a 2008 Amnesty International report, in the twenty years prior to 2008, 70,000 people had been killed and three to four million had been displaced; during the forty years prior to the report, 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.[188] These deaths were the result of fighting between guerrillas, paramilitary "self-defense" groups, the military, and drug cartels.[189] Much of the violence has its roots in

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184 *See* KEEN & HAYNES, *supra* note 183, at 473 (describing the National Front's monopoly on the political process).

185 *See* COLOMBIA: A COUNTRY STUDY, *supra* note 179 at 41–42 (stating that in 1957, "Colombians voted overwhelmingly . . . to approve [the agreement establishing the National Front] as amendments to the Constitution of 1886").

186 *See* Jose E. Arvelo, Note, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT'L L. 411, 416 (2006) (noting that in spite of the National Front Agreement, "the social conflict regarding agrarian interests in the rural areas continued").

187 Esquirol, *supra* note 178, at 28–29.

188 AMNESTY INT'L, 'LEAVE US IN PEACE!': TARGETING CIVILIANS IN COLOMBIA'S INTERNAL ARMED CONFLICT 7 (2008).

189 *See* INT'L CRISIS GRP., COLOMBIA CONFLICT HISTORY 1 (2011) (describing the rise of guerrillas, paramilitary groups, and drug cartels in the years and decades that followed formation of the National Front, which had concentrated power in the political elite).

the La Violencia period and the failures of the National Front settlement.[190] 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.

2.3. 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 inappropriately conservative; entrenches religious, cultural or ethnic divisions; does not fully

[190] *See* AMNESTY INT'L, *supra* note 188, at 5 (describing contemporary guerilla groups that owe their origins to the La Violencia period of the 1950s); *see also,* SPRINGER, *supra* note 179, at 1 (detailing the social consequences of La Violencia and remarking that a "durable legacy of [La Violencia] was the creation of memories of hate, desire for vengeance and lasting distrust among the victims and their descendants"); Diaz, *supra* note 179, at 471 (stating that the modern Colombian armed conflict "finds its roots in" La Violencia).

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, neither constitution-drafting nor a resulting constitution can 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 the societal acceptance of the rule of law under the constitution."[191] It establishes constitutional supremacy in setting rules for governance and for protecting human rights.[192] Richard A. 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."[193]

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[191] Richard A. Rosen, *Constitutional Process, Constitutionalism and the Eritrean Experience*, 24 N.C. J. INT'L L. & COM. REG. 263, 276 (1998).

[192] PIERRE J. J. OLIVIER, *Constitutionalism in the New South Africa*, *in* SOUTH AFRICA'S CRISIS OF CONSTITUTIONAL DEMOCRACY: CAN THE US CONSTITUTION HELP? 18, 19 (Robert A. Licht & Bertus de Villiers eds., 1994) (explaining that at a minimum, constitutionalism entails that government is "constrained by the constitution and shall govern only according to its terms and subject to its limitations, only with agreed powers and for agreed purposes").

[193] Rosen, *supra* note 191, at 276.

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 Section 3.

3. SALVAGING THE MERGER OF PEACEMAKING AND CONSTITUTION-DRAFTING PROCESSES

Section 2 showed that using constitution-drafting as a peacemaking tool without first stabilizing and securing the state, sets up the constitution-drafting process and constitution for failure and could 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

[194] Arato, *supra* note 2, at 555. *See also*, Samuels, *supra* note 1, at 671 (noting that a poorly designed constitution can "ferment conflict in sharply divided societies," "undermine the sustainability of the peace," and "exacerbate fault lines, divisions, and tensions in society").

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 Section 3.1 below describes, a multi-stage constitutional process could resolve many of the inherent tensions created when peacemaking and constitution-drafting are merged. Section 3.2, however, points out that such resolution is not inevitable. Rather, such resolution will depend heavily on the context of the internal conflict and the will of the warring groups.

3.1. 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 though obviously one is preferable. Warring parties then will negotiate an interim constitution as 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.[196] Numerous

[195] *See supra* Section 2.1 (discussing Rutti Teitel's vision of transitional constitutions).

[196] *See e.g.*, Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution,* 23 UALR L. REV. 809, 815 (2001) (discussing the initial principles incorporated into South Africa's interim constitution during its bifurcated

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 multistage 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.[197] 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 drafting process of an interim constitution at its onset favors peacemaking at the expense of constitutional goals or the process is less than fully representative will be irrelevant in large part.[198] 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 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 could 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

constitution-drafting process); The Honorable Albie Sachs, J., Constitutional Court of S. Afr., Address on the Creation of South Africa's Constitution, *in* 41 N.Y.L. SCH. L. REV. 669, 675 (1997) (discussing the debates surrounding the drafting of South Africa's constitution and noting that "[t]he Assembly was free to develop any provisions as long as they complied with the constitutional principles").

[197] *See* Bell, *supra* note 15, at 398–99 (noting that peace agreements which act as precursors to finalized constitutions utilize broader language and set general principles to better allow time for eventual "deeper constitutionalization of the commitments [initial agreements] embody").

[198] *See* Proceedings, *Workshop on Constitution Building Processes*, *supra* note 5, at 25 (arguing that it is acceptable for initial constitution-drafting to help engender peacemaking and political discussion in lieu of violence at early stages even if more specific constitutional issues concerning the broader community are not addressed until a later time).

[199] *See* Jackson, *supra* note 1, at 1252 (observing that a constitution's permanent character may render parties less willing to negotiate or cooperate).

provisions later if 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 ten-year insurgency led by the Communist Party of Nepal (Maoist) (the 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 since 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 (the 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 January 2007, the SPA and the Maoists reached an initial agreement to draft an interim constitution to establish a process for the election of a constituent assembly that would be responsible both for drafting a new constitution and acting as a transitional parliament.[205]

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200 *See* Bell, *supra* note 15, at 399 ("By setting forth principles and processes rather than final provisions, peace negotiations can be concluded more quickly").

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 *See, e.g.*, Donna Lyons, *Maximising Justice: Using Transitional Justice Mechanisms To Address Questions Of Development In Nepal*, 13 TRINITY C. L. REV. 111, 112 (2010) (describing Nepal as a country severely divided along ethnic, caste, class, religious, and regional lines that have led to deep inequalities and helped spark the Maoist insurgency).

203 *See* Bishnu Sharma et al., *Nepal–A Revolution Through The Ballot Box*, 62 AUSTL. J. INT'L AFF. 513, 516–17 (2008) (noting that shortly after the reinstated parliament removed power from the king and drafted an interim constitution, "[t]he Government and the Maoists signed [a peace accord], ending 10 years of conflict").

204 *See* INT'L CRISIS GRP., NEPAL'S CONSTITUTIONAL PROCESS 1 (2007) (noting the suspension of the monarchy and the Maoist demand for a constituent assembly).

205 *See id*. at 1 ("The interim constitution promulgated on 15 January 2007 established a framework for constitutional change and enshrined the guiding principles agreed in earlier negotiations.").

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, which describes state transformation from a "centralized and unitary" government to a "progressive, democratic" state.[206] 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.[207] 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.[208]

Overall, the Interim Constitution has been amended at least five times to respond to demands, which, if 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 and its subsequent amendments have generally permitted a lengthier final constitution-drafting process. Nepal however, provides a limited example of interim constitutional processes' potential. As Section 3.2 describes, while the Interim Constitution so far can be considered a success, the final drafting

[206] *See* INTERNATIONAL CRISIS GROUP, NEPAL: IDENTITY POLITICS AND FEDERALISM, ASIA REP. NO. 199, at 8 n.57 (2011) ("[B]y eliminating the centralised and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic system."(citation omitted)).

[207] *See* INT'L CRISIS GRP., *supra* note 204, at 1 (narrating the progression of the civil war and the ensuing peace process).

[208] *See* INTERNATIONAL CRISIS GROUP, NEPAL, *supra* note 206, at 8 n.57 (surmising from interviews with senior Maoist leaders that even though federalism was not mentioned expressly, the leaders believed Article 138's language "implied federalism clearly enough"). Ultimately, popular protests in the south plains of the Tarai 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. *See id.* at 8 (describing the Tarai protests which resultantly compelled the Prime Minister to "guarantee[] federalism").

process has repeatedly stalled. This has threatened peace and illustrates 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 inherent tensions of 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 Section 1 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 reignites 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 and 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 Section 2.1 shows, security is a precondition of 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 its human rights for security. It also will have less need to draw on 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—which also functions as the peace agreement—they have built the foundation for additional compromises. As levels of trust increase, so do the chances that society and the drafters will reach a meaningful consensus on a

[209] *See* Proceedings, *Workshop on Constitution Building Processes*, *supra* note 5, at 27 (stressing the desirability of reaching a cease-fire and interim agreement before drafting a final constitution).

national identity, national values, and a governance framework for the state either ahead of or during the final drafting process.[210] Since the Interim Constitution 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 discontented 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 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 as well as one 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

[210] *See* HART, *supra* note 1, at 11 (providing South Africa's creation of a post-Apartheid constitution as an example of one where trust among elites and the general public preceded the actual drafting process).

drafting process that represents all members of society and allows for substantial public participation.[211] 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.[212] 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. Nonviolent 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 time frame for drafting provides the public with greater opportunity to participate in the final drafting process. 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. On balance, 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 accomplish the transition from authoritarian, minority party rule to liberal democracy without descending into a much

[211] *See* WILLIAM, *supra* note 147, at 32 (underscoring the importance of enfranchisement of societal groups in the constitution-drafting process).

[212] *See* Proceedings, *Workshop on Constitution Building Processes*, *supra* note 5, at 31 ("It is important to take deliberate steps to broaden participation in the subsequent constitution building exercise in order to counter the effects of letting warring factions dominate the process at the first stage.").

[213] *See, e.g.*, Samuels, *supra* note 2, at 29 (concluding that, while subject to a few tradeoffs, representative constitution-drafting generally counterbalances the "aggravated dissent and political tensions" that otherwise would result from constitution-drafting dominated by a single concentrated interest).

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, 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 point, the majority population was no longer going to accept minority rule.[217] 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.[218] The ANC entered negotiations recognizing it did not hold sufficient

[214] The Inkatha Freedom Party, a Zulu-based party headed by Mangosuthu 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. *See* Stephen Ellis, *The Historical Significance of South Africa's Third Force*, 24 J. S. AFR. STUD. 261, 284–86 (1998) (describing the continuation of low-intensity warfare during the Apartheid regime's last years in power). Eventually, the National Party and the ANC managed to sideline the Inkatha. *Id.* at 290 ("On 26 September 1992, the National Party and the ANC signed a Memorandum of Understanding which impliedly confined Inkatha to the margins.").

[215] Approximately 14,000 people were killed in South Africa between 1990 and 1994. *Id.* at 263. *See also*, Vincent Maphai, *Prospects for a Democratic South Africa*, 69 INT'L AFF. 223, 225–26 (1993) (noting the extensive violence that threatened to derail peace talks in 1993).

[216] *See* Hermann Giliomee, *Democratization in South Africa*, 110 POL. SCI. Q., 83, 86–92 (1995) (detailing the factors that helped catalyze South Africa's constitutional negotiations).

[217] *Id.* at 87 (noting that as the white minority South African population decreased and the black majority population became increasingly educated, the majority population's "political discontent" and "status demands" became increasingly prominent).

[218] *Id.* at 85 ("By the end of the 1980s, the anti-apartheid struggle had produced such a political transformation that the regime was forced to embark on negotiations to replace minority rule with a [new form of government].").

power to defeat the Apartheid government in a military battle.[219] Because South Africa simply feared a full-fledged civil war and did not face one,[220] 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,[221] 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.[222] 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.[223] The ANC rejected an elite driven drafting process, demanding a democratic Constitutional Assembly as part of its fight for self-

[219] *See* J. Daniel O'Flaherty, *Holding Together South Africa*, 72 FOREIGN AFF., 126, 126–27 (1993) (remarking that ANC leaders had "abandoned armed struggle" and noting that neither party would have the strength to govern alone); Ellis, *supra* note 214, at 265 (describing how gaining political support was more important than violence for the ANC).

[220] *See, e.g.*, Jeffrey Herbst, *Creating a New South Africa*, 94 FOREIGN POL'Y, 120, 130 (1994) (mentioning how the alternative to negotiation was not desired); *see* O'Flaherty, *supra* note 219, at 126 (noting that the prospect of civil war pushed politicians to negotiate); Ellis, *supra* note 214, at 294 (discussing political efforts made by politicians to avoid civil war).

[221] *See* Giliomee, *supra* note 216, at 96 (noting the costs of non-negotiations as including a worsened state of the economy and increased violence).

[222] *Id.*

[223] *See* Sachs, *supra* note 196, at 700 (stating that the striking down of election proclamations was "hailed with great joy by the National party"); Murray, *supra* note 196, at 813 (describing the National Party's goal of settling constitutional drafting prior to losing political control).

determination.[224] The negotiations deadlocked over how the constitution would be drafted.[225]

Shortly thereafter, South Africa entered a crisis period. The ANC withdrew from CODESA following the killing of 38 people in Boipatong, believed to have been carried out by government forces.[226] 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.[227] As the points of friction increased, both sides recognized they could not defeat the other.[228] 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 would contain constitutional principles that must be followed in the final document.[229] The final constitution would not become law until the Constitutional Court, established by the Interim Constitution, certified that it fulfilled those principles.[230] Fearing that the black majority would use its power to retaliate against the white minority, the National Party

[224] *See* Murray, *supra* note 196, at 814 (detailing that all members of the Parliament elected were to act as the Constitutional Assembly in 1994 for the purpose of drafting the final constitution).

[225] *See* HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION MAKING IN SOUTH AFRICA 133–47 (Oxford Univ. Press 1998) (describing the deadlock as not one of principle, but one of political power, which fueled intense mistrust, bust eventually came to an end).

[226] *See* Ellis, *supra* note 214, at 289 (describing the attack as a potential consequence of suspended negotiations).

[227] *See id.* at 289–90 (describing the attack and the reaction of South African locals who believed that it was the work of the security forces).

[228] *See* Giliomee, *supra* note 216, 91–92 (commenting on the stalemate between the white government and the opposition).

[229] *See* Murray, *supra* note 196, at 814–15 (outlining some of the main principles that were included in the interim constitution); Sachs, *supra* note 196, at 675 (discussing public involvement in the debate over constitutional principles).

[230] *See* Sachs, *supra* note 196, at 676 (describing the role of the Constitutional Court and Assembly in meeting the two-year deadline).

demanded democratic guarantees of freedom of association and minority language and religious rights in these principles.[231] The ANC sought to limit the principles to avoid unfair concessions to the white minority, such as a white veto or overrepresentation of the National Party.[232] Albie Sachs, a South African Constitutional Court judge and participant in the constitutional negotiation, explains: "We ended up with thirty-four principles . . . . There is a lot of detail in the principles because this was our modality for making everybody feel comfortable with the proceedings and ensuring that no one felt the constitution was a result of the triumph of one section of society over another."[233] 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.[234] At this point, violence continued throughout South Africa, but it had not reached the level of a civil war, which allowed for a longer time frame 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 three-fourths of South Africa's population and that the Constitutional Assembly had received more than two million submissions from the public.[235] 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.

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[231] *Id.* at 672 (describing the importance of harmonizing incompatible interests of the minority and majority parties).

[232] *See* Giliomee, *supra* note 216, at 100 (explaining the complex power dynamics of race in South African politics); Sachs, *supra* note 196, at 670–71 (discussing the minority's desire for constitutional protections and fear of retribution from the majority).

[233] Sachs, *supra* note 196, at 673.

[234] *See* Sachs, *supra* note 196, at 670–72 (describing the compromise between the National Party and African National Congress).

[235] *See* Murray, *supra* note 196, at 817 (detailing public reactions to the Constitutional Assembly's public participation program).

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.[236] 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.[237] 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 stable foundation for the future.[238]

3.2. 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.

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

[236] *See* Herbst, *supra* note 220, at 121 (describing the historic but reluctant compromise between the parties and the particular concessions of both the National Party and the African National Congress).

[237] *See* Sachs, *supra* note 196, at 672 (discussing the importance of each party identifying with the principles of the new constitution).

[238] *See* Murray, *supra* note 196, at 817 (highlighting the wide array of input and opinions that were taken into account when drafting the constitution).

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 2.2 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/peacemaking process, 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.[239] The TAL established an eight-month drafting period to follow the election of an interim National Assembly and permitted one six-month extension of the process.[240] The National Assembly delayed appointments to the constitution-drafting committee for more than five months, leaving drafters less than three months to complete a 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]

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[239] *See generally* Eileen Babbitt, *The New Constitutionalism: An Approach to Human Rights from a Conflict Transformation Perspective*, BERGHOF CONFLICT RESEARCH 67 (2010), *available at* http://www.berghof-handbook.net/documents/publications/dialogue9_babbitt_comm.pdf (analyzing the importance of building inter-community relationships throughout the political process to secure human rights through the creation of the constitution); *see also* International Crisis Group, *Iraq: Don't Rush The Constitution*, MIDDLE E. REP., June 2005, at 10 (listing state structure, religion and national identity as being among the main issue TAL identified in the Iraqi constitution building process).

[240] *See* Nathan J. Brown, *Post-Election Iraq: Facing the Constitutional Challenge*, CARNEGIE ENDOWMENT FOR INT'L PEACE, DEM. AND RULE OF L. PROJECT POL'Y OUTLOOK, Feb. 2005, at 2 (chronicling the difficulties the National Assembly faced in drafting a permanent constitution).

[241] *See* Morrow, *supra* note 58, at 8–10 (discussing whether an extension would have helped the Committee produce a better result).

While experiences elsewhere showed the need for a long drafting process in post-conflict situations,[242] the continued conflict with Sunni insurgents drove the United States 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 U.S. invasion, ordinary Iraqis who wanted to see the end of the U.S. 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 U.S.-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 United States 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 Parts 2.2.1-2.2.2, 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 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

[242] *See* Brown, *supra* note 240, at 1–2 (commenting on the low success rate of constitutions written in post-conflict nations); *see also* INT'L CRISIS GRP., *supra* note 189 (recounting the intense political conflict in Colombia even after the government drafted a new constitution in 1991).

[243] *See* International Crisis Group, *Iraq's Constitutional Challenge*, MIDDLE E. REP., Nov. 2003, at 6–7 (explaining the United States' reasons for rushing the constitutional drafting process). *But see id.* (noting Paul Bremer's statement that a rushed drafting process would be dangerous).

[244] *See id.* at 6 (describing how constitutional questions became intertwined with the transfer of sovereignty in Iraq).

[245] *See* Brown, *supra* note 240, at 4–5 (describing the series of ambitious deadlines for writing and adopting the Iraqi constitution).

[246] *See* Jackson, *supra* note 1, at 1289 ("[A]greements may be particularly difficult to arrive at in circumstance in which one or more powerful groups believes it will be in a better position to strike a deal at some future time . . . .").

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 3.1 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 forty percent of the seats in a 2008 election, forming a coalition government with the Communist Party of Nepal United Marxist-Leninist 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 constitution-drafting deadlines of May 2010, May 2011, and August 2011 over these issues as groups remain deadlocked.[249] The Maoists in particular

[247] *See Workshop on Constitution Building Processes*, *supra* note 5, at 26–27 (noting the propensity for a power vacuum without a national or international body to provide governmental services). Nepal provides an important example of this power vacuum. *See* Asian Development Bank, *Nepal: Political And Economic Update*, http://www.adb.org/documents/reports/validation/NEP/in324-10.pdf (last visited Oct. 15, 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.

Id.; s*ee also* Ishaan Tharoor, *After Maoist Protests, Nepal Faces a Murky Future*, TIME, May 12, 2010, http://www.time.com/time/world/article/0,8599,1988455,00.html (outlining potential problems in the aftermath of a Nepal's delay in constitution drafting).

[248] *See* Sagar Rijal, Issue Brief, *Destabilization in Nepal,* ODU MODEL UNITED NATIONS SOCIETY 2 (2011) (describing the issues associated with the integration of Maoist forces).

[249] *See* Kiran Chapagain, *Nepal Averts Crisis Over Constitution Deadline*, N.Y. TIMES, May 30, 2011, at A9 (describing how Nepal's political parties averted political collapse by extending the deadline for the country's new constitution).

have been accused of subverting the drafting process for personal gain.[250]

The continued intransigence of the parties in the final drafting process and the absolute distrust between them has left a power-vacuum in Nepal. Despite their plurality of CA seats, the Maoists were unable to sustain a coalition government and were unwilling to join a coalition in which a different party held the Prime Minister's role.[251] Numerous parties also have sought to exclude the Maoists from power. As each constitution-drafting deadline passed, two-thirds of the CA needed to vote to amend the Interim Constitution to change the deadline and extend the CA's authority. Without Maoist agreement to an extension, the CA, the peace process and constitution-drafting risked collapse. In May 2010 and again in May 2011, the Maoists agreed to the amendment but only if the existing coalition government resigned.[252] This forced new Constituent Assembly elections for government posts, including the Prime Minister, leading to four Prime Ministers in four years. In 2010, it took seven months before the CA was able to elect a Prime Minister. After sixteen attempts to choose one, in February 2011 the Maoists gave their support to Jahalanth Khanal, a United Marxist-Leninist candidate, based on an agreement over the Maoist troops that satisfied both parties.[253] The CA and new Prime Minister failed to concretize the agreement, and as the May 2011 deadline approached, parties again agreed to extend the term for the CA, this time only for a three-month period, and again forced

250 *See* Kiran Chapagain & Jim Yardley, *Nepal Selects a Premier, Ending a Stalemate*, N.Y. TIMES, Feb. 4, 2011, at A10 (describing allegations of Maoist subversion of the constitution drafting process).

251 *See generally* International Crisis Group, *Nepal's Faltering Peace Process,* ASIA REP., Feb. 2009 (outlining several roadblocks to a sustained peace in Nepal).

252 *See* Kiran Chapagain & Jim Yardley, *Nepal Avoids Political Crisis With Broad Deal to Extend Parliament*, N.Y. TIMES, May 29, 2010, at A8 (describing the agreement struck between the political parties which prevented the dissolution of parliament); *see also* Chapagain & Yardley, *supra* note 250 (describing Maoist conditions for amending the constitution).

253 *See Nepal: Multiple Challenges Remain After Long-Awaited Election of Prime Minist*er, EUR. INTERAGENCY SEC. F. (Feb. 16, 2011), http://www.eisf.eu/alerts/item.asp?n=12175 (describing the process leading up to the election of Prime Minister Jhalanath Khanal and the instability that still remains after his election).

the Prime Minister to resign.[254] This process was repeated in August 2011, after which a Maoist was elected Prime Minister and the constitution-drafting process was extended to November 30, 2011.

The risks to Nepal are high without clear leadership and consensus.[255] This type of stalemate could easily cycle Nepal back into violence.[256] The predominant fear at this point is that the general population, extremists on either side or historically unrepresented ethnic groups will grow sufficiently frustrated with the current constitutional process and resort to violence to end the deadlock.[257] Commentators view the recent election of a Maoist Prime Minister as a hopeful sign that the constitution-drafting/peace-process will move forward, or at least ease immediate tensions, but only time will tell.[258] As the Nepali 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

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254 *See* Chapagain & Yardley, *supra* note 250 (illustrating the political wrangling involved in Nepal's constitution-drafting).

255 Adding to the risks of violence caused by a power vacuum, the United Nations Mission in Nepal (UNMIN), which was responsible for monitoring the cease-fire agreements, mediating the disarmament of Maoist troops and their integration into the regular Nepal army, and monitoring the Nepalese army for abuses, withdrew in late 2010 to force the end of the status quo and shake-up the negotiations between parties. *See* Press Release, Security Council, 'We are Not in Favour of Repeated Extensions of UN Mission in Nepal in Climate That Undermines Its Ability to Function Effectively,' Security Council Hears, U.N. Press Release SC/10053 (Oct. 14, 2010).

256 *See* EUR. INTERAGENCY SEC. F., *supra* note 253 (suggesting that lack of leadership could result in a resurgence of faction violence).

257 *See* Rijal, *supra* note 248 (analyzing the effects of political deadlock on the Nepalese security situation).

258 *See* Gopal Sharma, *Nepal Parliament Elects Maoist Prime Minister*, REUTERS, Aug. 28, 2011, *available at* http://in.reuters.com/article/2011/08/28/idINIndia-59015120110828 (noting that the Prime Minister's election "raises hopes for revival of the edgy peace process and could settle the future of Maoist combatants").

as parties attempt to hold onto their negotiating power.[259] 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."[260] Crisis management may demand these compromises, permitting short-term peace goals to override long-term constitution-drafting goals.

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.[261] The Taliban were able to reign in some of the regional conflicts through violence and co-option.[262] 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 U.S.-aligned regional warlords, along with an elite group of Afghans, signed the Bonn Agreement to design a blueprint for achieving a stable Afghanistan.[263] The Bonn Agreement did not end the conflict with the Taliban but rather presumed its defeat. One commentator describes that, "the Bonn Agreement was not a peace agreement between belligerents, but a statement of general

259 *See* Samuels, *supra* note 1, at 24 (describing some of the intricacies in resolving factional fighting with a negotiated peace agreement and constitution).

260 *Id.* at 27.

261 *See, e.g.*, HUMAN RIGHTS WATCH, "KILLING YOU IS A VERY EASY THING FOR US": HUMAN RIGHTS ABUSES IN SOUTHEAST AFGHANISTAN (July 2003) (detailing the human rights violations taking place in Afghanistan).

262 *See* International Crisis Group, *Afghanistan's Flawed Constitutional Process,* ASIA REP., June 2003, at 22 (noting the difficulties the United States and NATO faced in dealing with multiple regional military groups after the fall of the Taliban).

263 *See* Esther Pan, *Afghanistan: Karzai vs. the Warlords*, COUNCIL ON FOREIGN REL. (Sept. 15, 2004), http://www.cfr.org/afghanistan/afghanistan-karzai-vs-warlords/p7791 (detailing the beginnings of stabilization efforts in Afghanistan).

goals and intended power sharing among the victors of a conflict."[264] 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 permanent constitution, which are the primary functions of one.[265] 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 United States continued to back the warlords in order to maintain 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.[266] Policy makers hoped to co-opt the warlords into supporting a centralized government by bringing them into the transitional governance process.[267] Crisis management demanded that the regional factions and their warlord leaders participate in the Bonn Agreement as well as in the constitution-drafting process.[268]

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[264] Schneider, *supra* note 1, at 180.

[265] *See supra* Part 2.1.

[266] *See* Barnett R. Rubin, *Crafting a Constitution for Afghanistan,* 15 J. OF DEMOCRACY 5, 7–8 (2004) (discussing the issues that arose under Afghanistan's five previous constitutions between 1923 and 1987).

[267] *See* Pan, *supra* note 263 (detailing efforts made to include warring factions in the constitutional process).

[268] 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, *Afghanistan's Warlords Still Call the Shots*, THE ASIAN WALL STREET JOURNAL, Dec. 24, 2003, *republished by* Human Rights Watch at http://www.hrw.org/en/news/2003/12/23/afghanistans-warlords-still-call-shots.

With their power on the rise,[269] 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. Thus, during each of the two drafting periods, warlord factions had a significant voice. The first drafts emerged from a nine-member Constitution Drafting Committee appointed by Transitional President Hamid Karzai; the group produced two separate drafts reflecting a split in the members.[270] Karzai later appointed a thirty-five-member committee to merge the two drafts and respond to public consultations.[271] The larger committee was made up mostly of members of the regional factions[272] causing some to accuse Karzai of choosing members based on "factional bargaining . . . without . . . consideration of the public interest."[273] These same

[269] *See* Barbara Haig, *Democratization Efforts in Afghanistan*, NAT'L ENDOWMENT FOR DEMOCRACY (Nov. 19, 2003) http://www.ned.org/about/staff/barbara-haig/democratization-efforts-in-afghanistan.

> 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 sidelining 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.

Id.

[270] *See* J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557, 566–67 (2007) (describing the process of dual-drafting the constitution of Afghanistan).

[271] *See id.* at 567 (noting that the second, larger, Constitutional Drafting Commission represented a broader political and ethnic spectrum than the first Commission, and received greater international support); Schneider, *supra* note 1, at 192 (discussing the Constitutional Commission's efforts to solicit public opinion); *see also* International Crisis Group, *supra* note 262, at 15 (discussing the creation of the second Constitutional Drafting Commission).

[272] *See* Klaus-Peter Klaiber, *The European Union in Afghanistan: Lessons Learned*, 12 EUR. FOREIGN AFF. REV. 7, 9 (2007) (discussing the Bonn agreement's key objective to have all major ethnic communities in Afganistan participate in establishing a democratic government); James Ingalls, *The New Afghan Constitution: A Step Backwards for Democracy*, FOREIGN POL'Y IN FOCUS (Mar. 10, 2004), http://www.fpif.org/articles/the_new_afghan_constitution_a_step_backwards_for_democracy (describing how the Afgan Consitution only solidified some of the problems that existed prior to Afghan "democracy").

[273] International Crisis Group, *supra* note 262, at 16.

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.[274]

Although the mandate of the Constitution Drafting Committee (CDC) clearly stated there would be public consultations about the draft constitution,[275] 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[276] and that it would create public confusion.[277] 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 existing power-holders" and "backroom deal-making."[278] The over-representation of warlords resulted in a constitution process perceived by many Afghans to be illegitimate, causing

[274] *See* Thier, *supra* note 270, at 570 (reviewing the organizational structure of the Constitutional Loya Jirga); *see also Afghanistan: Constitutional Process Marred by Abuses,* HUMAN RTS. WATCH (Jan. 8, 2004), http://www.hrw.org/news/2004/01/07/afghanistan-constitutional-process-marred-abuses (detailing concerns about warlords and factional leaders strong-arming and bribing *loya jirga* delegates).

[275] *See* Schneider, *supra* note 1, at 190 (describing the Constitution Drafting Committee's assurance that the public would be consulted during the constitution-making process).

[276] *See* Thier, *supra* note 270, at 568 (laying out the timeline of the constitutional drafting process and President Karzai's reluctance to make the first draft available to the public); International Crisis Group, *supra* note 262, at 15 ("To justify the refusal to publish, Commission and UNAMA officials claimed that a published draft would have a negative impact on public debate because it would polarise opinion.").

[277] *See* International Crisis Group, *supra* note 262, at 26 ("The fear of public confusion . . . is a disingenuous concern that trades on an inaccurate and demeaning stereotype of rural Afghans who lack formal education.").

[278] Thier, *supra* note 270, at 569. Thier concluded that although there was ultimately some public consultation, "the reluctantly gathered opinions of the public were swept under the carpet in last-minute backroom deal-making." *Id.*

observers to lament that "a manipulated constitutional *loya jirga* has undermined the constitution's legitimacy."[279]

The warlords were not the only ones with undue influence.[280] Transitional President Hamid Karzai received immense U.S. support as a potential reformer. The United States 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 United States won as the constitution adopted a centralized Presidential system.[281]

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 seem to be gaining support at least in part from Afghans fed up with the warlords and U.S. influence in the country.[282] By assuming an eventual defeat, the Bonn process glossed over any need for Taliban participation in the constitution-drafting process.[283] Now, the Afghan leadership is considering negotiations with it. Because

[279] Samina Ahmed, *Warlords, Drugs, Democracy*, THE WORLD TODAY, May 2004, at 15.

[280] *See* Brendan Whitty & Hamish Nixon, *The Impact of Counter-Terrorism Objectives on Democratization and Statebuilding in Afghanistan*, 5 TAIWAN J. OF DEMOCRACY 187, 196 (2009), *available at* http://www.tfd.org.tw/docs/dj0501/187-218-Brendan%20Whitty.pdf (describing the large influence of local and regional commanders and international donors as a limitation on the Afghan government).

[281] *See* Thier, *supra* note 270, at 572 (describing the branches and balancing of power in the newly organized Afghan government); Editorial, *An Afghan Constitution*, WASH. POST, Dec. 24, 2003, at A14 ("[I]t now seems probable that the assembly will approve . . . a draft that will create a strong presidential system of government . . . .").

[282] *See* Lakhdar Brahimi, *Afghanistan: Prospects for the Future*, 4 GEO. J. INT'L AFF. 75, 76 (2003) (noting that Taliban members were not present at Bonn, but still expressing hope that less radical Taliban members may, in the future, join the peacemaking process); Ahmed, *supra* note 279, at 15 (describing the difficulties faced by the Afghan government and the further complications resulting from the presence of international influences, local warlords, and Taliban who seek to establish a resurgence in the area).

[283] *See* Rubin, *supra* note 266, at 6 (enumerating the groups that took part in the Bonn process and attributing the Taliban's absence to its status as an enemy to the new state).

the Taliban sees itself as negotiating from a 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,[284] underscoring the short-sightedness 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."[285] The interim agreements in Lebanon did little more than delay the conflict. As Part 2.2.1.2 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 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

[284] *See* Matt Waldman, *Navigating Negotiations in Afghanistan*, U.S. INST. OF PEACE: PEACE BRIEF, Sept. 13, 2010, at 4, *available at* http://www.usip.org/files/resources/PB%2052%20Navigating%20Negotiations%20in%20Afghanistan.pdf (arguing that, based on field research, negotiations could lead to a power-sharing agreement, but forewarning that it would likely be difficult to implement); *see also* International Crisis Group, *supra* note 262, at 6 (commenting on the required balancing of interests between Islamic law and Western law when drafting the Constitution).

[285] Jackson, *supra* note 1, at 1290.

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.

4. 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-stage process conducted during on-going violence.