Working Paper

The Ties That Bind

Peace Negotiations, Credible Commitment and Constitutional Reform

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Abstract

In negotiations to end an intra-state armed conflict, the belligerent parties are filled with hatred, anger and suspicion. They find it difficult to make plausible commitments and overcome their fear that their opponent will renege on its promises. Previous research has identified two major strategies for addressing the commitment problem: third party security guarantees during the transition, and domestic power-sharing in the post-conflict society. This paper identifies and analyses a third major strategy frequently employed by conflict parties to address the commitment challenge. In a high proportion of cases, the parties decide to constitutionalize their comprehensive peace agreement (CPA) in whole or in part. This decision constitutes a credible commitment because constitutionalization locks in and institutionalizes the envisaged CPA reforms and renders them durable and enforceable. A post-conflict constitution has these effects because, unlike a CPA, it has the status of supreme law.

Imprint

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List of acronyms

CPA	Comprehensive Peace Agreement
EACJ	East African Court of Justice
MILF	Moro Islamic Liberation Front
PAM	Peace Accords Matrix
PCC	Post-Conflict Constitution

1 Introduction

In the course of the acrimonious negotiations to end minority rule in South Africa in the early 1990s, the main protagonists had deep apprehensions about their opponent's commitment to reaching, and abiding by, a mutually acceptable settlement.[1] The ruling National Party, representing the white minority, was afraid that a future black majority government would marginalize whites, seize their land and property, adopt socialist policies and, worse still, exact revenge for the sins of apartheid. The African National Congress, representing the black majority, was worried that right-wing elements in the apartheid army would mount a coup, that the National Party would demand untenable constitutional constraints on democratic majoritarianism, and that the white minority would somehow contrive to retain control of the security services, affording it a de facto veto on socio-economic transformation in the post-apartheid society.

In negotiated transitions from intra-state conflict to peace, the belligerent parties are filled with hatred, anger and suspicion towards each other. After years of killing, destruction and zero sum politics, how are they able to make plausible commitments and overcome their fear that their opponent will renege on its promises? Much has been written on the difficulty of securing a lasting peace agreement when the parties cannot credibly commit to honor their undertakings (e.g. Walter 2002; Fearon 2004; Mattes & Savun 2009). This literature has identified two major strategies for managing that difficulty: international peacekeeping and other third party security guarantees during the transition; and power-sharing arrangements of various forms in the post-conflict society.

This paper identifies and analyses a third major strategy frequently employed by conflict parties to address the commitment challenge. In a high proportion of comprehensive peace agreements (CPAs), the parties resolve to legalize their agreement, in whole or in part, through constitutional reform. Such reform constitutes a credible commitment because it locks in and institutionalizes the relevant CPA provisions and renders them durable and enforceable. A post-conflict constitution (PCC) has these effects since, unlike a CPA, it has the status of supreme law.

I define a PCC as a new or revised constitution enacted as part of efforts to end a violent conflict and prevent its recurrence. PCCs are a relatively common and widespread phenomenon. Since the end of the Cold War they have included the constitutions of Afghanistan (2004), Burundi (2005), Cambodia (1993), East Timor (2002), El Salvador (1992), Iraq (2005), Kenya (2010), Macedonia (2001), Namibia (1990), Nepal (2015), South Africa (1996) and Sudan (2005). PCCs also take the form of interim constitutions, as in Burundi (1998 and 2001), Chad (1991), Central African Republic (2013), Democratic Republic of Congo (1994), Kosovo (2001), Nepal (2007) and South Africa (1993). According to Widner (2005:1), between 1975 and 2003 "nearly 200 new constitutions were drawn up in countries at risk of conflict, as part of peace processes and the adoption of multiparty political systems".

1 In 1993 I represented the African National Congress in negotiations with the South African Defence Force on future civil-military relations and defence policy.

The paper comprises two parts. The first describes and dissects the conflict parties' tendency to include constitutional reform in CPAs. The second presents a theoretical framework that explains this tendency in terms of the credible commitment afforded by constitutional reform in transitions from intra-state conflict to peace. The framework delineates the nature of the commitments entailed in constitutionalizing CPAs and sets out the reasons why these commitments are credible. The paper does not cover the processes of peace negotiations and constitution-building and the vital question of whether inclusive processes lead to more sustainable outcomes than elite processes.[2]

2 On the process of constitution-building in transitions from intra-state conflict to peace, and on the benefits of popular participation in these processes, see Benomar (2004); Widner (2005); and Samuels (2006).

2 The imperative of constitutional reform

2.1 Statistical overview

The parties to a CPA generally see constitutional and legislative reform as a means to entrench and institutionalize their agreement. This is evident from the content of the 34 CPAs that comprise the Peace Accords Matrix (PAM) (Appendix 1). These CPAs were included in the PAM database on the basis of the following criteria: they were negotiated in civil conflicts between 1989 and 2012; the conflict led to at least 25 battle deaths per year; the major parties to the conflict participated in the negotiations that resulted in the agreement; and the substantive issues underlying the conflict were addressed in the negotiations (Joshi, Quinn and Regan 2015).

A review of the CPAs reveals the following patterns in terms of constitutionalization and legalization:

- Twenty CPAs (58.8%) expressly require constitutional reform. In addition, three CPAs (8.8%) were followed by constitutional reform although this was not stipulated in the agreement. In another four cases (11.8%), the CPA requires adherence to a new constitution adopted shortly before the CPA was concluded. In total, 27 CPAs (79.4%) are thus closely associated with constitutional reform (Appendix 1).

- Seven agreements (20.6%) are not associated with constitutional reform. Five of these deal with sub-national rather than national conflict (Appendix 1). Only two agreements (5.9%) relating to national conflict are not associated with constitutional reform.

- If the inquiry is extended to include legislative reform, we see that as many as 30 CPAs (88.2%) expressly require constitutional and/or legislative reform. Only four agreements (11.8%) do not refer to the need for either constitutional or legislative reform.

These statistics show that CPA parties generally want to legalize their negotiated settlement through constitutional and/or legislative reform. This finding is reinforced if we examine the documents in the UN Peace Agreements database. Whereas the PAM database is a subset of civil war peace agreements selected according to the criteria noted above, the UN database is more expansive, containing CPAs that do not meet these criteria.[3] For the period 1989-2012, the UN database includes as many as 60 CPAs that expressly require constitutional reform.[4]

The extent and focus of the envisaged constitutional reform vary among the CPAs. The variations derive in large measure from the particularities of each case. The relevant contextual factors include the constitutional history and character of the country; the perceived legitimacy and adequacy of the existing constitution; the causes and dynamics of the conflict; the content of the negotiated solutions in the CPA; the nature of the CPA parties and the balance of power between them; the legal and political orientation of the drafters of the CPA; and the involvement of external actors, such as mediators and donors, in the process of negotiating the CPA.[5]

3 See "Peace Agreements Database Search", UN Peacemaker website at https://peacemaker.un.org/document-search.

4 These agreements include the PAM CPAs that require constitutional reform.

5 This paper does not investigate the influence of external actors on the content of CPAs and PCCs. It is worth noting, though, that there is much variation in this regard. Dann and Al-Ali (2006: 428-9) distinguish between "total", "partial" and "marginal" degrees of external influence in the procedure and substance of constitution-making processes.

The discussion below identifies patterns in the extent and focus of the constitutional reform desired by CPA parties. It distinguishes between comprehensive, targeted and referral approaches to constitutional reform; short-term and long-term reforms; and constitutional and legislative reform.

2.2 Comprehensive, targeted and referral approaches

The scope of constitutional reform depends on whether the CPA adopts a comprehensive or targeted approach to constitutionalization. The comprehensive approach expects the entire CPA to be constitutionalized. This can take different forms: the CPA can itself be a constitution (e.g. the 1993 Interim Constitution of South Africa); it can contain a constitution (e.g. the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina); or it can state that the peace agreement must be incorporated into the constitution (e.g. the 1992 General Peace Agreement for Mozambique and the 2006 Darfur Peace Agreement).

The targeted approach focuses on specific constitutional amendments. An example of this is the 1996 Guatemalan Accord for a Firm and Lasting Peace. The Accord stipulates the need for constitutional reform concerning the identity, rights, languages and spirituality of indigenous peoples; the constitutional characterization of the Guatemalan nation; the Congress; the judiciary; the functions of the President; the civil police; and the armed forces. The 1989 Taif Accord that ended the Lebanese civil war requires constitutional approval of the political reforms in the agreement, which cover the legislature, the president, the prime minister, the cabinet, the courts and administrative decentralism. The 2000 Arusha Peace and Reconciliation Agreement for Burundi requires constitutional reform to cover fundamental values, human rights, political parties, elections, the legislature, the executive, the judiciary, local government, the administration, and the defence and security forces (Protocol II).

Both the comprehensive and the targeted approaches can also adopt a referral approach whereby the CPA refers the process of formulating the details of constitutional reform to a designated body and procedure. For example, the 2005 Comprehensive Peace Agreement for Sudan establishes a National Constitutional Review Commission, comprising members of the signatory parties and representatives of other political forces and civil society, to prepare a "Legal and Constitutional Framework text in the constitutionally appropriate form, based on the Agreement and the current Sudan Constitution" (Chapter 2, Article 2.12.5). After adoption by the National Assembly and the National Liberation Council of the Sudan People's Liberation Movement, the text will become the Interim National Constitution.

Along similar lines, the 2006 Darfur Peace Agreement, concluded shortly after the Sudan Comprehensive Peace Agreement was signed, states

that "the National Constitutional Review Commission shall, as a matter of priority, prepare a text in the constitutionally appropriate form for adoption in accordance with the procedures specified in the [Interim National Constitution]" (Article 32(504)). The 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stipulates that the government must create a committee to review the constitution and recommend appropriate revisions and amendments so as to ensure that the constitution "represents the needs and aspirations of the people of Sierra Leone and that no constitutional or any other legal provision prevents the implementation of the present Agreement" (Article X).

A number of scholars have developed a categorization of CPA provisions in order to conduct a fine-grained analysis of the impact of peace agreement design (Badran 2014), or the impact of peace agreement implementation (Joshi, Quinn and Regan 2015), on the durability of peace. Badran (2014: 196) identifies the following prototypical structural provisions: political regulation and reform pacts; economic recovery and structural reform; cultural and social reform; self-determination; transitional justice; security sector reform; judicial and/or constitutional reform; human rights; and refugees and internally displaced people. Joshi, Quinn and Regan (2015:554) distinguish between 51 different types of provision, which include ceasefires and other transitional arrangements; boundary demarcation; constitutional changes; decentralization/federalism; electoral or political reform; executive, legislative, judicial and civil administration reform; interethnic state relations; and power-sharing.

These categorizations understate the extent, centrality and significance of the constitutional reform envisaged in CPAs. Constitutionalization is not simply one among many CPA provisions that all have comparable weight and implications. Rather, it is a meta-category that encompasses numerous CPA provisions and elevates them to the status of supreme law. If the CPA adopts a comprehensive approach to constitutional reform, the reform is expected to cover all or most of the provisions in the CPA. Even if the CPA adopts a targeted approach to constitutional reform, it can cover a large swathe of governance issues. Examples of this include the CPAs for Guatemala, Lebanon and Burundi, cited above, and for Macedonia, cited below.

Regardless of a CPA's express requirement for constitutional reform, moreover, many of the provisions listed by Badran (2014) and by Joshi, Quinn and Regan (2015) cannot come into effect unless they are constitutionalized. Obvious examples of this are provisions on the rule of law, human rights and freedoms, protection of the culture and languages of minorities, the structure of the political dispensation, the independence of the judiciary, and the powers and functions of the executive. The viability of CPA provisions on these matters is contingent on whether they are constitutionalized.

2.3 Short-term and long-term reforms

Ludsin (2011) expresses concern about the contemporary trend of using the constitution-drafting process as a peacemaking instrument in intra-state conflict, and of treating the resultant constitution as a peace treaty, as in Iraq, Afghanistan and Nepal. She argues that peacemaking and constitution-drafting have different goals and orientation. The former attempts to stop violence and the latter aims to create a functioning and ordered state. Whereas peace agreements reflect the immediate changes and compromises needed to end violent conflict, "constitutions codify an existing consensus on national identity and values and on how society wishes to be governed, anticipating future threats to peaceful relations" (Ludsin 2011:247). Unlike constitutions, which traditionally create stability and guard against radical change, a peace agreement may adopt measures that radically change the politics and governance of a country emerging from armed conflict (ibid). Ludsin (2011) concludes that the goals of peacemaking and of constitution-drafting may be incompatible, posing a risk to the sustainability of peace and weakening the foundation of the state when peacemaking and constitution-drafting are merged.

Ludsin's (2011) concerns do not appear to be shared by the conflict parties. Contrary to her assertion that peace agreements focus on the immediate compromises and changes needed to end violent conflict, the CPAs in the PAM database indicate that the parties are equally attentive to long-term measures. According to Joshi, Quinn and Regan (2015:556), 76 per cent of the PAM CPAs cover military reform, 71 per cent cover police reform, 62 per cent cover respect for human rights, 59 per cent cover decentralization or federalism, and 53 per cent cover civil administration reform. In addition, CPAs typically seek to address the core incompatibilities that led to the armed conflict (Nathan 2019). The parties' attention to long-term considerations is hardly surprising – they expect their negotiated settlement to endure beyond the implementation phase and they seek not only to end immediate violence but also to prevent its recurrence.

Furthermore, Ludsin's (2011) contention that constitutions are intended to create stability and guard against radical change does not make political sense in the context of transitions from civil war to peace. Where the causes of the armed conflict are embedded in the constitution itself – such as minority rule in the case of apartheid South Africa and white-ruled Rhodesia – the resolution of the conflict necessarily requires constitutional transformation. In such circumstances, radical transformation and long-term stability are not inherently antithetical. Indeed, the latter may well depend on the former.

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2.4 Constitutional and legislative reform

As noted above, the CPAs in the PAM database vary in terms of their requirement for constitutional reform, legislative reform or a combination of the two. These variations are partly due to contextual factors related, inter alia, to the causes of the conflict, the legitimacy and content of the existing constitution, and the balance of power between the parties.

In addition, certain CPA measures typically require constitutional reform, others typically require legislative reform, and yet others typically require neither of the two. The 2001 Ohrid Agreement for Macedonia illustrates these distinctions. The constitutional measures relate to official languages, including the languages of minority communities; rights and freedoms relating to religion; protection of ethnic, cultural, linguistic and religious identity; the Constitutional Court, the Republican Judicial Council and the Security Council of the Republic; and procedures for amending the constitution. The issues designated as legislative matters cover the adoption of new laws, or amendment of existing laws, on local self-government, local finance, municipal boundaries, electoral districts, and languages. Implementation and confidence-building measures, which do not require constitutional or legislative enactment, include support from the international community, refugee return and rehabilitation, and the date of the next parliamentary election.

It is striking that most of the PAM CPAs that are not linked to constitutional reform deal with sub-national struggles for greater autonomy rather than with national conflicts (e.g. the 1997 Chittagong Hill Tracts Peace Accord in Bangladesh; the 1993 Bodo Accord in India; the 2005 Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement; and the 1996 Mindanao Final Agreement in the Philippines). In all the cases mentioned here, legislative reform was the preferred mode of legal institutionalization. Legislative reform may be easier to enact than constitutional reform but it can also be more easily diluted at a later date. It is subordinate to the constitution and can therefore be declared unconstitutional by a court (see below). Further research is needed to ascertain whether constitutional and legislative reform have different effects on conflict dynamics and peace durability.

3 Credible commitment and the PCC

This section begins with an overview of commitment theory and indicates how constitutional reform fits into that theory. It then develops the argument that the conflict parties' tendency to include constitutional reform in CPAs is a major strategy aimed at mitigating the commitment problem. Three issues are addressed in this regard: the respective legal status of CPAs and PCCs; the commitments entailed in a PCC; and the credibility of these commitments.

3.1 Overview of credible commitment theory

In the political science literature on the durability of peace agreements to end civil wars, the dominant framework is bargaining theory with an emphasis on the commitment problem (e.g. Walter 1997, 2002; Mattes and Savun 2009; Joshi and Quinn 2015). After a period of armed hostilities and a sustained drive to defeat an opponent, mutual enmity and mistrust among the conflict parties are very high. The parties worry that if they enter into negotiations and sign a peace agreement, their opponent may later renege on its commitments (Hartzell and Hoddie 2003:321). The breakdown of the agreement might leave the parties worse off than had they continued fighting (Walter 1997:338-9). This risk might cause them to reject negotiations or, if they engage in talks, to back away from concluding a settlement (Walter 1997:339-40).

The commitment dilemma is heightened by more specific dangers and vulnerabilities. On the one hand, a negotiated settlement usually expects rebels to demobilize and disarm, drastically reducing their capacity to defend themselves against attack by the government or non-signatory armed groups. Disarmament and demobilization also reduce the rebels' bargaining power during the implementation of a CPA and subsequently in the post-conflict society. On the other hand, the government, weakened through war, may be vulnerable to attack or overthrow. In addition, CPAs may reform the system of governance, with ruling elites incurring some loss of power. Minority groups that controlled the government during the war are likely to be replaced through elections, leaving them at risk of marginalization, even persecution. Marginalization and persecution are potential future threats to all minorities.

There are no ironclad ways of protecting the conflict parties fully against these risks. Nevertheless, previous research has identified a number of commonly utilized forms of protection, which can be grouped into two categories. The first comprises external third-party roles associated with security, including international peacekeeping and monitoring compliance with a peace agreement (Walter 1997; Fortna 2004; Mattes and Savun 2009). In pioneering work, Walter (1997) found that the critical factors in determining the success of peace negotiations include security guarantees by external powers that promise to enforce the terms of an agreement during the transition period. Such guarantees raise the cost of non-compliance and compensate for the absence of credible commitment by the parties.

The second category of protection comprises political, military and territorial power-sharing arrangements. These arrangements offer all sides protection against executive abuse of power and unilateral decision-making, and they are especially valuable to minority communities that fear marginalization and discrimination. Hartzell and Hoddie (2003) find that the greater the number of power-sharing dimensions specified in a peace agreement, the more likely it is that peace will endure. They suggest this is because power-sharing institutions meet the security concerns of former enemies and encourage conditions conducive to a self-enforcing peace. DeRouen, Lea and Wallensteen (2009) maintain that political, military and territorial power-sharing arrangements in peace agreements may have different effects on durability. Other research reveals that what matters is the implementation, and not simply the type and content, of these arrangements (e.g. Hoddie and Hartzell 2003; Jarstad and Nilsson 2008).

Third-party security guarantees and power-sharing arrangements are no doubt important in managing the commitment problem but they are insufficient: the former are usually confined to the transition period, after which the domestic actors are left to their own devices; strong domestic parties can easily abandon power-sharing arrangements that are not entrenched and enforceable; and peace agreements induced by international leverage are at risk of collapsing when external actors withdraw (Beardsley 2011). The CPA parties therefore seek additional protection. Studies of the content of CPAs show that this protection encompasses institutional reform, respect for human rights and governance principles such as accountability, the rule of law and the independence of the judiciary (Joshi, Quinn and Regan 2015; Badran 2014). As discussed below, constitutional reform locks in and institutionalizes these protections and renders them durable, justiciable and enforceable. It is thus an additional major strategy for meeting the commitment challenge.

The CPA parties are no doubt aware that a constitution is not a perfect solution to the commitment problem. This is bound to be of concern, in particular, to minority groups and to political parties that are unlikely to win elections and form a government. They may have little confidence in constitutional safeguards, apprehensive that the executive will treat the constitution as "just a piece of paper". This apprehension will be all the greater where the judiciary lacks independence and is deferential to the executive. Notwithstanding these concerns, however, the statistical overview presented above suggests that CPA signatories regard a PCC as a "stronger piece of paper" than a CPA. This is because PCCs have the status of supreme law and thereby offer a more credible commitment than CPAs, which do not have any legal status. The respective legal status of PCCs and CPAs is central to the argument of this paper and we turn now to examine the issue further.

3.2 The legal status of CPAs and PCCs

Bell (2006:378) observes that substantive peace agreements typically have a legal-looking structure, with preambles, sections, articles and annexes, and typically employ legal-type language, referring to parties, signatories, and binding obligations. She concludes that "the parties mutually view [these agreements] as legal documents" (ibid.). Whereas this assertion refers to the parties' perception of their agreement, Badran (2014:196) advances an objective claim: "Peace agreements legalize peace. Although not binding in the traditional sense, peace agreements enjoy a legal force". This claim is based on the work of Abbot et al. (2000), who identify three dimensions to the international legalization of agreements among states: obligation, precision and delegation. In intra-state peace agreements, according to Badran (2014:196), "obligations and commitments are outlined, rules are laid down, principles are affirmed, and authority for interpretation and dispute resolution is routinely delegated to a joint commission, a high court of justice, or an outside party".

For three reasons, these perspectives are not an accurate reflection of the domestic legal status of intra-state peace agreements. First, they do not correspond to the outlook of the conflict parties. We have seen that in nearly 90% of the PAM CPAs, the parties want to legalize some or all of their agreement through constitutional or legislative reform. This is precisely because they do not believe that the CPA itself has any legal status. For example, the Burundi parliament adopted the Arusha Peace and Reconciliation Agreement of 2000, which ended the long-running civil war, as national legislation.[6] This move would have been unnecessary had the Agreement been regarded as an enforceable legal text.

Second, the political process whereby conflict parties negotiate and sign a CPA does not supersede the prior constitutional process whereby the existing laws and constitution were approved by parliament and/or a constituent assembly. Until the CPA is legalized, the existing laws and constitution remain in force. Hence the Arusha Agreement for Burundi provides that the transitional National Assembly shall, as a matter of priority, amend or repeal legislation incompatible with the provisions of the Agreement and that, until amended or repealed, "all laws in force prior to the commencement of the transition shall remain in force" (Protocol II, article 16). Similarly, the 2005 CPA for Sudan requires the development of a new constitution but notes that before that constitution is adopted by the National Assembly, "the Parties agree that the legal status quo in their respective areas shall remain in force" (Chapter 2, article 2.12.8).[7]

Third, a CPA that has not been legalized is at risk of being declared invalid by a court if it is deemed inconsistent with the existing constitution or legislation. The Philippines provides an example of this scenario. In 2001 the government entered into negotiations with the Moro Islamic Liberation Front (MILF), resulting in a Memorandum of Agreement on Ancestral Domain that granted greater autonomy to the Moro people. The Supreme Court nullified the agreement on the grounds that the legal obligation for consultation on such matters had not been met; the proposed association between the government and the envisaged Bangasamoro Juridical Entity ignored existing laws; and the memorandum was unconstitutional as it implied that the new juridical entity would attain independence (Gatmaytan 2016).

The decision of the Philippines court reflects a legal norm that is axiomatic, even if it is controversial in certain cases: a peace agreement is subordinate to the constitution. A recent annunciation of this norm was the controversial decision of the Burundi Constitutional Court concerning presidential term limits. In April 2015 the ruling party in Burundi announced that President Pierre Nkurunziza would run for a third term in office. This move intensified the political and security crisis induced by the government's increasingly authoritarian and exclusionary rule (International Crisis Group 2017). From a legal perspective, the controversy arose from ambiguous provisions on presidential term limits in the 2005 Constitution and a possible inconsistency in this regard between the Constitution and the preceding Arusha Agreement. The Agreement asserts clearly that the president may only serve two terms. The constitutional provisions on term limits are less clear. When the Court reviewed the matter, it endorsed the significance of the Arusha Agreement. It stated that in interpreting the Constitution, special attention should be given to the Agreement, which is "a genuine, unavoidable and indispensable document from which the inspiration was drawn by the Burundian Constitution drafters"; the Agreement was "the Constitution's bedrock"; and its legal status had been established when it was adopted by Parliament as national legislation (Constitutional Court 2015:4). Notwithstanding this endorsement of the Arusha Agreement, the Court held that the Constitution did in fact allow the president to serve a third term.

For present purposes, the central question is not whether the Court interpreted the Constitution correctly or whether it acted with proper independence and impartiality.[8] Rather, the point is that the Court treated the Constitution as supreme in the event of any inconsistency between the Constitution and the Arusha Agreement. As the Court put it, the Agreement may be the bedrock of the Constitution but it "is not supra-constitutional" (Constitutional Court 2015:4). This was unsurprising. The Arusha Agreement itself insists that "the Constitution shall be the supreme law and must be upheld by the Legislature, the Executive and the Judiciary" (Article 3(30)).

The Burundi Constitution was also supreme in the sense that its apex court was the final arbiter in the legal dispute over presidential term limits. This status was affirmed when a civil society group applied to the East African Court of Justice (EACJ) to overturn the Burundi Court's decision. The EACJ is the regional court of the East African Community, of which Burundi is a member. In 2016 the EACJ held that while it enjoyed primacy in interpreting the

6 Law No. 1/017 on the Adoption of the Arusha Peace and Reconciliation Agreement for Burundi, 1 December 2000.

7 The 1995 Constitution of Bosnia and Herzegovina is an exception to the general pattern of constitutionalizing CPAs through an appropriate legal process. The Constitution was contained in Annex 4 of the General Framework Agreement for Peace in Bosnia and Herzegovina. It came into being, superseding the existing constitution, upon the signing of the Agreement, without any formal process of parliamentary adoption (Yee 1996).

8 The Vice President of the Constitutional Court, Sylvere Nimpagaritse, reported that the judges had been subject to political intimidation prior to concluding the case, causing him to flee to neighbouring Rwanda (Al Jazeera 2015).

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Treaty governing the Community, this did not extend to reviewing decisions of the courts of member states (East African Court of Justice 2016: arts 46-49). Since the Treaty endorsed the independence of national courts as a paramount principle of the rule of law, the EACJ was not at liberty to review the Burundi court's decision (ibid.). The bottom line, as stipulated in the Burundi Constitution, was that "the decisions of the Constitutional Court are not susceptible to any recourse" (ibid.: art 44).

3.3 The nature of constitutional commitments

What commitments are entailed in constitutionalizing a CPA? The overarching, fundamental answer to this question goes to the heart of constitutionalism, the essence of which is the concept of constraint. Constitutionalism is the idea that "government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations" (Waluchow 2018). Although constitutionalism has evolved since ancient times, "the most persistent, and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law" (McIlwain 1947:21). The forms of constitutional constraint have varied in different periods and constitutional dispensations. In the modern era they include constitutional principles and mechanisms that provide for the rule of law, separation of powers, judicial review, enshrined human rights and restrictions on amending the constitution.

In the context of transitions from war to peace, the constitutionalization of a CPA generates several types of constraint that address the commitment problem: it makes the constitutionalized provisions of the peace agreement legal, justiciable and enforceable, inhibiting violations by the conflict parties and enabling judicial redress in the event of violation; in light of the restrictions on amending a constitution, constitutionalization locks in the CPA provisions and constrains the government and political parties from easily abandoning them; and more broadly, it constrains the executive, the security services and other powerful actors from harming their opponents and oppressing communities.

An additional function of constitutionalization is that it gives effect to CPA provisions that would otherwise remain idle promises. Many provisions only come into being when they are legalized through constitutional or legislative reform. This is true of much of the agenda of institutional reform (e.g. judicial independence and review, democratic civil-military relations, and accountable governance structures); it is true of human rights, including cultural, religious and language rights that are of great concern to minorities; and it is true of some types of power-sharing, such as decentralization, parliamentary quotas and proportional representation electoral systems. The 2006 CPA for Nepal offers a succinct illustration of this function of constitutionalization.

The parties summed up their vision of a post-conflict political dispensation with the following article, few elements of which were achievable without constitutional reform:

> [The parties agree to] pursue a political system that fully complies with the universally accepted fundamental human rights, competitive multiparty democratic system, sovereignty inherent in the people and the supremacy of the people, constitutional check and balance, rule of law, social justice and equality, independent judiciary, periodic elections, monitoring by civil society, complete press freedom, people's right to information, transparency and accountability in the activities of political parties, people's participation and the concepts of impartial, competent, and fair administration (Comprehensive Peace Agreement for Nepal 2006, article 3.4).

While the concept of constraint lies at the heart of constitutionalism, constitutions do not only constrain actors in order to prevent a negative state of violence. Liberal constitutions also seek to enact and enable a communal commitment to a positive state of peace. They do this though symbols, values and norms that transcend sectarian divisions and unite a nation; through enshrined human rights that promote the security and well-being of individual and groups; and through principles, rules and mechanisms that facilitate non-violent political competition, resolution of disputes and management of grievances.

The proposition that a constitution can entrench and give affect to a commitment to peace reflects a long-standing thrust of liberal philosophy regarding the causes of domestic peace. As Roland Paris (2006:425-6) puts it:

> The classical liberals of the eighteenth century were among the first to propose a link between constitutional limits on governmental power, respect for individual freedoms in the political and economic spheres, and peace. These thinkers maintained that protecting individual liberties and limiting the powers of the state would attenuate or even eliminate violent conflict.

In well-established democracies, the peace-promoting and peace-maintaining functions of a constitution acquire a taken-for-granted character. Against the backdrop of armed conflict, however, the PCC can be a prominent and influential blueprint of a seismic transition from "normalized violent politics" to "normalized pacific politics". A PCC, unlike a CPA, consequently has the potential to be a self-enforcing peace institution.

3.4 The credibility of constitutional commitments

Why are constitutional commitments are credible? It should be emphasized again that this is a relative rather than an absolute consideration. In other words, the question is why a PCC offers a more credible commitment than a CPA. I discuss below seven features of constitutions and constitutionalizing a CPA that contribute to credibility.

First, at a symbolic level, constitutionalizing a CPA confers on the peace agreement the highest possible status in a country's hierarchy of political and legal principles, norms, rules and procedures. When the conflict parties decide to include constitutional reform in their CPA, they send a strong signal that the negotiated settlement is not merely an agreement equal in status to other agreements reached previously or subsequently. Instead, the agreement will become part of the foundational basis of the constitutional order, the state and the post-conflict society as a whole.

Second, a constitution is binding on a much wider range of actors than a CPA. A CPA only binds the signatory parties, excluding political actors that did not approve the agreement. A constitution, on the other hand, binds the state in its entirety, all branches of government and all persons, groups and political actors in the country. This enhances the security, in particular, of minorities and other politically vulnerable groups. In addition, a defining feature of a constitution is that it binds not only the generation of constitution drafters but all subsequent political generations as well. It therefore affords assurance to all groups and political parties that are uncertain whether they will constitute the majority or a minority in decades to come.

Third, constitutionalization ensures that the parties' commitments are formally justiciable and enforceable in the long term. Regardless of whether international monitors, peacekeepers and guarantors are really able to safeguard a CPA during the transitional period (c/f Walter 1997; Fortna 2004), these external actors will eventually withdraw from the country. Thereafter, the courts are the principal non-coercive mechanism available to individuals, groups and political parties seeking protection against violations of the CPA. The parties do not necessarily have confidence in the judiciary but they are likely to have greater confidence in a formally enforceable PCC than in a non-enforceable CPA. They may also expect the judiciary to be reformed in light of the negotiated settlement – nearly half the CPAs in the PAM dataset include judicial reform (Joshi, Quinn and Regan 2015:556).

Fourth, courts perform an adjudicative function as well as an enforcement function. While this is needed in all societies, it is especially necessary in post-conflict societies after the conclusion of a CPA. The CPA parties are likely to have different interpretations of certain provisions in the agreement, some provisions may be deliberately or inadvertently vague or ambiguous, and lingering enmity and mistrust may impede the parties' ability to resolve interpretive disputes on an amicable bilateral basis. Courts can play an adjudicative role in an impartial and hence acceptable manner, preventing the disputes from escalating and becoming destabilizing.

Fifth, a constitution is a permanent, living document. It is intended to outlive the drafting generation and it can be amended, in accordance with specified procedures, in order to reflect changing experiences and circumstances. By contrast, the durability of CPAs is limited. Since these agreements do not have legal status and are generally not subject to periodic review and amendment, their salience dwindles over time. We have seen that CPA parties are concerned as much about the long-term as about the short-term, and they therefore want their agreement to be embedded in a durable text.

Sixth, an intrinsic feature of constitutions is that they cannot be amended easily. Limiting government power through a constitution would count for little if the constitution could be changed by executive decree or a simple parliamentary majority (Waluchow 2018). The restrictions on amending a constitution vary from one country to another and include approval by a supermajority of parliamentarians; approval by both an upper and a lower house of parliament; approval at both national and regional levels; popular approval through a referendum; entrenched constitutional provisions that cannot be amended; and judicial review of amendments. All such measures serve to protect minority communities and opposition political parties.

Seventh, constitutionalism has political costs. It imposes constraints on majority decisions and on the actions of government and political parties; subordinates the executive to the courts; entrenches the compromises of a negotiated settlement in supreme law; and antagonizes constituencies that oppose the compromises. When conflict parties agree to constitutionalize their CPA, they signal their willingness to accept these costs, heightening the credibility of their promises. In bargaining models of war termination, "costly signals" are moves by the conflict parties that entail costly concessions or risks in order to convey a conciliatory attitude, build trust and reinforce the pledge to end hostilities (Kydd 2000). In civil war termination the most costly forms of signaling are disarmament and demobilization, which may leave a party vulnerable to military attack. Consenting to constitutionalize a CPA has a lower level of risk but the costs outlined above are nonetheless significant.

Jarstad and Nilsson (2008: 210-12) take a different position, suggesting that the implementation of political power-sharing does not incur high costs and therefore does not amount to a costly signal. Whereas power-sharing through territorial devolution of power or integration of armed forces cannot easily be abandoned once it has taken place, a party can unilaterally dissolve a political pact fairly quickly and easily. However, this position ignores situations where political power-sharing is constitutionalized. Violating a constitution has domestic political costs, such as loss of legitimacy and popular support, and may even provoke violent resistance. It also has international political costs that include reputational damage and, in severe cases, international sanctions. By contrast, the costs of violating a CPA fall once the transitional period is over and the agreement loses its salience.

4 Conclusion

This paper has shown that CPA parties typically seek to legalize their peace agreement through constitutional or legislative reform. This tendency is explicable as a major strategy employed by conflict parties to address the commitment problem that afflicts negotiated transitions from intra-state conflict to peace. The strategy is necessary because the other major approaches are insufficient: third party security guarantees are usually confined to the transition period, and power-sharing arrangements are at risk of breaking down if they are not entrenched and enforceable.

Consenting to constitutionalize a CPA reflects a compelling commitment by the parties to honor the agreement in the long-term. This commitment is more credible than a CPA on its own. In summary, this is because a constitution confers on the agreement the highest possible status; it is binding on a much wider range of actors than a CPA; it ensures that the constitutionalized provisions of the CPA are formally enforceable through the courts; it enables the courts to resolve interpretive disputes regarding the agreement; it is a living document that endures beyond the drafting generation; it cannot be amended easily; and there are domestic and international political costs associated with violating a constitution.

The conflict parties' reasons for constitutionalizing their CPA are not necessarily limited to those discussed in this paper, namely promoting and signaling credible commitment during peace negotiations; constraining the state and the security forces; affording protection to minorities; effectuating CPA provisions that would not otherwise come into being; and creating legitimate mechanisms for non-violent political competition, resolution of disputes and management of grievances. The parties might also believe that constitutional reform is needed to resolve the conflict incompatibilities (Nathan 2019), and that the outcome will be more legitimate than the CPA if it entails approval by a constituent assembly, power-sharing legislature or referendum (Widner 2005). It is possible too that constitutional reform is influenced by international actors that support peace processes and by the global diffusion of constitutionalism since World War II (Goderis and Versteeg 2014).

There is no guarantee that constitutional reform in a given case will resolve the conflict incompatibilities adequately and ensure pacific political competition. Indeed, it is possible that the reforms themselves generate tension and disputes (Hart 2001). The contestation is especially severe where elites have not reached agreement on the political settlement underlying the CPA (Bell and Zulueta-Fülscher 2016). Examples of protracted and conflictual constitution-making processes include Nepal (Thapa and Ramsbotham 2017); Zimbabwe (Raftopoulos 2013); and Libya, Somalia and Yemen (Bell and Zulueta-Fülscher 2016). But where post-conflict countries are indeed pacific, this is invariably associated with constitutional principles and mechanisms that constrain the exercise of power and provide for non-violent political competition and dispute resolution. In short, the PCC can be a vital institutional cause of peace.

Exactly which features of liberal (and non-liberal) constitutions contribute significantly to the maintenance of peace in post-conflict societies is an empirical question. Danilovic and Clare (2007:399) distinguish between three concepts that are often conflated: "the protection of individual freedoms (liberalism), the rule of law and legal equality (constitutionalism), and representative rule (as embodied, for example, in modern democracy)". The authors find that states that embrace liberal constitutionalism experience fewer civil wars than any other type of regime, including regimes measured on a strictly democratic scale regardless of their respect for civil liberties. Walter, focusing specifically on civil war recurrence, finds that "governments that are beholden to a formal constitution, that follow the rule of law, and that do not torture and repress their citizens are much less likely to face renewed violence in any form" (Walter 2010:3; see also Walter 2015).

The literature on credible commitment dynamics in negotiated transitions from intra-state conflict to peace has generated a good but incomplete understanding of the conflict parties' strategies for addressing the commitment challenge. The major strategy of legalizing the CPA through constitutional and legislative reform has largely been ignored. Further research is needed on this strategy – its aims, implementation, impediments, and effects on peace and stability – in order to broaden and deepen understanding of transitions and the durability of peace.

Appendix

Relationship between CPAs in the Peace Accords Matrix and Post-Conflict Constitutions[9]

1. CPAs associated with PCCs (79.4% of 34 CPAs)

1.1 CPA requires PCC (58.8% of 34 CPAs)

- Bosnia and Herzegovina, General Framework Agreement for Peace in Bosnia and Herzegovina, 1995
- Burundi, Arusha Peace and Reconciliation Agreement for Burundi, 2000
- Cambodia, Framework for a Comprehensive Settlement of the Cambo dia Conflict, 1991
- Congo, Agreement on Ending Hostilities in the Republic of Congo, 1999
- Cote d'Ivoire, Ouagadougou Political Agreement, 2007
- Djibouti, Agreement for Reform and Civil Concord, 2001
- El Salvador, Peace Agreement (Mexico Agreement), 1991
- Guatemala, Agreement on a Firm and Lasting Peace, 1996
- Lebanon, Taif Accord, 1989
- Macedonia, Framework Agreement, 2001
- Mozambique, General Peace Agreement for Mozambique, 1992
- Nepal, Comprehensive Peace Accord, 2006
- Papua New Guinea, Bougainville Peace Agreement, 2001
- Rwanda, Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, 1993
- Sierra Leone, Peace Agreement between the Government of Sierra Le-one and the Revolutionary United Front of Sierra Leone (Lomé Agree ment), 1999
- South Africa, Constitution of the Republic of South Africa (Interim Constitution), 1993
- Sudan, Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement / Army, 2005
- Tajikistan, General Agreement on the Establishment of Peace and National Accord in Tajikistan, 1997
- Timor-Leste (East Timor), Agreement between Republic of Indonesia and Portuguese Republic on the Question of East Timor
- United Kingdom, Good Friday Agreement, 1998

1.2 CPA followed by PCC although not expressly required (8.8% of 34 CPAs)

- Croatia, Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium (Erdut Agreement), 1995
- Guinea-Bissau, Agreement between the Government of Guinea-Bissau and the Self-Proclaimed Military Junta (Abuja Peace Agreement), 1998
- Liberia, Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia and the Political Parties, 2003

1.3 CPA requires adherence to preceding PCC (11.8% of 34 CPAs)

- Angola, Lusaka Protocol, 1994
- Djibouti, Agreement on Peace and Reconciliation, 1994
- Mali, National Pact Concluded between the Govt. of Mali and the Unified Movements and Fronts of Azawad Giving Expression to the Special Status of Northern Mali, 1992
- Niger, Agreement Establishing Permanent Peace between the Government of the Republic of Niger and the Organization de La Résistance Armée (ORA), 1995

2. CPAs not associated with PCCs (20.6% of 34 CPAs)

2.1 CPA relates to national conflict (5.9% of 34 CPAs)

- Angola, Luena Memorandum of Understanding, 2002
- Sierra Leone, Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (Abidjan Agreement), 1996

2.2 CPA relates to regional conflict (14.7% of 34 CPAs)

- Bangladesh, Chittagong Hill Tracts Peace Accord, 1997
- India, Memorandum of Settlement (Bodo Accord), 1993
- Indonesia, Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005
- Philippines, Mindanao Final Agreement, 1996
- Senegal, General Peace Agreement between the Government of the Republic of Senegal and Le Mouvement des Forces Démocratiques de la Casamance (MFDC), 2004

9 As discussed in this paper, the Peace Accords Matrix covers 34 CPAs concluded between 1989 and 2012 (Joshi, Quinn and Regan 2015).

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