

The Imperative of Constitutionalizing Peace Agreements

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Thematic Paper

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About this publication

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The project explored how peacemaking – particularly mediated peace negotiations – interfaces with constitution building in practice, a so far understudied area. It identified the challenges and opportunities at this ‘nexus’, the lessons learned, and policy options and their implications on sustaining peace.

To this end, a number of thematic and field studies were commissioned, desk studies were conducted, and expert roundtables, interviews and peer exchange were organised involving scholars and practitioners from the fields of mediation and constitution building. The following publications capture the insights from the project on crucial processual and substantive issues at the nexus, which are expected to be valuable for practitioners.

Key output

- ≡ Key considerations for practitioners working at the nexus of constitutions and peace processes

Case studies

- ≡ Burundi [French and English]
- ≡ Guatemala [Spanish and English]
- ≡ Republic of (North) Macedonia

Thematic studies

- ≡ From armed intra-state conflict to a functioning constitutional order: reconciling principles of third-party support – a reflection
- ≡ Constitution making in contexts of conflict: paying attention to process
- ≡ Critical substantive issues at the nexus of peacemaking and constitution building
- ≡ The imperative of constitutionalizing peace agreements

The publications are available online at www.berghof-foundation.org/pmcb.

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Abstract

This paper seeks to contribute to an understanding of the substantive and legal relationship between comprehensive peace agreements (CPAs) and post-conflict constitutions (PCCs). It shows that CPA parties typically regard constitutional reform as a vital means of institutionalizing their settlement and maintaining peace in the long-term. A major reason for this is that a PCC, unlike a CPA, has the status of supreme law and is therefore durable, justiciable and enforceable. Conceiving of a PCC as a peace agreement is not the standard approach adopted in the scholarly literature but it is consistent with conventional definitions of a peace agreement as well as with the parties' perspective. Because a PCC supersedes the preceding CPA, it becomes the definitive peace agreement.

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Introduction

This paper seeks to contribute to an understanding of the relationship between comprehensive peace agreements (CPAs) and post-conflict constitutions (PCCs). I define a PCC as a new or revised constitution enacted as part of efforts to end a violent intra-state conflict and prevent its recurrence. This definition focuses on the purpose and not the timing of the constitutional reform. It encompasses constitutional reform that precedes, follows or takes the place of a CPA in an envisaged transition from intra-state conflict to sustainable peace.

PCCs are a relatively common and widespread phenomenon. 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”. The South African Interim Constitution of 1993 is an example of a PCC that takes the place of a CPA. The Angolan Constitution of 1992 and the Nigerien Constitution of 1992 are examples of PCCs that precede a CPA. PCCs that have followed the conclusion of a CPA include the Constitutions of Burundi (2005), Macedonia (2001), Nepal (2015) and Sudan (2005).

This paper addresses three questions: How do the conflict parties see the substantive and legal relationship between CPAs and PCCs when they are negotiating a settlement to end armed conflict? Why do the parties to a CPA frequently wish to constitutionalize their negotiated settlement in whole or in part? And what is the substantive and legal relationship between CPAs and PCCs after constitutional reform has taken place?

In addressing the first question, I show that the parties to a CPA generally consider constitutional reform to be a vital means of entrenching their settlement and consolidating and maintaining peace in the long-term. This is evident in the high proportion of CPAs that expressly require constitutional reform. Utilizing the dataset of the Peace Accords Matrix (Joshi, Quinn and Regan 2015), I show that the majority of CPAs require constitutional reform; over two-thirds require either constitutional reform or adherence to a PCC that was adopted shortly before the CPA was concluded; and nearly 90 per cent require either constitutional or legislative reform or a combination of the two.

In addressing the second question, I argue that CPA parties consider it imperative to constitutionalize their settlement because a PCC offers greater assurance than a CPA that their opponent will adhere to the terms of the agreement. A PCC thus mitigates the credible commitment problem more convincingly than a CPA. A major reason for this is that a PCC, unlike a CPA, has the status of supreme law and is therefore durable, justiciable and enforceable. In addition, many of the provisions typically contained in a CPA can only come into effect through constitutional or legislative enactment. These provisions include respect for human rights and the rule of law, territorial autonomy arrangements, and reform of the judiciary, the executive, the electoral system and the security sector. A further reason for conflict parties wanting to constitutionalize their settlement is that, ideally, constitutions play a central role in maintaining peace in post-conflict societies.

They can do this in numerous ways, the most important of which are constitutional norms and mechanisms that enable political activity, competition for power and resolution of disputes to proceed in a non-violent manner.

In short, it appears that CPA parties regard the PCC as a type of peace agreement that is intended to reinforce and institutionalize their negotiated settlement. Conceiving of a PCC as a peace agreement is not the standard approach adopted in the scholarly literature, but I show that it is consistent with conventional definitions of a peace agreement as well as with the parties' perspective.

With respect to the third question, the essence of the substantive and legal relationship between CPAs and PCCs is that a PCC supersedes the preceding CPA and consequently becomes the definitive peace agreement. I present three scenarios in which this can be demonstrated in practice: the first occurs where a CPA requires constitutional reform and the reform is subsequently effectuated through a PCC; the second scenario, which is a subset of the first scenario, occurs where provisions of a PCC are substantially different from those of the preceding CPA; and the third scenario, which is a subset of the second scenario, occurs when a court is called on to adjudicate an inconsistency between the CPA and the PCC. Where a CPA is not followed by a PCC, it is subordinate to the existing constitution. In this scenario, a court may rule that some or all of the CPA is unconstitutional.

This paper focuses on the substantive and legal relationship between CPAs and PCCs and does not examine the interrelated processes of peace negotiations and constitution-building.¹ The paper is organized around the three research questions, examining sequentially the conflict parties' perspective of the relationship between CPAs and PCCs; their motivation for wanting to constitutionalize their settlement; and the relationship between CPAs and PCCs after constitutional reform has taken place.

1 On the process of constitution-building in transitions from war to peace, and on the benefits of popular participation in these processes, see Benomar (2004); Widner (2005); Samuels (2006); and Bell and Zulueta-Fülscher (2016).

How do the conflict parties see the relationship between CPAs and PCCs?

The drive to constitutionalize the CPA

The parties to a CPA tend to regard constitutional reform as a necessary corollary of their agreement. This is evident from the content of the 34 CPAs that comprise the Peace Accords Matrix (Appendix 1).² These CPAs were included in the Matrix on the basis of the following criteria: they were negotiated in civil conflicts between 1989 and 2012; the conflict resulted in at least 25 battle deaths per annum; the major parties to the conflict participated in the negotiations that produced the agreement; and the substantive issues underlying the conflict were addressed in the negotiations (Joshi, Quinn and Regan 2015).

A review of the CPAs in the Peace Accords Matrix reveals the following patterns regarding the constitutionalization and legalization of peace agreements:

- Twenty of the 34 CPAs (58.8%) expressly require constitutional reform. In addition, three CPAs (8.8%) were followed by constitutional reform even though this was not stipulated in the agreement. In another four cases (11.8%), the agreement requires adherence to a PCC adopted shortly before the CPA was concluded. In total, 27 CPAs (79.4%) are closely associated with constitutional reform (Appendix 1).
- Seven agreements (20.6%) are not associated with constitutional reform (Appendix 1). Five of these relate to sub-national rather than national conflict.

Only two agreements (5.9%) dealing with national conflict are not associated with constitutional reform.

- If the inquiry is broadened to include legislative as well as constitutional reform, it transpires that 30 agreements (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 indicate that CPA parties generally envisage constitutional and/or legislative reform as a means of entrenching their commitment to peace and safeguarding and institutionalizing their negotiated settlement.

This finding is reinforced when one examines the documents in the UN Peace Agreements database. Whereas the Peace Accords Matrix is a small subset of civil war peace agreements, selected according to the criteria noted above, the UN database is more expansive, containing roughly 800 documents that “can be understood broadly as peace agreements and related material”.³ For the period 1989-2012, the UN database includes as many as 60 peace agreements that expressly require constitutional reform (Appendix 2).⁴

The extent of the required constitutional reform varies among the agreements included in the Peace Accords Matrix: 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); it can specify

2 The Peace Accords Matrix can be viewed at <https://peaceaccords.nd.edu/>.

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

4 These agreements include the Peace Accords Matrix CPAs that require constitutional reform.

the required constitutional amendments (e.g. the 2001 Ohrid Agreement for Macedonia); or it can call for constitutional reform on specific topics without providing much elaboration (e.g. the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan). The focus of the required reform entails both considerable differences and marked similarities among the CPAs. The differences relate primarily to the political solutions to the conflict incompatibilities, while the similarities relate primarily to basic principles of democratic governance and institutional reform.

These variations in the extent and focus of the envisaged constitutional reform arise from the peculiarities of each case. They are due to one or more of the following factors: the constitutional history and character of the country; the 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 role of donors and other external actors in the negotiation and drafting of the CPA (discussed below).

The distinction between constitutional and legislative reform

As noted above, the CPAs in the Peace Accords Matrix 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 relating, inter alia, to the causes of the conflict and to the legitimacy and content of the existing constitution.

In addition, certain CPA measures typically require constitutional reform, others typically require legislative reform, and yet others typically require neither constitutional nor legislative reform. The 2001 Ohrid Agreement for Macedonia illustrates these distinctions. As one might expect, 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 efforts, and determining the date of the next parliamentary election.

It is striking that most of the CPAs in the Peace Accords Matrix that are not associated with constitutional reform cover sub-national struggles for greater autonomy rather than national conflicts (e.g. the Chittagong Hill Tracts Peace Accord, 1997; the Bodo Accord, 1993; the Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005; and the Mindanao Final Agreement, 1996). In these cases legislative reform was the preferred mode of institutionalization. Further research is required to ascertain whether constitutional and legislative reform have different effects on conflict dynamics and peace durability. It is clear, though, that legislative reform is subordinate to the existing constitution and might therefore be declared unconstitutional by a court (see below).

The role of external actors

On the basis of published research, it is difficult to generalize about the influence that external actors have on the content of CPAs and the drive to constitutionalize these agreements. Some scholars assert that the international community is very influential in this regard but offer no evidence of the role actually played by external actors (e.g. Joshi, Lee and Mac Ginty 2014; Bell 2006,392). In reality, there is considerable variation in the extent of direct external influence on the content of CPAs and PCCs (e.g. Dann and Al-Ali 2006). The variation ranges from maximum influence (e.g. Bosnia and Herzegovina) to minimum influence (e.g. South Africa). In between these two extremes, the outcome of peace negotiations that are supported by the international community may reflect a complex interplay between the respective preferences of external and domestic actors (e.g. Curtis 2013). In any event, as discussed in the following section, the conflict parties have an eminently sound motivation for wanting to constitutionalize their CPA.

Why do the conflict parties want to constitutionalize the CPA?

Credible commitment

In the literature on the durability of peace agreements to end civil wars, the dominant conceptual framework is bargaining theory with an emphasis on the commitment problem (e.g. Walter 2002; Mattes and Savun 2009). After a period of armed hostilities, mutual enmity and mistrust among the conflict parties are very high. The parties fear 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 literature has identified two ways in which the protagonists attempt to address this problem: external third-party roles during the transitional period, particularly in supporting security arrangements (Walter 1997; Fortna 2004); and political, military and territorial power-sharing arrangements in the post-conflict dispensation (Hartzell and Hoddie 2003).

Constitutionalizing CPAs is another strategy employed by conflict parties to mitigate the commitment problem. The parties seek to incorporate the provisions of a CPA, which has no enduring enforceability, into a PCC, which in principle is enforceable through the courts. They are no doubt aware that a constitution cannot guarantee abiding adherence to the terms of the CPA. Opposition groups and minority communities, in particular, may be fearful that the executive will treat the constitution as “just a piece of paper”. Scepticism about a PCC will be especially high where the courts, which are the primary instrument for ensuring adherence to the constitution, lack independence. Nevertheless, the parties evidently see a PCC as a “stronger piece of paper” than a CPA. On the one hand, CPAs do not enjoy a clear and certain legal status in terms of domestic law (Bell 2006). The uncertainty might only be resolved on an ad hoc basis when a court

rules on the matter. We will see below that a court may regard a CPA as having authoritative influence but not legal status. On the other hand, a PCC is formally binding and enforceable and it binds not only the CPA signatories but also the state, the executive and all political actors in the country. In relative terms, then, a PCC offers the parties greater confidence than a CPA.

Effectuating the CPA

The parties’ motivation for wanting to constitutionalize some or all of their CPA lies not only in a PCC’s capacity to endow the negotiated settlement with long-term enforceability. In addition, certain categories of CPA provisions simply do not come into effect unless they are embedded in the constitution or other law. This is true, for example, of power-sharing arrangements such as territorial devolution of power and proportional representation voting systems; institutional reform such as reform of the judiciary, security services and administration; and respect for human rights and the rule of law. In the absence of constitutional or legislative enactment, these CPA provisions have no abiding value.

Addressing the conflict incompatibilities

Like CPAs, PCCs aim not only to end an armed conflict but also to prevent its recurrence. To a greater or lesser extent, they must therefore attempt to resolve the incompatibilities that gave rise to the armed conflict. For example, the Angolan Constitution of 1992 introduces multi-party democracy; the Burundi Constitution of 2005 provides for power-sharing power between the Tutsi minority and Hutu majority communities; and the Macedonian Constitution of 2001 affords

special protection to the ethnic Albanian minority. The 1996 South African Constitution seeks to overcome the structural problems of minority rule and racial discrimination through the overarching construction of a constitutional democracy; through articles on universal franchise, dignity, equality, human rights, language, culture, land and affirmative action; and through the inclusion of socio-economic rights related to adequate housing, food, water, education, health care and social security. In the nature of negotiated settlements and elite pacts, addressing the incompatibilities might not be done perfectly, but if it is not done adequately, the risk of recurrent violence will remain high.

The PCC as a peace agreement

The statistics presented above suggest that the conflict parties view a PCC as a type of peace agreement. A strong illustration of this view is the 1996 Accord for a Firm and Lasting Peace for Guatemala. The Accord contains an Agreement on Constitutional Reforms and the Electoral Regime, setting out the areas in which such reforms are required. The Preamble to this agreement states that constitutionalization is needed to ensure the reconciliation of all Guatemalans, the end of the internal armed conflict, the peaceful solution of the nation's problems by political means, and full respect for, and application of, the law. According to the Preamble, the revised constitution will provide for "the institutionalization of a culture of peace based upon mutual tolerance and respect, shared interests and the broadest possible public participation in all structures of power". It will constitute "a historic step which, at the institutional level, guarantees and ensures the building of a just peace and democratic stability by political and institutional means, within the framework of the political Constitution of the Republic".

With only a few exceptions, the scholarly literature does not consider PCCs to be peace agreements. One exception is Samuels (2006, 664), who maintains that a PCC "can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate". Although Bell (2006, 391-4) does not recognize PCCs in general as peace agreements, she observes that some peace agreements take the form of a constitution (e.g. the South African Interim Constitution of 1993) or incorporate a constitution (e.g. the Dayton Peace Agreement of 1995). Because PCCs are generally not conceived as peace agreements, they are largely excluded from peace agreement databases.⁵

Whether or not PCCs can properly be viewed as peace agreements depends chiefly on whether they meet the definition of a peace agreement.

A standard definition is that these agreements are "contracts intended to end a violent conflict, or to significantly transform a conflict so that it can be more constructively addressed" (Yawanarajah and Ouellet 2003). A more elaborate definition is that the agreements are "formal documents that are publicly produced after discussion with all (or some of) the conflict's protagonists. They reflect a degree of agreement between those actors, primarily regarding the need to address and end physical violence" (Bell and Zulueta-Fülscher 2016, 18). Badran (2014) defines a peace agreement as "a consensual contract between some or all conflict protagonists to settle all or part of the incompatibility and regulate future interaction, with a view to ending armed conflict".

On the basis of these definitions, there is no conceptual difficulty in regarding PCCs as peace agreements. One of the main functions of a PCC is to contribute to ending a violent conflict and preventing its recurrence by addressing the causes of the conflict.

5 South Africa's Interim Constitution of 1993 is the only PCC included in the peace agreement databases of the Peace Accords Matrix (<https://peaceaccords.nd.edu/>) and the Uppsala Conflict Data Program (<https://www.pcr.uu.se/research/ucdp>). Libya's transitional constitution of 2011 is the only PCC in the UN Peacemaker database of peace agreements (<https://peacemaker.un.org/document-search>). The PA-X database, which has over 1,500 peace agreements, includes 17 constitutions but does not explain why these PCCs, and not others, were selected. (<https://www.peaceagreements.org/search?s=list>).

In policy circles this conception of a PCC as a type of peace agreement is not controversial. For example, after the signing of the Comprehensive Peace Accord for Nepal in 2006, the International Crisis Group (2007, i) observed that the “peace process [now] hinges on writing a constitution that permanently ends the conflict, addresses the widespread grievances that fuelled it and guards against the eruption of new violence”.

Peace agreements are not homogenous and can be differentiated on various grounds, such as whether they are comprehensive or partial and whether they are procedural or substantive (Högbladh 2012,10). We can also draw a temporal distinction between different types of peace agreement that are concluded at different phases of a peacemaking process, have different aims and therefore have different content. A conventional breakdown would include, sequentially, a cessation of hostilities, a declaration of principles for negotiations, and a CPA. The PCC is the next type of peace agreement in this sequence. Like a ceasefire agreement and a CPA, it may succeed or fail to keep peace but this does not affect its status as a peace agreement.

A liberal constitution can be understood as a peace agreement regardless of whether it pertains to a post-conflict society. It serves this function in a number of ways, both tangible and intangible and both substantive and procedural: as a symbol and collection of values and norms that unite a nation; as a framework of principles, rules and mechanisms that require and facilitate non-violent political competition, resolution of disputes and management of grievances; as a system of governance based on the rule of law and respect for citizen’s rights; and as a compact between citizens and the state that confers power on the state for the purpose of ensuring peace and order while at the same time constraining the exercise of that power. In well-established democracies, these peace maintenance 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 radical transition from “normalized violent politics” to “normalized pacific politics”.

What is the substantive and legal relationship between CPAs and PCCs?

This section explores the substantive and legal relationship between the CPA and the PCC. I argue that where constitutional reform takes place after the conclusion of a CPA, the PCC supersedes the CPA and consequently becomes the definitive peace agreement.

The following discussion illustrates this argument with three scenarios. The first scenario – CPA requires constitutional reform, PCC enacted – arises where a CPA calls for constitutional reform and a PCC is subsequently enacted. The nature of the relationship between the CPA and the PCC can be discerned from the content of these documents. The second scenario – CPA specifies constitutional reforms, PCC deviates – is a subset of the first scenario and arises where the provisions of a PCC are substantially different from those of the preceding CPA. The third scenario – CPA and PCC inconsistent, court decides – is a subset of the second scenario. It arises where there is a major inconsistency between the CPA and the PCC, and a court is called on to adjudicate the matter.

We will see that in all three scenarios, the status of the PCC is unquestionably superior to the CPA. This is obviously not the case where a CPA requires constitutional reform and, for whatever reason, the reform does not take place. This fourth scenario – CPA requires constitutional reform, PCC not enacted – is also discussed below. It highlights the supremacy of the existing constitutional dispensation over the CPA. The supremacy of the existing constitution is also apparent in a fifth scenario – CPA specifies legislative reform, court overrules – which arises where a court holds that legislative reform required by the CPA is invalid by virtue being inconsistent with the constitution.

CPA requires constitutional reform,
PCC enacted

Where a CPA expressly requires constitutional reform, it is almost certainly the intention of the conflict parties that the envisaged reform will supersede, and in some instances subsume, the CPA. There would be no point whatsoever in calling for constitutional reform that is subordinate to the CPA. It is also almost certainly the intention of the parties that the PCC should adhere closely to the spirit and letter of the CPA.

This argument can be illustrated with reference to the 2005 Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement / Army. The agreement was signed by the ruling National Congress Party (NCP) and the Sudan Peoples' Liberation Movement (SPLM), ending the decades-long civil war between the government and the rebel movement representing southern Sudan.

In Chapter 2 of the CPA, dealing with power-sharing, the parties pledge to “give legal and constitutional effect to the arrangements agreed therein” (Article 2.12.2). To this end, they will set up a National Constitutional Review Commission comprising members of the NCP, the SPLM and representatives of other political forces and civil society (Article 2.12.4.3). The Commission will prepare a “Legal and Constitutional Framework text in the constitutionally appropriate form, based on the Agreement and the current Sudan Constitution”, for adoption by the National Assembly and the SPLM National Liberation Council (Article 2.12.5). The Commission will also prepare other legal instruments that are necessary to give effect to the CPA, including draft statutes for the establishment of the National Electoral

Commission, the Human Rights Commission and other new national institutions (Article 2.12.2). In addition, the CPA requires the preparation of sub-national constitutions for Southern Sudan and the country's states, all of which constitutions must be consistent with the Interim National Constitution (articles 2.12.11 and 2.12.12).⁶

The CPA sets out the relationship between the peace agreement and the constitutional framework. If there is a contradiction between the two documents, the terms of the CPA shall prevail (Article 2.12.5). After the National Assembly and the SPLM National Liberation Council have adopted the framework, it will become the Interim National Constitution for Sudan (Article 2.12.7).⁷ Thereafter, constitutional amendments affecting the provisions of the CPA may be introduced only with the approval of the CPA signatories (Article 2.2.7). A Constitutional Court shall be instituted, with final and binding decision-making power to decide disputes that arise under the Interim National Constitution and the state constitutions, and to adjudicate on the constitutionality of laws (articles 2.11.3.2 and 2.11.3.3).

Dann and Al-Ali (2006, 448) claim that Article 2.12.5 of the CPA, cited above, establishes the supremacy of the CPA over the Interim Constitution; as the authors put it, the CPA “provides that in cases of conflict between the new Constitution and the CPA, the latter will prevail”. This is not accurate. Article 2.12.5 states that the CPA will prevail if there is any inconsistency between the agreement and the constitutional framework proposed by the Constitutional Review Commission. Once the framework is adopted, it becomes the Interim National Constitution and is thus supreme law. Prior to the adoption of the

Interim Constitution, the CPA does not have the force of law and therefore does not override the existing Constitution and legislation: “Pending the adoption of the Constitutional Text, the Parties agree that the legal status quo in their respective areas shall remain in force” (Article 2.12.8).

The relationship between the CPA and the Constitution is also set out in the 2005 Interim National Constitution. In many instances this document requires implementation of specific CPA provisions (e.g. articles 51(2), 58(1), 79, 148(2)). It also constitutionalizes the CPA in its entirety by providing that the CPA “is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution” (Article 225). This provision renders the CPA justiciable and enforceable by the Constitutional Court. But the CPA's legal status is not separate from, and in any way superior to, that of the Constitution. Rather, it is the Interim Constitution that confers on the CPA its legal status as part of the supreme law.

The NCP and the SPLM evidently wanted the PCC to hew closely to their CPA. The CPA contains a high level of detail on the content of the Interim Constitution, and the deadlines it sets for the constitution-making process leave no time for any further process of negotiation.⁸ We have seen, too, that the Interim Constitution effectively incorporates the CPA. It is therefore unlikely that any major discrepancy between the CPA and the PCC would arise. This is not always the case, however. It is possible that the content of a PCC differs substantially from that of the preceding CPA. This scenario is considered below.

6 For a discussion on the content and the drafting processes of the CPA, the Interim National Constitution and the sub-national constitutions in Sudan, see Murray and Maywald (2005).

7 The constitution is referred to as the “Interim National Constitution” because the CPA provides that after six years there will be a referendum allowing the people of Southern Sudan to either confirm the unity of Sudan or vote for secession (Comprehensive Peace Agreement, Chapter 1, Article 2.5).

8 The implementation schedule of the CPA chapter on power-sharing states that the National Constitutional Review Commission must prepare the constitutional framework within six weeks after receiving the CPA, and the constitutional framework must be adopted as the Interim National Constitution within two weeks from the date on which the NCP and the SPLM receive it.

CPA specifies constitutional reform,
PCC deviates

There are several possible reasons why the content of a PCC might deviate from the preceding CPA: the CPA parties may have made promises they never intended to honour; they may be suffering from buyer's remorse; they may be struggling to sell the CPA compromises to their constituents; the military or political balance of power between the parties may have changed; the balance of power between moderates and hardliners within a party may have changed; non-signatory parties, including actors that oppose aspects of the CPA, may be involved in the constitution-making endeavour; international pressure and support may have eased; and certain CPA provisions may be ambiguous or unrealistic.

A PCC's deviations from the CPA are bound to be greatest where the constitution-making project does not simply entail the legal codification of the peace agreement, as in the case of Sudan, but is rather a continuation of the contentious process of negotiating a resolution of the conflict. The contention is particularly severe where elites have not reached agreement on the underlying political settlement (Hart 2001; Bell and Zulueta-Fülscher 2016). Examples of conflictual constitution-making endeavours include Nepal (Thapa and Ramsbotham 2017); Burundi (Vandeginste 2009); and Libya, Somalia and Yemen (Bell and Zulueta-Fülscher 2016, 31-44). These cases are characterized by a protracted and unstable process of negotiation and re-negotiation, with significant differences between the resultant agreements.

The case of Nepal exemplifies this scenario. In 2006 the government and Maoist rebels signed the Comprehensive Peace Accord, ending a decade-long insurgency against the monarchy and caste-based hierarchy. The Accord covered transitional power-sharing, socio-economic reform, state restructuring, and elections for a

Constituent Assembly (CA) that would prepare a new constitution. The Interim Constitution of 2007 incorporated the Accord and provided for the formation of a transitional power-sharing government that was meant to last until the CA approved the final constitution. The Maoists won the elections for the CA but the divergent positions of political parties made it impossible to establish the national unity government. The parties then agreed to a constitutional amendment that enabled the formation of a majoritarian government. Four such governments were formed between 2008 and 2013. There was insufficient consensus to draft the new constitution and in 2013 a new CA was elected. After a devastating earthquake in 2015, it summoned the will to enact the final constitution. In 2016 marginalized ethnic communities mounted violent protests against the constitution, leading to constitutional amendments on delineation of constituencies and inclusive representation in state organs (International Crisis Group 2016).

The ten-year period following the conclusion of the Accord was wracked by shifting alliances, fractious bargaining and short-lived deals at national and sub-national levels, and periodic bouts of low-level violence (Thapa and Ramsbotham 2017). In this political maelstrom, the Accord was eclipsed by constitutional developments and numerous agreements that the government signed with various groups (International Crisis Group 2016). Jha (2017) shows that in significant ways, the 2015 Constitution dilutes the signatories' commitment in the Accord to "carry out an inclusive, democratic and progressive restructuring of the state.... by ending discrimination based on class, caste, language, gender, culture, religion, and region" (Comprehensive Peace Accord 2016, para 3.5). For our purposes, the key point is that the Accord served as an initial framework for negotiations on constitutional reform and not as a binding and abiding set of commitments.

CPA and PCC inconsistent, court decides

Once a PCC has been adopted, as argued above, it supersedes or subsumes the CPA. If there is any inconsistency between the PCC and the CPA, the former is thus likely to prevail over the latter. Where a court is called on to adjudicate such inconsistency, it can be expected to rule that the PCC is supreme. This expectation is illustrated below with reference to the controversial 2015 decision of the Burundi Constitutional Court regarding presidential term limits.

In April 2015 the ruling party in Burundi, the National Council for the Defense of Democracy – Forces for the Defense of Democracy (CNDD-FDD), announced that President Pierre Nkurunziza would run for a third term in office. The announcement dramatically heightened a political and security crisis induced by the government’s increasingly authoritarian and exclusionary rule. It generated street protests, a failed coup d’état, a split within the ruling party, the killing of civilians and the flight of several hundred thousand people into neighbouring countries (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 Peace and Reconciliation Agreement of 2000. The Arusha Agreement was the product of mediated negotiations to end Burundi’s long-running civil war. It was intended to serve as a blueprint not only for the transition to peace but also for the subsequent PCC.⁹ On the question of presidential term limits, Article 7(3) of the Arusha Agreement states unambiguously that the president “shall be elected for a term of five years, renewable only once. No one may serve more than two presidential terms”.

The Constitution affirms that the president is elected by direct universal suffrage for five years, renewable once (Article 96). However, Article 302 of the Constitution provides the following: “Exceptionally, the first President of the Republic of the post-transition period is elected by the [elected] National Assembly and the elected Senate meeting in Congress, with a majority of two-thirds of the members...”¹⁰ Two interpretations of Article 302 are possible: first, the formulation is not at odds with Article 96 of the Constitution and the Arusha Agreement but simply deals with the modality of the president’s first election, which is to be based on indirect rather than direct election; or, second, Article 302 creates a special post-transition presidency that is not part of the two-term limitation specified in Article 96 and the Arusha Agreement.

Opposition politicians and activists argued that the president was bound by the Arusha Agreement, that the Constitution emanated directly from the Agreement, and that the Agreement was the most authoritative text in interpreting ambiguous constitutional provisions (Vandeginste 2016, 48-49). This was an eminently plausible legal argument. By contrast, the Burundi intelligence service claimed that the Arusha Agreement was superior to the constitution in the hierarchy of norms (ibid., 48). This argument was legally implausible. 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)).

In opposing the third-term bid, the U.S. Administration recognized the superior legal status of the Constitution and therefore distinguished between a legal and a political approach. The U.S. Special Envoy Russ Feingold put the position as follows:

9 Chapter 1 of the Arusha Agreement sets out the constitutional principles of the post-transition constitution.

10 This translation from the French original is taken from Constitutional Court of Burundi (2015, 3).

Unlike the DRC and other countries on the continent, the Burundian Constitution could be read to allow President Nkurunziza to hold a third term. The United States does not refute that there is a legal argument for a third term. Instead [...] the United States is urging the Burundian government to ensure that the upcoming elections are consistent with the Arusha Accords, which state unambiguously that no president shall serve more than two terms. ...So, we are not making a legal argument here (quoted in Vandeginste 2016, 47-48).

In April 2015, a group of Burundi senators asked the Constitutional Court to interpret Articles 96 and 302 of the Constitution. The Court endorsed both the political and the legal 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 was confirmed when it was adopted by Parliament as national legislation (Constitutional Court of Burundi 2015:4). Furthermore, the Court held that Article 302 reflected an erroneous interpretation of the Arusha Agreement’s recommendation on presidential term limits (*ibid.*, 6).

Notwithstanding this unqualified endorsement of the Arusha Agreement, the Court held that Article 302 appeared to be independent of Article 96, “thereby creating a completely exceptional and special mandate which is unrelated to Article 96” (Constitutional Court of Burundi 2015, 6). Although the Arusha Agreement had recommended that no president serve more than two terms, the vague nature of Article 302 made a third term possible for a president who had headed the first post-transition period (*ibid.*, 6).

For present purposes, the central question is not whether the Court interpreted the Constitution correctly or whether it acted with proper independence and impartiality.¹¹ Rather, there are two cardinal points that confirm the argument of this paper regarding the primacy of a PCC over the preceding CPA. First, 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 of Burundi 2015:4). Even if the Court had interpreted the Constitution differently and concluded that the president was barred from serving a third term, its decision would still have affirmed the supremacy of the Constitution.

The second point is that the Constitutional Court was the final arbiter in the dispute. This point was reinforced in 2016 when a civil society group applied to the East African Court of Justice (EACJ) to overturn the Burundi court’s decision on presidential term limits. The EACJ is the regional court of the East African Community, of which Burundi is a member. The EACJ held that while it enjoyed primacy in interpreting the Treaty governing the community, this did not extend to reviewing decisions of the courts of member states (East African Court of Justice 2016: articles 46-49). According to the Treaty, the independence of national courts is a paramount principle of the rule of law. The EACJ could not interfere with that independence and it therefore could not review the Burundi court’s decision (*ibid.*). According to the EACJ, the bottom line, as stipulated in the Burundi Constitution, was that “the decisions of the Constitutional Court are not susceptible to any recourse” (*ibid.*, Article 44).

11 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).

In his analysis of the constitutional crisis, Vandeginste (2016, 40) argues that the trajectory and outcome of the crisis were shaped by “legal loopholes – the unique combination of constitutional ambiguity and legal enforcement gaps”. This argument is only partly correct. Constitutional ambiguity was indeed a major part of the problem but there was no legal enforcement gap. The Constitutional Court was asked to interpret constitutional provisions; it held that it was competent to do so; it issued a legally decisive ruling on the matter; and the EACJ recognized the Court’s ultimate authority in this regard.

CPA requires constitutional reform,
PCC not enacted

The CPA requirement for constitutional reform may be thwarted by subsequent political developments. One such development is the breakdown of the peace agreement and resumption of armed conflict. The Darfur Peace Agreement of 2006, for example, calls for the constitutionalization of the entire agreement (Article 1[1]), but it was doomed from the outset (Nathan 2006). Another development, illustrated below, is where constitutional reform is rejected in a referendum.

In 1996 the government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), a coalition of leftist rebel groups, concluded the Accord for a Firm and Lasting Peace. The Accord marked the culmination of a protracted process of peace negotiations and ended a devastating thirty-six year civil war. It specifies the need for constitutional reform in a number of areas: the identity and rights of indigenous peoples; the strengthening of civilian power and the administration of justice; and the security services. In accordance with the prevailing Constitution, the Agreement stipulates that the reforms must be adopted by parliament and approved in a referendum.

In 1999, after parliament had renegotiated and approved the reforms, the referendum was defeated (Brett and Delgado 2005). In the absence of constitutional endorsement, the CPA has no authoritative status and the failure of the referendum has greatly impeded the transformation of Guatemalan society as envisaged in the CPA (Hessbruegge, and García 2011; Brett 2013).

CPA specifies legislative reform, court
overrules

Where a CPA eschews the option of constitutional reform and relies instead on legislative reform, the agreement and any ensuing laws are subordinate to the existing constitution. This raises the risk that a court may declare the laws invalid on the grounds that they are inconsistent with the constitution. This risk is probably greatest where the legislation entails changes that are radical in relation to the constitutional dispensation.

The Philippines provides an illustration of this phenomenon. For several decades the government and the Muslim minorities in the south of the country were locked in armed conflict. Peace agreements signed in 1976 and 1996 failed to end hostilities. In 2001 the government entered into negotiations with the Moro Islamic Liberation Front (MILF), leading to a Memorandum of Agreement on Ancestral Domain that entailed greater autonomy for the Moro people. Local governments successfully challenged the constitutionality of the agreement in the Supreme Court. The Court held that the legal obligation for consultation on such matters had not been met; the proposed association between the government and the envisaged Bangsamoro Juridical Entity ignored existing laws; and the memorandum was unconstitutional as it implied that this entity would attain independence (Gatmaytan 2016).

Conclusion

In a high proportion of cases, the parties to a CPA regard constitutional reform as a crucial means of institutionalizing their negotiated settlement and consolidating and maintaining peace in the long-term. The imperative of constitutionalizing or at least legalizing the CPA derives from the parties' conviction that a PCC is more likely than a CPA to ensure that their opponent will honour its commitments and not return to violence. This conviction is due in large measure to the PCC's status of supreme law, making the settlement durable, justiciable and enforceable. In addition, many of the provisions typically contained in a CPA cannot come into effect unless they are enacted through the constitution or other law; conflict incompatibilities embedded in the constitution of the ancien régime have to be resolved through constitutional reform in order to prevent a recurrence of violence; and the parties may hope that the PCC will play a central role in maintaining peace in the post-conflict society. By virtue of being supreme law, the PCC supersedes the CPA and becomes the definitive peace agreement.

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Appendix 1: Relationship between CPAs in the Peace Accords Matrix and Post-Conflict Constitutions

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, Cambodia 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 Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement), 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)

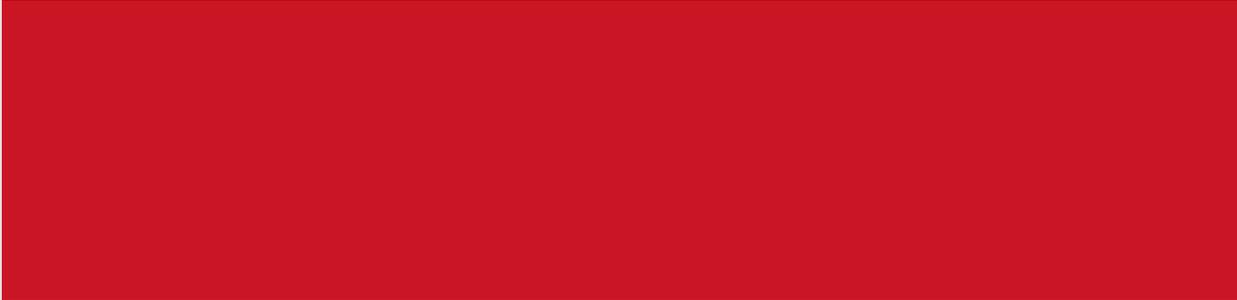
- ≡ Bangladesh, Chittagong Hill Tracts Peace Accord, 1997
- ≡ India, Memorandum of Settlement (Bodo Accord), 1993
- ≡ Indonesia, Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement, 2005
- ≡ Philippines, Mindanao Final Agreement, 1996
- ≡ Senegal,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

Appendix 2: Other CPAs that Require Constitutional Reform

In addition to the CPAs in the Peace Accords Matrix that require constitutional reform, the following peace agreements in the UN Peacemaker database (<https://peacemaker.un.org/document-search>) also stipulate the need for constitutional reform:

- ≡ Afghanistan, Afghan Peace Accord (Islamabad Accord), 1993
- ≡ Afghanistan, Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, 2001
- ≡ Angola, Bicesse Accords, 1991
- ≡ Burundi, Agreement Embodying a Convention on Governance between the Forces for Democratic Change and the Political Parties of the Opposition, 1994
- ≡ Burundi, The Global Ceasefire Agreement, 2003
- ≡ Burundi, Accord de partage de pouvoir au Burundi, 2004
- ≡ Colombia, Acuerdo Final entre el Gobierno Nacional y el Movimiento Armado Quintin Lame, 1991
- ≡ Colombia, Acuerdo Político entre el Gobierno Nacional, los Partidos Políticos, el M-19, y la Iglesia Católica en Calidad de Tutora Moral y Espiritual del Proceso, 1990
- ≡ Colombia, Acuerdo Final entre el Gobierno Nacional y el Ejército Popular de Liberación, 1991
- ≡ Colombia, Acuerdo Final entre el Gobierno Nacional y el Partido Revolucionario de los Trabajadores, 1991
- ≡ Comoros, Accord cadre pour la reconciliation aux Comores (Accord de Fomboni), 2001
- ≡ Cote d'Ivoire, Linas-Marcoussis Agreement, 2003
- ≡ Democratic Republic of the Congo, Global and Inclusive Agreement on Transition in the Democratic Republic of Congo (Pretoria Agreement), 2002
- ≡ Democratic Republic of the Congo, Inter-Congolese Political Negotiations: The Final Act (Sun City Agreement), 2003
- ≡ Gabon, Accords de Paris, 1994
- ≡ Georgia, Declaration on Measures for a Political Settlement of the Georgian/Abkhaz Conflict, 1994
- ≡ India, Memorandum on Settlement of Bodoland Territorial Council (BTC), 2003
- ≡ Kenya, Kenya National Dialogue and Reconciliation - Longer-Term Issues and Solutions: Constitutional Review, 2008
- ≡ Kosovo, Serbia, Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), 1999
- ≡ Madagascar, Charte de la transition, 2009
- ≡ Maldives, Roadmap for a Possible Way Forward, 2012
- ≡ Mexico, San Andrés Larráinzar Agreements, 1996
- ≡ Papua New Guinea, Charter of Mirigini for a New Bougainville, 1994
- ≡ Papua New Guinea, Loloata Understanding, 2000
- ≡ Philippines, Framework Agreement on the Bangsamoro, 2012
- ≡ Russian Federation, Agreement on the Basic Principles of Relations between the Russian Federation and the Chechen Republic, 1995
- ≡ Solomon Islands, Townsville Peace Agreement, 2000
- ≡ Somalia, Cairo Declaration on Somalia, 1997

- ≡ Somalia, Declaration on Cessation of Hostilities and the Structures and Principles of the Somalia National Reconciliation Process, 2002
- ≡ Somalia, Decisions of the High Level Committee (Djibouti Agreement), 2008
- ≡ Somalia, Agreement between the Transitional Federal Government and the Puntland Regional State of Somalia (Galcayo Agreement), 2009
- ≡ Somalia, Protocol Establishing the Somali National Constituent Assembly, 2012
- ≡ Sudan, Sudan Peace Agreement, 1997
- ≡ Sudan, Agreement between the Government of Sudan and the National Democratic Alliance (Cairo Agreement), 2005
- ≡ Sudan, Eastern Sudan Peace Agreement, 2006
- ≡ Sudan, Doha Document for Peace in Darfur (DDPD), 2011
- ≡ Togo, Dialogue inter-Togolais: accord politique global, 2006
- ≡ Yemen, Agreement Establishing a Union between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen, 1990
- ≡ Yemen, Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC), 2011
- ≡ Zimbabwe, Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations, on Resolving the Challenges Facing Zimbabwe, 2008



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