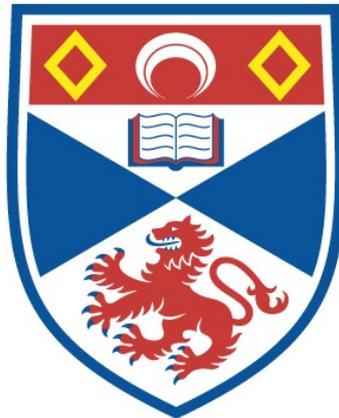


COURTING PEACE  
PEACE CONSTITUTIONS AND JURISPRUDENCE

Jenna Marie Sapiano

A Thesis Submitted for the Degree of PhD  
at the  
University of St Andrews



2017

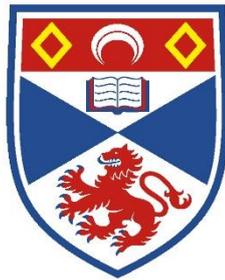
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# Courting Peace Peace Constitutions and Jurisprudence

*Jenna Marie Sapiano*



University of  
St Andrews

This thesis is submitted in partial fulfilment for the degree of PhD  
at the  
University of St Andrews

23 September 2016

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## Abstract

This aims of this thesis are, first, to consider peace and violence in the constitution drafting and implementation processes, and to return to constitutional theory, proposing that peace constitutions are distinctive in their source; and second, to show that courts, in reviewing peace constitutions, are in fact navigating between an elite pact and a more open constitutional way of doing business, where both remain important to any emergent constitutionalism. To do so, the intention of this thesis is to assess the peace constitution in both the short and long-term, by addressing two sets of questions: (1) what is the process of constitution-making as part of the political settlement and what type of constitutional arrangement result; and (2) how have courts interpreted peace constitutions and in what way (if any) are they engaging with the peace process?

This thesis approaches these questions through a critical review of the legal and political literature. The research design is principally in comparative constitutional law, which as a specialised legal field has adopted its own methodological framework. The project is adopting the functional methodological approach, as defined in the comparative law literature. The two questions under consideration in this thesis have dedicated chapters, using separate illustrative cases. There are twenty-three possible cases identified by International IDEA as classifying as 'peace constitutions' since 1990. In the chapter on the distinctiveness of peace constitutions, I focus on three of these cases: the DRC, Nepal and Burundi. The chapter on the role of court looks at Colombia, Northern Ireland and Bosnia-Herzegovina. The reason for having, in effect, two-sets of case studies is dictated by an acknowledgement that locating generalizable cases is unlikely, as each case is context specific; nonetheless, it is possible to locate common themes and dilemmas that are present in the political settlement processes across time and place. Further, the influences, language and practices impacting these processes are always changing, so that processes that were completed before certain watershed points will present different learning outcomes.

## List of Cases

### Domestic

#### ***Bosnia-Herzegovina***

Constitutional Court of Bosnia and Herzegovina, *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH, Case U 5/98, Partial Decision* (30 Jan 2000), *Partial Decision* (19 Feb 2000), *Partial Decision* (1 July 2000), *Partial Decision* (19 Aug 2000) [Constituent Peoples Case].

Constitutional Court of Bosnia-Herzegovina, *Decision on Admissibility*, Case No. U13/05 (26 May 2006).

Constitutional Court of Bosnia-Herzegovina, *Admissibility and Merits*, Case No. AP-2678/06 (29 Sept 2006).

#### ***Burundi***

Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303, 4

#### ***Canada***

*Edwards v. A.-G. Canada* [1930] A.C. 124.

*Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145.

*R v. Big M Drug Mart Ltd.* [1985] 1 S.C. R. 295.

*Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486.

*R. v. Oakes* [1986] 1 S.C.R. 103.

#### ***Colombia***

Judgment C-577/2014.

Judgment C-579/2013.

Court of Colombia, Decision C-488 de 2009

*Gustavo Gallón Giraldo y Otros v. Colombia*, Judgement, C-370/2006 (Dossier D-6032), 18 May 2006.

No. 45, 2413 G.J. 32, 40 (1983).

No. 43, 2418 G.J. 383, 387 (1984).

No. 126, 2430 G.J. 141, 146-47 (1987)

T-406, G.C.C. (1992) (2)

### ***Germany***

BVerfGE 14 (1951) [*Southwest State Case*].

BVerfGE 7, 377 (1958).

BVerfGE 13, 97 (1961).

BVerfGE 16, 194 (1963).

BVerfGE 19, 342 (1965).

BFVerfGE 90, 241 (1994) [*Holocaust Denial Case*].

BVerfGE 95, 48 (1996).

### ***France***

French Conseil Constitutionnel, Decision no 77-44 DC (16 July 1971).

### ***India***

*Golaknath v. State of Punjab* (1967) AIR 164, 1967 SCR (2) 762.

*Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

### ***Israel***

H CJ 73/53 *Kol Ha'am Co. Ltd v. Minister of the Interior* 7 PD [1953].

H CJ 98/69 *Bergman v Minister of Finance* 23 (1) PD 693 [1969].

H CJ 390/79 *Dweikat et al., v. Government of Israel et al.* 34(1) PD [1979] (Elon Moreh Case).

LCA 6339/97 *Roker v Solomon* 55(1) PD 199 [1999].

### ***South Africa***

*S v Makwanyane* 1995 (3) SA 391 (CC).

### ***United Kingdom***

*Robinson v Secretary of State for Northern Ireland and Ors* [2002] UKHL 32

### ***United States***

*District of Columbia v. Heller*, 554 U.S. 570 (2008).

*Dred Scott v. Sandford*, 60 U.S. 393 (1857).

*Marbury v Madison*, 5 U.S. (1 Cranch) (1803) 137.

*New York Times v. Sullivan* 376 U.S. 254 (1964).

*Roe v. Wade*, 410 U.S. 113 (1973)

*Towne v Eisner*, 245 U.S. 418 (1918).

## International

### ***European Court of Human Rights***

*Sejdić and Finci v. Bosnia and Herzegovina*, 27996/06 and 34836/06, 22 Dec 2009.

### ***Inter-American Commission of Human Rights***

*Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez and Carlos Antonio Martínez*, Report N° 1/99, Case 10.480, El Salvador, 27 January 1999.

Report on the Demobilization Process in Colombia, OEA/Ser.L/V/II.120, doc. 60, 13 December 2004.

### ***Inter-American Court of Human Rights***

*Merchants v. Colombia, Merits, Reparations and Costs*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, 5 July 2004.

*Mapiripán Massacre v. Colombia, Merits, Reparations and Costs*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 134, 15 September 2005.

*Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 140, 31 January 2006.

*Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 148, 1 July 2006.

*La Rochela Massacre v. Colombia, Merits, Reparations and Costs*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, 11 May 2007.

*Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs*, 2013 Inter-Am. Ct. H.R. (ser. C) No. 252, 25 October 2012.

### ***International Court of Justice***

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16.

*Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12.

*Frontier Dispute [Burkina Faso v. The Republic of Mali]*, Judgment, ICJ Reports 1986, p. 554.

*East Timor [Portugal v. Australia]*, Judgment, ICJ Reports 1995, p. 90.

*Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v. Uganda]*, Judgment, ICJ Reports 2005, p. 168.

*Armed Activities on the Territory of the Congo (New Application: 2002) [Democratic Republic of the Congo v. Rwanda]*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, p. 6.

***Sierra Leone Special Court***

*Prosecutor v. Kallon, Kamara*, Decision on Jurisdiction, Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) 13 March 2004.

## Introduction

*‘[T]here is nothing more futile than rebellion and liberation unless they are followed by the constitution of the newly won freedom’.<sup>1</sup>*

TRANSITIONS FROM WAR TO PEACE often require new or revised constitutional arrangements to give clarity to the post-conflict state and to legitimize the emerging political settlement.<sup>2</sup> Constitutions are very often drafted following a revolution or a war – which as Hannah Arendt highlights, must be the consequence of rebellion and liberation, for without a new constitution, they are, in her words, futile.<sup>3</sup> A constitution voices the idea of what the state *is*, and how it *ought* to be; it records the story of the state’s past, but also imagines its future; is it political and legal, and also symbolic. A constitution limits the power of the state, and protects the rights of the people. For a society deeply divided by conflict, a constitution, it is hoped, can capture the political settlement, and create stability. To do this a constitution must be more than a social contract and a legal guardian of rights.

Constitutions are often coupled with a peace agreement as the political and legal pacts that dictate the terms of peace and the intentions of the parties in transitioning out of a state of war. A peace process is only truly concluded when a new institutional arrangement is formalized in the original or newly drafted constitution.<sup>4</sup> In the context of political settlements, peace agreements and constitutions are connected. The political settlement is ‘the invisible agreement between elites, and often between elites and society more broadly, on how power should be constrained and exercised.’<sup>5</sup> The peace agreement and constitution

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<sup>1</sup> Arendt, *On Revolution* ([1963] 2006), 133.

<sup>2</sup> The best definition of a political settlement is from the UK Department for International Development: a political settlement is ‘the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power’ (di John and Putzel, *Political Settlements: Issues Paper* (2009), 4). I would also contend that the implementation and interpretation of the constitution forms part of the political settlement.

<sup>3</sup> Arendt reframes the concept of revolution, taking it back from those who understand revolution to be continuous, with-out an ending. The end goal of revolution is a constitution of political freedom (see Bernal, ‘A Revolution in Law’s Republic’ (2009)).

<sup>4</sup> As Bell has noted, ‘the notion of ongoing agreements being “peace agreements” may begin to disappear ... as the conflict resolution attempts of the peace process merge imperceptibly into the ongoing process of public law, signifying a measure of success’ (Bell, ‘Peace Agreements’ (2006), 378). See also Darby and Mac Ginty, ‘Introduction’ in *The Management of Peace Processes*, edited by Darby and Mac Ginty (2000), 8.

<sup>5</sup> Bell and Zulueta-Fülsher, ‘Sequencing Peace Agreements’ (2016), 18.

operate within the political settlement, but in a way that is not necessarily sequential or logical.

The ‘peace constitution’ and political settlement are the outcomes of a transition from conflict towards a sustainable peace. A peace constitution<sup>6</sup> (as a shorter, and more comprehensive, version of the terms ‘peace agreement constitution’<sup>7</sup> or ‘constitutional peace agreement’) is a constitution drafted (or revised) as part of this process. Peace constitutions<sup>8</sup> are not autonomous or free-standing, but are mutually constitutive of the peace agreement that provides legal and political authority for their enactment. Such constitutions do not become dissociated from the peace agreement after their implementation. Rather, peace constitutions derive their authority from the framework of the original peace agreement that precipitated a new or amended constitution. In effect, the peace agreement is foundational to the constitution, but may not be sufficient to maintain a fragile political settlement. Peace agreements and constitutions may be joined in more ways than the constitution acting as a peace agreement. For example, many peace agreements set out the principles for a new constitution, such as in Cambodia, in which the provisions for a new constitution were outlined in the Comprehensive Peace Agreement (Paris Agreement) or Burundi, where the principles for the new constitution were outlined in the Arusha Accord. In Bosnia-Herzegovina the constitution was included, in its entirety, as an annex to the Dayton Peace Accords. There are also constitutions that resemble peace agreements, such as the Colombian Constitution of 1991, which was written as part of the ongoing (and continuing) peace process. Some interim constitutions also resemble and perform the function of peace

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<sup>6</sup> I use the term ‘peace constitution’ rather than post-conflict constitution to make clear the link between the peace agreement and the constitution. The term that is frequently used is ‘peace agreement constitution’ - see, for example, Bell, ‘Peace Agreements’ (2006) and Easterly, ‘Peace Agreements as a Framework’ in *Jus Post Bellum*, edited by Stahn *et al.* (2014) who uses the concept ‘peace agreement constitution’ as a comparative tool. See also Bell, *On the Law of Peace* (2008); Bell, *Peace Agreements and Human Rights* (2000); Widner, ‘Constitution Writing in Post-Conflict Societies’ (2008); Ludsin, ‘Peacemaking and Constitution-Drafting’ (2011); Samuels, ‘Post-Conflict Peace-Building’ (2005); Darby and Mac Ginty, ‘Introduction’ in *The Management of Peace Processes*, edited by Darby and Mac Ginty (2000); and Teitel, ‘Transitional Jurisprudence’ (1997) who uses the term ‘transitional constitution’. Manuel José Cepeda Espinosa (former justice of the Colombian Constitutional Court), calls such agreements ‘constitutional peace pacts’, Cepeda Espinosa, ‘The Peace Process and the Constitution’ (2016). International IDEA is a useful source on constitution building ([www.idea.int/cbp/](http://www.idea.int/cbp/)) – they also use the term peace agreement constitution in workshop report, Sapiiano *et al.*, ‘Constitution-Building in Political Settlement’ (2016).

<sup>7</sup> This is the term that I use in my article, ‘Courting Peace (2017), which is based on this thesis (chapter four). I have amended it in this thesis as it is a less cumbersome term, rather than because it has a distinct meaning. The term peace constitution (like the use of peace agreement constitution) includes peace agreement constitutions and constitutional peace agreements.

<sup>8</sup> Throughout this thesis, I refer to a peace constitution as a single document. Such peace constitutions are often written in more than one formal document (or as additions to a separate document) but in the interest of simplicity and consistency I use the singular form.

agreements. For example, in South Africa, the interim constitution was in fact the main peace agreement.<sup>9</sup>

In Zimbabwe and Kenya, new constitutions were required in the settlement between political parties following disputed elections that resulted in violence, but not full scale civil war. There are also cases that would fall under the category of peace constitution in which the constitution and peace process are being drafted concurrently, although not necessarily in collaboration. Such cases include the current processes in Somalia, Yemen, and Libya. The concept of a peace constitution can also be extended to sub-state constitutional settlements, such as the Belfast (or Good Friday) Agreement in Northern Ireland, which exemplifies all the traits of a peace constitution and is illustrative of peace constitutions arising at a sub-state level. The purpose and intention of the constitutions in all these cases was to further the peace process as part of the political settlement.

### Objectives and Structure

This aims of this thesis are, first, to consider peace and violence in the constitution drafting and implementation processes. Second, to suggest that peace constitutions are distinct in their foundation and source of authority, and that traditional constitutional theory does not address this distinctiveness. Third, and finally, to show that courts, in reviewing peace constitutions, are in fact navigating between an elite pact and a more open constitutional way of doing business, where both remain important to any emergent constitutionalism. To do so, the intention of this thesis is to assess the peace constitution in both the short and long-term, by addressing two sets of questions: (1) what is the process of constitution-making as part of the political settlement and what type of constitutional arrangement result; and (2) how have courts interpreted peace constitutions and in what way (if any) are they engaging with the peace process?

This thesis has four substantive chapters, in addition to this introduction and a conclusion. The first chapter defines and analyses peace agreements, the first of the two documents forming the subject of this thesis. Peace agreements are legal and political documents that dictate the terms of peace and the intentions of the state and opposing parties in transitioning from a state of war to peace. There are several documents that are negotiated as part of the political settlement that would classify as a 'peace agreement', for example, pre-negotiation agreements, ceasefire agreements, negotiation agreements, implementation agreements, and, in some cases, a (interim) constitution.<sup>10</sup> Still, like 'peace', the meaning and the legal standing of peace agreements are vague. Christine Bell best argues this point, suggesting that,

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<sup>9</sup> The 1996 constitution was required to comply with thirty-four constitutional principles set out in the interim constitution. The interim constitution required that the newly established Constitutional Court be responsible for determining that the new constitution fulfilled this obligation. In Nepal, the interim constitution was passed shortly after the Comprehensive Peace Agreement, which outlined the procedures for the drafting of a new constitution.

<sup>10</sup> For example, the 1993 Interim Constitution of South African. There is scope to argue that the peace agreement can be likened to an interim constitution, an interim constitution may perpetuate the 'status

despite the prevalence of documents that could be described as peace agreements, and the emergence of legal standards addressing them as a category, the term "peace agreement" remains largely undefined and unexplored. The label is often attached to documented agreements between parties to a violent internal conflict to establish a cease-fire together with new political and legal structures.<sup>11</sup>

Peace agreements often go beyond the immediate arrangements necessary to end violence, in laying a foundation for a new (or revised) constitution. As Bell explains, '[p]eace agreements can be understood as a distinctive form of political constitution', so that '[o]nce we locate the peace agreement firmly within the constitutional discourse, conflict resolution dilemmas can be understood in terms of the dilemmas inherent to the political constitutional project'.<sup>12</sup> By understanding the constitution as a form of peace agreement,<sup>13</sup> interpretation of the constitution may be similarly thought of as an exercise in conflict resolution, which is the subject of this thesis. Peace agreements are often negotiated with actors from outside of the domestic legal system of the state and can properly be categorized as international legal agreements.<sup>14</sup> Still, to be implemented they must fit into the domestic legal system of the state. Legal authority may be acquired if the peace agreement obtains the status of a constitutional document and, in this way, gains *ex post facto* legal standing under domestic law. Similarly, the constitution may find authority in the peace agreement, making the documents mutually constitutive of the political settlement and the legal constitution. The

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quo' or baseline constitution that would be difficult to then later deviate from when forming a new, permanent constitution. However, interim constitutions can also be a more useful conflict resolution practice than drafting a permanent constitution immediately following the end of the conflict. For more on interim constitutions see Rodrigues, 'Letting Off Steam?' (2017) and Zulueta-Fülsher, *et al.*, *Interim Constitutions* (2015).

<sup>11</sup> Bell, 'Peace Agreements' (2006), 374.

<sup>12</sup> Bell, *On the Law of Peace* (2008), 202.

<sup>13</sup> The most famous (or perhaps classic) example, the American Constitution, may be understood as a peace agreement. The American Constitution, signed in 1787, replaced the Articles of Confederation. The Confederacy was breaking (and indeed broke) and there was fear about the possibility of war between the states/regions or the possibility of renewed conflict with the British. The debate at the Philadelphia Convention in the summer of 1787 was between 'nationalists', who wished for sovereignty to remain with the states, and 'federalists', who advocate for a stronger, federal government. The delegates came to an agreement after the Great Compromise of July 16, which gave all states equal representation in the Senate, and representation by population in the House. The compromise included the counting of slaves as three-fifths of a person. A further compromise (necessary for South Carolina and Georgia) allowed the states to continue to import slaves until 1808. DC Hendrickson makes the convincing case that the Constitution is a peace pact (see Hendrickson, *Peace Pact* (2003)). The claim that the US Constitution is a peace agreement may be rarely made, however, it is a claim that has been made of other constitutions (and is the argument being made in this thesis). The Colombian Supreme Court, pronounced 'in a famous statement, that constitutions are peace treaties', Cepeda Espinosa, 'The Peace Process and the Constitution' (2016).

<sup>14</sup> Bell, *On the Law of Peace* (2008), 27–45.

authority of the constitution is derived from a formally negotiated peace agreement, itself a comprised and foundational political settlement between elites that were formally violently opposed. Indeed, the case of a peace constitution indicates the way in which that document's authority is constructed around a concept of non-violent stability or peace.<sup>15</sup> Focusing on peace constitutions creates not only a foundation of comparison, but also links the comparative constitutional debate more closely to the conflict resolution and peace agreement literature. Such focus allows for a more complete evaluation of the peace process and agreement and makes sense of the subsequent constitution it produces, the peace constitution.

The purpose of the second chapter is to address the first question being asked in this thesis, that is, what is the process of constitution-making as part of the political settlement and what type of constitutional arrangement results. This chapter refers to several examples of peace constitutions since 1990 to put into practical focus the dilemmas and tensions present in the process of drafting and implementation of the peace constitution. These cases are more alive to the current concerns and pressures of the peace and constitution making processes from the international, and make clear the continued potential for violence that is present in the political settlement process, which is less present in the latter three cases considered in the fourth chapter. In the concluding section of the chapter, three cases are used to illustrate the importance of continued violence for peace constitutions. These are the DRC, Burundi and Nepal.

Chapter three is concerned with public law and constitutional theory, considering the distinctiveness of peace constitutions. Constitutional theory, a theoretical perspective that is distinct from both legal and political theory, but which also takes from both, is best described as an 'account of the authority of constitutions and an account of the way constitutions should be interpreted'.<sup>16</sup> Constitutional theory is a branch of study that is not to be confused with political theory, which takes a distinct approach and is broader in scope. Constitutional theory is also a discrete branch of theory outside jurisprudence (or legal theory) in recognising and allowing for pragmatism and politics in interpreting the law. Traditional concerns of constitutional theory – the source of constitutional authority, constituent power and constitutional interpretation – are present in the theory on peace constitutions, however, the distinct concerns and foundations of peace constitutions are not yet fully understood or considered in constitutional theory literature.

The fourth chapter, which addresses the second question considered in this thesis, cites cases from three domestic and two regional courts that have bearing on the political settlement, with the aim to evaluate the normative role of the judiciary in the process of constitutionalism

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<sup>15</sup> This argument borrows from Hannah Arendt's theory, see Honig, 'Declarations of Independence (1991). As Arendt argues: 'The very concept of Roman authority suggests that the act of foundation inevitably developed its own stability and permanence, and authority in this context is nothing more or less than a kind of necessary "augmentation" by virtue of which all innovations and changes remained tied back to the foundation which, at the same time, they augment and increase' (Arendt, *On Revolution* ([1963] 2006), 194).

<sup>16</sup> Raz, 'On the Authority and Interpretations' in *Between Authority and Interpretation* edited by Raz (2009), 328.

in post-conflict states. The judiciary, acting in some way to mediate between tensions inside the peace constitution, has limited the pace at which development of the political settlement has taken place, maintaining the constitutional link to the peace agreement, while acknowledging that the link should not preserve elite pacts permanently or without limit. Using cases from the constitutional courts of Colombia and Bosnia-Herzegovina, and the United Kingdom House of Lords, concerning the situation in Northern Ireland, there is evidence of an emerging global ‘peace jurisprudence’,<sup>17</sup> based on purposive interpretation and the principle of proportionality, that protects the foundations of the political settlement. However, the jurisprudence of these domestic courts is contrasted to that of the regional courts, namely, the European and American regional human rights courts, which are less well placed to appreciate the context under which the peace constitution operates, and are in danger of unwinding the political settlement without providing a viable alternative for peace.

International and regional organisations have been playing a more direct role in domestic constitution-making and in monitoring their implementation. For example, the charters for the African Union and the Organisation for American States both contain specific prohibitions on unconstitutional changes of government. The Venice Commission of the European Council also monitors constitutions among the member states. Regional human rights courts, as branches of the organisations, are likewise playing an active role in the constitutional arrangement. International and regional courts have also increasingly engaged in the interpretation of constitutional arrangements and peace agreements. It is, for this reason, necessary to consider their jurisprudence as it relates to the peace constitutions being considered in this thesis. This is done in chapter one, looking at international court decisions as they impact on peace agreements, and in chapter four, as regional human rights courts have engaged in decisions on the constitutional arrangement.

This thesis lays out a foundation to better understand the relationship of peace and political settlements in judicial decisions. It does so by reviewing cases considered ‘foundational’. The aim is first, to provide evidence across constitutional jurisdictions concerning the fundamental meaning of the constitutional order, and second, to highlight the impact certain judicial decisions may have on the legal and political order of a post-conflict state. Constitutional courts interpreting peace constitutions have found that peace is foundational to the constitutional structure<sup>18</sup> and is an acceptable justification to proportionally limit certain constitutional rights,<sup>19</sup> which suggest is evidence of an emerging global peace jurisprudence.

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<sup>17</sup> The theory of peace jurisprudence borrows language from Ruti Teitel’s concept of transitional jurisprudence. Teitel’s notion of transitional jurisprudence is connected to the concept of transitional justice. Teitel’s theory of transitional jurisprudence is applicable to transition from illiberal rule, such as the transitions that occurred in the Velvet Revolutions (see Teitel’ *Transitional Jurisprudence*’ (1997), 2068-2070). Teitel deals with both criminal justice and constitutional justice as part of her theory development. It is the latter which is of relevance here and is another reason for why the terminology for this thesis was borrowed from her article.

<sup>18</sup> For this argument, I rely on Barak, *Purposive Interpretation* (2005).

<sup>19</sup> There have been several recent publications on this topic: including, Alexy, *A Theory of Constitutional Rights* (2002); Barak, *Proportionality* (2012); Bomhoff, *Balancing Constitutional Rights* (2013); Cohen-Aliya and Porat, *Proportionality and Constitutional Culture* (2013). See also

## Methodology

This thesis approaches these questions through a critical review of the legal and political literature. The research design is principally in comparative constitutional law, which as a specialised legal field has adopted its own methodological framework.<sup>20</sup> The project is adopting the functional methodological approach, as defined in the comparative law literature. The two questions under consideration in this thesis have dedicated chapters, using separate illustrative cases. There are twenty-three possible cases identified by International IDEA as classifying as ‘peace constitutions’ since 1990.<sup>21</sup> In the second chapter, on the distinctiveness of peace constitutions, I focus on three of these cases: the DRC, Nepal and Burundi. The fourth chapter, on the role of court looks at Colombia, Northern Ireland and Bosnia-Herzegovina. The reason for having, in effect, two-sets of case studies is dictated by an acknowledgement that locating generalizable cases is unlikely, as each case is context specific; nonetheless, it is possible to locate common themes and dilemmas that are present in the political settlement processes across time and place. Further, the influences, language and practices impacting these processes are always changing, so that processes that were completed before certain watershed moments will present different learning outcomes.

Such is the case with the examples used to evaluate the second question – the constitutional courts of Bosnia-Herzegovina and Colombia, the UK House of Lords (concerning the situation in Northern Ireland), the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights – which concern peace constitutions that were completed in the 1990s. The time lapse since these constitutions were drafted means that several factors that are necessary to consider in understanding peace constitutions now, were not present at that time. For example, since the Belfast Agreement was signed (the last of these cases to have been completed), the United Nations Security Council passed Resolution 1325 pushing for the inclusion of women in the peace and constitution-drafting processes. The 1996 South African constitution-making process that emphasised participation has also meant that constitution-drafting that is not inclusive (as was the case with the Bosnian constitution, attached as an annex to the 1995 Dayton Peace Accord) would not now be seen to be legitimate. Moreover, the selection of case studies for court decisions must factor in a sufficient passage of time for the constitution to have been implemented and interpreted. For these reasons, the thesis does not adopt a direct case study approach, rather, in the second chapter, several examples are referenced to give clarity to the meaning of ‘peace constitution’, and to allow evidence for the distinctiveness of these types of constitutional arrangement. The fourth chapter accepts a more standard approach, comparing across three peace

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Möller, *The Global Model* (2015) and Möller, ‘Constructing the Proportionality Test’ in *Reasoning Rights* edited by Lazarus, *et al.* (2014), who argues that the principle of proportionality is part of an emerging ‘global model’ of rights. See also Gardbaum, ‘Positive and Horizontal Rights’ in *Proportionality* edited by Jackson and Tushnet (2016).

<sup>20</sup> Jackson, ‘Comparative Constitutional Law’ in *The Oxford Handbook of Comparative Constitutional Law* edited by Rosenfeld and Sajó (2012); Jackson, ‘Methodological Challenges’ (2010); Ginsburg and Dixon, ‘Introduction’, in *Comparative Constitutional Law*, edited by Ginsburg and Dixon (2011).

<sup>21</sup> Bell and Zulueta-Fülscher, ‘Sequencing Peace Agreements’ (2016).

constitution (pulling on both domestic and international court judgments), locating in the decisions a similarity in reasoning, which this thesis suggests is evidence of an emerging peace jurisprudence.

A new constitutional arrangement does not necessarily bring an end to violence as intended, and may, in fact, be a cause for continued conflict and instability. The intention of the second chapter is to give context to the peace agreement and constitution-making processes and highlight the challenges that are involved in the design, in both practice and substance, of such constitutional arrangements that courts are being asked to interpret. All examples were selected to illustrate political settlements negotiated in the context of high-level violence both leading up to the peace agreement and since the adoption of the constitution. These processes have also been tainted by continued violence and uncertainty over their appositeness. Intentionally, the cases included in this section are also not ones commonly selected in comparative constitutional law. There has been increased attention given to methodology and case selection in comparative constitutional law. Ran Hirschl makes the point that there are a limited number of cases that are too frequently recycled in the literature, such as the UK, the US, Germany and Israel.<sup>22</sup>

Similarly, the cases used in the fourth chapter, Colombia, Bosnia-Herzegovina and Northern Ireland, have been commonly used in the comparative constitutional law literature.<sup>23</sup> These three places have also all experienced protracted conflict, with high civilian casualties. The number of casualties across the cases differ widely, nonetheless, they all hit the threshold of violent conflict. The most commonly used indicator for ‘civil war’ is 1,000 war-related deaths.<sup>24</sup> In selecting my cases I considered those that have had high-level of sustained (or ongoing) conflict. Northern Ireland is an exception to this criterion. Between 1966 and 2006, approximately 3,720 people were killed because of the conflict.<sup>25</sup> However, as Brendan O’Leary and John McGarry argue, the conflict has been ‘very intense’ and so fits into this category.<sup>26</sup>

In two of the cases, Bosnia-Herzegovina and Northern Ireland, the peace agreement and constitution resulted in a termination of the conflict (although the stability of that peace is fragile, it is holding). In the third case, Colombia, the conflict continued past the adoption of the 1991 Constitution, although it successfully brought an end to the M-19 movement (which

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<sup>22</sup> Hirschl, *Comparative Matters* (2014).

<sup>23</sup> There are also problems of accessing judicial decisions and commentary in English, which limits the cases that can be used. The initial cases selected for the section on peace jurisprudence were Bosnia-Herzegovina, Cambodia and Lebanon. The latter two cases had to be abandoned as there were not enough cases available in English. The translation of constitutional court cases is a political decision.

<sup>24</sup> See Wallenstein, ‘Theoretical Developments’, in *Routledge Handbook of Civil Wars*, edited by DeRouen Jr and Newman (2014). Chapter one deals in more detail on the distinction between international armed conflict and non-international armed conflict.

<sup>25</sup> Dixon, *Northern Ireland* (2008), 27.

<sup>26</sup> O’Leary and McGarry, *The Politics of Antagonism* (1996), 20.

had only years before attached the Palace of Justice, which left eleven judges dead).<sup>27</sup> Currently, the peace process between the government and the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia (FARC) has been closer to settlement than any time previously. On 23 June 2016, the parties signed a ceasefire that came into effect on 29 August 2016, with the intention of signing a peace agreement on 26 September 2016. This has not impacted on how this thesis has considered this case study. In fact, as David Landau has reflected, the Constitutional Court, having played a significant role in the peace process to date (as detailed below in the case section) will most likely continue to take part in the implementation of the agreement, and the post-conflict transition.<sup>28</sup>

Northern Ireland stands out as a case, however, the Belfast Agreement and the 1998 Act, I argue, are an example of a peace constitution; although one that concerns a sub-state entity. The case also stands out because the court that is being considered is the British House of Lords which is the court of last resort concerning matters on the implementation of the Agreement and Act. This differs then from Bosnia-Herzegovina and Colombia which both established strong-form constitutional courts within the new peace constitution. However, in *Robinson v Secretary of State for Northern Ireland* the House of Lords made a very clear determination on the status of the Belfast Agreement and 1998 Act, although the House of Lords (and now the Supreme Court) is an example of weak-form judicial review.

The approach taken in this thesis, based in constitutional theory and comparative constitutional law, is grounded in normative functionalism.<sup>29</sup> This methodological approach is borrowed from Stephen Tierney, who explains that,

[normative functionalism] is both immanent and functionalist in its focus. Its methodology and content are therefore each distinguishable from the substantive normativity implied by both republicanism and deliberative democratic theory... it is an attempt both to understand constitutionalism as a form of political practice, and to frame evaluations of how this practice works against its own internal logic.<sup>30</sup>

In laying out his approach, Tierney argues that '[i]t is the very contingency of constitutional theory, and the centrality of political practice to its essence, that makes inoculation of constitutional analysis from value judgement impossible'.<sup>31</sup> In accepting this, he adjusts his approach to a functional normativity, by which he means that 'even in functional terms any account of constitutional law must recognize that normative presuppositions are inherent

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<sup>27</sup> During the constitution-making process, other guerrilla groups (including the M-19) demobilised and participated in the Constituent Assembly.

<sup>28</sup> See Landau, 'Can the Colombian Model Be Generalized?' (2016).

<sup>29</sup> This methodological approach is influenced by Tierney, *Constitutional Referendums* (2012) and Jackson, 'Comparative Constitutional Law', in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012).

<sup>30</sup> Tierney, *Constitutional Referendums* (2012), 2.

<sup>31</sup> *Ibid.*

within any exercise of constitutional creation, reform, or practice'.<sup>32</sup> Tierney's approach marries constitutional theory and the functionalist method of comparative analysis, which has been described as a means to 'identify an institution that exists in multiple constitutional systems and explores its function(s); or ... [is used to] identify one or more functions performed by constitutions or constitutional institutions or doctrines in some societies, and analyse whether and how that function is performed elsewhere'.<sup>33</sup> This same approach is used here to compare the function and interpretation of peace constitutions. This legal methodological approach is used principally to address the second question of this thesis, namely, how have courts interpreted peace constitutions?

The functional method is the most commonly adopted research approach in comparative constitutional law; however, scholars have criticised comparative functionalism for reducing the complex to a common base.<sup>34</sup> This method, as used in comparative constitutional law, distinguishes constitutional institutions or doctrine, where the present research seeks to compare long-term peace building and stability, a function rather broader than a specific constitutional design feature. There is an inherent tension in finding compromise between locating comparison between cases and accepting that context is 'everything'. The thesis aims to find this balance in locating common themes and dilemmas in explaining the peace constitution in chapter two, using examples from several contexts, and in suggesting that courts are using common reasoning in interpreting peace constitutions because of increasing levels of constitutional borrowing and the emergence of 'global' rules of interpretation.

Nonetheless, there continue to be limits to comparison that require clarification.<sup>35</sup> First, constitutions are designed and interpreted in distinctive historical contexts, making comparison difficult. This is especially true in the type of comparison in this thesis. The challenge, which is common to all such studies, is to balance case specific analysis while recognizing certain common features across all cases.<sup>36</sup> Second, constitutions are strongly expressivist, which makes comparison problematic. The states (and case law) selected for this chapter have singular histories, political and legal systems, and have moved beyond conflict (or not) discretely. By analysing many cases from various regions and courts, normatively valuable trends emerge to conceptualise a theory of 'peace jurisprudence'.

The literatures on conflict resolution and constitution making are often at odds in their methodological and epistemological approach and in their focus. This is not least because those working in the two academic fields are often from the disciplines of politics and law,

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<sup>32</sup> *Ibid.*

<sup>33</sup> Jackson, 'Comparative Constitutional Law', in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 62.

<sup>34</sup> Frankenberg, 'Critical Comparisons' (1985).

<sup>35</sup> Jackson, 'Comparative Constitutional Law', in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 71-72.

<sup>36</sup> Rawls, *A Theory of Justice* (1971).

respectively.<sup>37</sup> The distinction between subjects, as will be laid out below in the literature review section, has some impact on this thesis, its style, and conclusions.

### Literature Review

This thesis sits broadly between the disciplines of International Relations, constitutional theory, international and comparative constitutional law. In so doing, this thesis adds value to several existing bodies of literature by:

- 1) analysing the literature on constitutions as peace agreements across the disciplines of International Relations, international law, and constitutional law;
- 2) contributing to the mediation and negotiation literature in measuring the interpretation of peace agreement provisions;
- 3) participating in the international legal debate by locating the legality of peace constitutions;
- 4) contributing to the constitutional law, comparative constitutional law, and constitutional theory literature by introducing the concept of peace constitutions and by evaluating the implications of violence on the process; and
- 5) adding value to the peace and conflict literature by conceptualising the long-term impact of peace agreements and post-conflict political settlements by considering the interpretation of constitutional courts.

The discipline of International Relations is largely preoccupied with war.<sup>38</sup> This focus has meant there has been relatively less work on questions of peace, especially on long-term peace building. Oliver Richmond is damning of International Relations theory for its resolute attention to war at the expense of a deeper study of peace.<sup>39</sup> The source of this single-mindedness is accepting that war, not peace, is the natural state of being, a point of view that may be tied to Hobbes' view of the human condition as being 'nasty, brutish, and short'. The core of the discipline may be preoccupied by war; however, I would be cautious in overstating this fixation. On the topic of peace, there is a significant body of work in conflict resolution. There is also much written on the peace process itself, evaluating factors that lead to the

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<sup>37</sup> These methodological challenges were similarly recognised by Alan Kuperman in his edited book, *Constitutions and Conflict Management in Africa*. Kuperman's book, like this thesis, is concerned with peace, not democracy, which as he notes, is the common focus in conflict management literature, but not comparative constitutional law. In the introduction he comments that, '[a]s the first rigorous study of its kind, this book faces formidable methodological challenges', however, he also makes the case that '[i]n the future, as research expands and knowledge cumulates on the ways in which constitutional design may buffer or exacerbate shocks, such challenges should diminish.' (Kuperman, 'Designing Constitutions', in *Constitutions and Conflict*, edited by Kuperman (2015), 9).

<sup>38</sup> This is of course not uniformly the case, however, as the grounding of the field was concerned with war (and the prevention of war, rather than the maintenance of peace), the discipline continues to be oriented towards the study of war.

<sup>39</sup> Richmond, 'Understanding Peace' (2005).

successful conclusion of peace agreements,<sup>40</sup> factors that threaten that process,<sup>41</sup> and the implementation phase of the agreement.<sup>42</sup> Additionally, there literature on the mediation and negotiation and negotiation process and actors.<sup>43</sup> This literature evaluates mediation and negotiation strategies, including direct accounts by facilitators and mediators involved in conflict resolution processes.<sup>44</sup>

The concept and literature on political settlements is a response to the disappointment in standard theories to describe political transitions.<sup>45</sup> The meaning of the political settlements takes as a starting point that the transformation from conflict to peace is a non-linear process that incorporates the peace agreement and the constitution. There is a growing recognition that political settlements must also be inclusive to be successful,<sup>46</sup> even as there is an acknowledged tension between participation and elite-level bargaining across the process.<sup>47</sup> The literature on peace agreements critically evaluates the text and provisions included in peace agreements<sup>48</sup>, including transitional justice and amnesties,<sup>49</sup> ethnic and national identity,<sup>50</sup> human rights<sup>51</sup> and peacekeeping and security.<sup>52</sup> In addition, research on peace agreements assesses the representativeness of peace agreements, such as the inclusion, in both the process and agreement, of civil society,<sup>53</sup> gender,<sup>54</sup> and minorities. However, the literature does not thoroughly evaluate the long-term implementation of the agreement, not including, as a notable exception, active debates on power-sharing arrangements.<sup>55</sup>

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<sup>40</sup> See Zartman, *Ripe for Resolution* (1989).

<sup>41</sup> See Stedman, 'Spoiler Problems' (1997).

<sup>42</sup> See Stedman *et al.*, eds, *Ending Civil Wars* (2002) and Walter, *Committing to Peace* (2002), 4 who argues that 'it is the implementation phase, long ignored by scholars, that is the most difficult to navigate and the reason so many negotiations fail'.

<sup>43</sup> Those of note are J Bercovitch, FO Hampson, JZ Rubin, TD Sisk, IW Zartman. See also the United States Institute of Peace (USIP) especially, Crocker *et al.*, eds., *Herding Cats* (1999).

<sup>44</sup> See Holbrooke, *To End a War* (1999) which memorialises Holbrooke's role in the Dayton Peace Accords.

<sup>45</sup> Bell, 'What We Talk About When We Talk About Political Settlements' (2015). For more on political settlements see the Political Settlements Research Programme website (<http://www.politicalsettlements.org/>).

<sup>46</sup> Castillejo, *Promoting Inclusion* (2014).

<sup>47</sup> See Sapiano *et al.*, 'Constitution-Building in Political Settlement Processes' (2016).

<sup>48</sup> Bell, *On the Law of Peace* (2008), 6.

<sup>49</sup> Bell *et al.*, 'Transitional Justice' (2007).

<sup>50</sup> Noel, ed., *From Power-Sharing to Democracy* (2005); McEvoy and O'Leary, eds., *Power-Sharing* (2013).

<sup>51</sup> Bell, *Peace Agreements and Human Rights* (2000).

<sup>52</sup> Ratner, *The New UN Peacekeeping* (1995), 26-28.

<sup>53</sup> Bell and O'Rourke, 'The People's Peace?' (2007).

<sup>54</sup> Chinkin, 'Gender, Human Rights and Peace Agreements' (2003); Bell and O'Rourke, 'Peace Agreements or Pieces of Paper?' (2010); and McWilliams, 'Women at the Peace Table', in *Gender and Peacebuilding*, edited by Flaherty *et al.* (2015).

<sup>55</sup> See, for example, Weller and Metzger, *Settling Self-determination Disputes* (2008).

Whether peace is best achieved by accommodating rival ethnic and religious groups or assimilating them under a single identity is disputed in the comparative politics scholarship. Nowhere is this better exemplified than in the debate between scholars Donald Horowitz and Arend Lijphart.<sup>56</sup> Their exchange centres on the accommodation model, with Lijphart advancing consociationalism<sup>57</sup> as a set of principles for institutional design to manage divided societies. Horowitz rejects Lijphart's thesis in favour of centripetalism, as an incentive based approach through electoral engineering.<sup>58</sup> Timothy Sisk offers a power-sharing approach that combines both approaches as part of the peace process in ethnic conflicts.<sup>59</sup> These positions are in addition to other democratic alternatives to majoritarianism, such as the protection of minority rights through policies of multiculturalism or territorial pluralism in a federation.<sup>60</sup> The accommodation model contrasts with the integration approach, which sits in fine balance between assimilation and individual rights and identity. The integration model approach to introduce democracy and peace into deeply divided states is to build common political institutions and identity, and to remove cultural, linguistic and ethnic identity from public discord. This policy is commonly favoured by the United Nations, the World Bank, the International Monetary Fund, peace research institutes and academic conflict resolution centres.<sup>61</sup> The success of this model is debatable. While there has been a marked increase in constitution-making, there has been a notable rise of constitutional breakdown. Focusing on Africa (the cases considered are Burundi, Ghana, Nigeria, Senegal, Sudan and Zimbabwe), Alan Kuperman 'counterintuitively' recommends against,

promoting the constitutional design typically prescribed by academics for ethnically divided societies—which is based on decentralization and other explicit accommodation of ethnic groups— because it would be too different from what currently exists<sup>62</sup>

However, Nic Cheeseman takes the opposite view, critiquing Kuperman's conclusions for '[underestimating] the danger of centralized constitutions and [overstating] the risks of introducing inclusive political arrangements'.<sup>63</sup> Cheeseman concludes, based on his own

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<sup>56</sup> In addition to Horowitz and Lijphart, DS Lutz, J Linz, G Sartori and G O'Donnell have contributed to the comparative politics literature.

<sup>57</sup> Lijphart, 'Constitutional Design' (2004); Lijphart, *Thinking About Democracy* (2008); Lijphart, *Patterns of Democracy* (2012).

<sup>58</sup> Horowitz also advocates federalism and presidential systems in Horowitz, *Ethnic Groups* (2000) and Horowitz, *A Democratic South Africa?* (1991); see also Horowitz, 'Constitution-Making' (2007) and Horowitz, 'Conciliatory Institutions' (2008).

<sup>59</sup> Sisk, *Power Sharing and International Mediation* (1995). Sisk's book is an effort to link scholarship on power-sharing, from the comparative politics literature, with the literature on mediation.

<sup>60</sup> McGarry *et al.*, 'Integration or Accommodation?', in *Constitutional Design*, edited by Choudhry (2008).

<sup>61</sup> *Ibid.* Of course, this is a generalisation which is examined in more depth in Kymlicka, 'The Internationalization of Minority Rights', in *Constitutional Design*, edited by Choudhry (2008).

<sup>62</sup> Kuperman, 'Designing Constitutions', in *Constitutions and Conflict*, edited by Kuperman (2015), 2.

<sup>63</sup> Cheeseman, 'Accommodation Works' (2016), 539.

research on democracy in Africa,<sup>64</sup> that violence and instability are caused by centralised constitutional systems that exclude opposition groups for political ends, so that ‘allowing integrative constitutions to remain in place with only limited reforms, as Kuperman recommends, would pose a major risk to continental peace and democracy.’<sup>65</sup> In agreement with Kuperman, however, he urges caution in undertaking constitutional transitions, when the risk of violence is high.

Constitutional courts are political, not simply judicial, institutions.<sup>66</sup> This assumption is widely accepted in practice and academia and reflected in the scholarship on constitutional courts. However, the debate as to whether authority is held in the law or politics at the foundation of constitutionalism, and so is critical to the discussion on constitutional interpretation. While Frank Michelman reasons that ‘nobody who participates seriously in constitutional discussions [can] overlook ... one of the two viewpoints, the rule of the people or the rule of the law, in the long term’,<sup>67</sup> the tension between those who give priority to the law or politics is ever present in the discourse.<sup>68</sup> This tension is present in the debate between Hans Kelsen and Carl Schmitt on the foundational authority of the constitution. Binary arguments are also central to the issue of constitutional interpretation, between those who hold that the judiciary should be the final arbiter of the constitution against those who dismiss this, advocating the supremacy of the legislature to interpret the constitution.

Hannah Arendt, who, as a political theorist writing on violence, revolution and authority,<sup>69</sup> also reflected on this most basic contest on law and politics. To Arendt, law is the foundation of society<sup>70</sup>, although much of the work on Arendt asks, ‘what is *politics*’ not ‘what is *law*’. Arendt, however, is unique amongst political theorists for her focus on law and legal proceedings:

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<sup>64</sup> See Cheeseman, *Democracy in Africa* (2015).

<sup>65</sup> Cheeseman, ‘Accommodation Works’ (2016).

<sup>66</sup> This argument is a reasonably well supported; however, some would disagree with this statement, see Dahl, ‘Decision-Making’ (1957) who makes this case about the American Supreme Court.

<sup>67</sup> Michelman, ‘Kollektiv, Gemeinschaft’ in *Auf der Suche nach der gerechten Gesellschaft*, edited by Frank Frankenberg (1994), 61 quoted in Volk, *Arendtian Constitutionalism* (2015), 173.

<sup>68</sup> There are some, for example F Michelman and J Habermas, who argue for a third approach that gives equal weighting to law and politics. Still, in the academy, which is entrenched in its disciplinary divide, their approach is not in the majority, see Volk, *Arendtian Constitutionalism* (2015).

<sup>69</sup> Arendt was a self-described ‘political theorist’, however, I would also place her in the more limited group of constitutional theorists, see Hayden, ed., *Hannah Arendt* (2014) which, in addition to Hayden’s introduction on Arendt as a theorist and person, each chapter is dedicated to a concept (such as revolution, violence, statelessness, evil, power and violence) or topic on which Arendt’s writing were influential.

<sup>70</sup> ‘No civilization — the man-made artifact to house successive generations — would ever have been possible without a framework of stability, to provide the wherein for the flux of change. Foremost among the stabilizing factors, more enduring than customs, manners, and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other’ (Arendt, ‘Civil Disobedience’ in *Crises of the Republic*, edited by Arendt (1972), 79 quoted in Volk, *Arendtian Constitutionalism* (2015), 173.

[Arendt] was well aware of the intimate and reciprocal relationships between law and politics. Where political theorists generally tend to treat law as the result of politics (and thus as somehow epiphenomenal, and of lesser importance), for Arendt, so it seems, law was more than just the outcome of politics, or the reflection of politics, or the handmaiden of politics. Reflecting on legal trials and judgments made sense to her, precisely because of their political relevance. Law, to her, was an intrinsic part of political action and, as every activist will realize, often political action is geared to facilitate legal change.<sup>71</sup>

Arendt has the rare ability to cross between legal and political theory, and into the discrete discipline of constitutional theory. It is for this reason that I use Arendt in making my argument here, especially on the place of violence in constitutions, for which Arendt had a distinct contribution as a scholar writing on the American and French revolutionary, on political violence and criminal courts (in her work on the Eichmann trials). However, apart from a few key contributions, Arendt's reflections on law and constitutions have not gained the same level of academic interest as her work on violence and power. This does seem, however, to be changing with a renewed interest in constitutional change and contestation. At the international level, there is likewise, an increased recognition that international law and politics are intertwined, a 'notable development because, traditionally, liberal theories of constitutional rule have construed law and politics as being in opposition and, further still, that law serves as an imagined check on the excesses of state power and authority.'<sup>72</sup> There has also been a strong tendency in politics to dismiss the impact or strength of international law, as argued by Hans Morgenthau in *Politics Among Nations*, that 'the political realist maintains the autonomy of the political sphere [and] thinks in terms of interest defined as power ... the lawyer, of conformity of action with legal rules'.<sup>73</sup> This thesis aims to find some middle ground between law and politics accepting that politics can dominate, but also that the law is something more than simply politics by other means.<sup>74</sup>

Comparative constitutional law and comparative politics have integral roots. Early scholars within the field were interdisciplinary,<sup>75</sup> and while that trend was halted for a period, there are recent examples of cross disciplinary collaboration. For example, Sujit Choudhry, a

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<sup>71</sup> Klabbers, 'Possible Islands of Predictability' (2007), 2.

<sup>72</sup> Rajkovic *et al.*, 'Introduction' in *The Power of Legality*, edited by, Rajkovic *et al.* (2016), 1.

<sup>73</sup> Morgenthau, *Politics Nations* (1966), 13 quoted in *ibid*, 2.

<sup>74</sup> On the need to better combine the social sciences and law, particularly in the study of comparative constitutionalism, see Hirschl's 2013 editorial in the *International Journal of Constitutional Law*. Hirschl advocates a new methodological approach that combines the study of law and politics to get a more holistic understanding of the social and political impact of constitutions, not simply an evaluation of their jurisprudence. While this thesis continues with this trend of analysing court and their case law, it is also intended to draw together the two disciplines to understand how courts are acting in political ways to help hold together the peace agreement. This thesis also hopes to speak to both lawyers and social scientists. Hirschl, 'Editorial' (2013).

<sup>75</sup> Crane and Moses, *Politics* (1884) and Burgess, *Political Science and Comparative Constitutional Law* (1893) are both examples given in Hirschl, *Comparative Matters* (2014), ch 4.

constitutional theorist, in his edited book on constitutions in divided societies, synthesizes the legal and political scholarship.<sup>76</sup> Choudhry's stated motivation for doing so was to fuse the debates on divided societies taking place in comparative politics and comparative constitutional law. There is a similar push in methodology to combine politics and law. Ran Hirschl, in advocating the incorporation of social science methodology into comparative constitutional law,<sup>77</sup> unequivocally argues that '[a]ny attempt to portray the constitutional domain as a predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, a-historical, overly doctrinal or formalistic accounts of the origins, nature and consequences of constitutional law'.<sup>78</sup> The current methodological fashion of straddling politics and law – although still shaky – makes this thesis a very timely contribution to the field. Comparative constitutional law, itself a subset of comparative law and constitutional law, has experienced a renaissance in the last three decades, being revived as an academic discipline following the constitution writings concluded in Eastern European, Latin American and South Africa after 1989. Contemporary literature in this field has largely been concerned with rights and rights-based institutions since its academic revival.<sup>79</sup> Comparative constitutional studies consider the constitution-making process<sup>80</sup> and constitutional design.<sup>81</sup> However, it is important to note that the impact of a constitution on long-term stability cannot be gleaned from its inception nor is it sufficient to simply consider the process of design and creation in and of itself.<sup>82</sup>

Anne-Marie Slaughter and her co-authors wrote in the *American Journal of International Law* that 'political scientists and international lawyers have been reading and drawing on one another's work with increasing frequency and for a wide range of purposes'.<sup>83</sup> However, interdisciplinary scholarship between international law and International Relations, irrespective of such pronouncements, is hesitant and, apart from some notable exceptions,<sup>84</sup> continues to be limited.<sup>85</sup> International Relations scholars have, however, begun to delve into constitutional law, which has traditionally been the prerogative of the constitutional or

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<sup>76</sup> Choudhry, ed., *Constitutional Design for Divided Societies* (2008).

<sup>77</sup> Comparative constitutional law, which as a specialised legal field, has adopted its own methodological framework. See Jackson, 'Comparative Constitutional Law' in *The Oxford Handbook of Comparative Constitutional Law* edited by Rosenfeld and Sajó (2012) and Hirschl, 'The Question of Case Section' (2005).

<sup>78</sup> Hirschl, 'From Comparative Constitutional Law' (2013), 2.

<sup>79</sup> Choudhry, 'Introduction', in *Constitutional Design*, edited by Choudhry (2008).

<sup>80</sup> See, for example, Miller, ed., *Framing the State* (2010) and Elster, 'Forces and Mechanisms' (1995).

<sup>81</sup> See, for example, Choudhry, ed., *Constitutional Design* (2008) and Ginsburg, ed., *Comparative Constitutional Design* (2012).

<sup>82</sup> See Kuperman, 'Designing Constitutions', in *Constitutions and Conflict*, edited by Kuperman (2015), 19 who also argues that the process of constitution-making and institutionalisation may be more important than its design (that is, whether it is accommodative or integrative).

<sup>83</sup> Slaughter *et al.*, 'International Law and International Relations Theory' (1998), 367.

<sup>84</sup> See, for example, work by Alec Stone Sweet; Martti Koskenniemi; and Benedict Kingsbury.

<sup>85</sup> There are, however, some notable exception. These include Friedrich Kratochwil, Christian Reus-Smit and Michael Byers.

comparative constitutional law scholars.<sup>86</sup> The lure of constitutionalism and constitutional law to the International Relations academy is the effect of the constitutionalisation of international law and the internationalisation of constitutional law.<sup>87</sup>

International law and constitutional law are two branches of law which have a strong bearing on the other. The link between the two has resulted in the development of an emerging literature in international constitutional law. There are three distinguishable exchanges between scholars in this field.<sup>88</sup> The first perspective is the ‘internationalisation of domestic constitutional law’ which is occurring because of international human rights standards and tribunals and through constitutional borrowing.<sup>89</sup> The second perspective is concerned with the influence capacity and reach of international law in domestic constitution-making processes, which ‘makes explicit ... the idea that both domestic and international spheres play a role in creating constitutional orders’.<sup>90</sup> The final perspective is ‘the constitutionalisation<sup>91</sup> of international law’ which is further sub-categorized into three projects. The first such project is concerned principally with the work of Jan Klabbers and Anne Peters,<sup>92</sup> who see an emerging international constitutional order where the law is supreme to politics. The second project is a constitutionalisation of international law. The European Union is most often cited as having the necessary characteristics of this international constitutional order. The UN is also cited as the centre of a global constitutionalism.<sup>93</sup> The third project suggests that the flow of constitutional language and values from the national level to the international level points to an emerging international constitutional method. The relationship between international law and constitutional law is still developing, the full implications of which are not yet clear.

In addition to the literature on peace agreements and state building, this thesis draws upon constitutional law literature.<sup>94</sup> Thus in addition to this thesis’ primary original contribution

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<sup>86</sup> Wiener *et al.*, ‘Global Constitutionalism’ (2012).

<sup>87</sup> Bell, ‘What We Talk about When We Talk about International Constitutional Law’ (2014). Bell, in cataloguing these narratives, is looking to resolve whether, and if so where, these intellectual approaches speak to each other. It is her contention that while the first two perspectives are in regular discussion, the third is the outlier.

<sup>88</sup> *Ibid.*

<sup>89</sup> See for example, Jackson, *Constitutional Engagement* (2012) and Choudhry, ed., *The Migration of Constitutional Ideas* (2010).

<sup>90</sup> Bell, ‘What We Talk about When We Talk about International Constitutional Law’ (2014), 243.

<sup>91</sup> Constitutionalisation is defined by the editors of *Global Constitutionalism* as ‘the process by which institutional arrangements in the non-constitutional global realm have taken on a constitutional quality’ (Wiener *et al.*, ‘Global Constitutionalism’ (2012), 5).

<sup>92</sup> See Klabbers *et al.*, *The Constitutionalization of International Law* (2011).

<sup>93</sup> See, for example, Fassbender, *The United Nations Charter* (2009).

<sup>94</sup> See Rosenfeld and Sajó, ed., *The Oxford Handbook of Comparative Constitutional Law* (2012); Ginsburg and Dixon, ‘Introduction’, in *Comparative Constitutional Law*, edited by Ginsburg and Dixon (2011); Jackson and Tushnet, eds. *Defining the Field of Comparative Constitutional Law* (2002).

of advancing the argument on peace constitutionalism, a secondary contribution is made by linking these two disparate bodies of literature.

Most of the world's modern one hundred and seventy written constitutions include some form of judicial review, making constitutional courts and judges the primary interpreters of this document. The legitimacy of courts as the 'least dangerous branch'<sup>95</sup> to interpret the constitution is disputed. Ronald Dworkin<sup>96</sup> and John Ely Hart<sup>97</sup> best enunciate the arguments for judicial review in contemporary jurisprudence. On the other hand, Jeremy Waldron,<sup>98</sup> Mark Tushnet<sup>99</sup> and Richard Bellamy<sup>100</sup> have argued against judicial review in favour of political constitutionalism. Although the merits of judicial review debatable, the inclusion of a strong constitutional court is commonplace, especially in newer constitutions in states where the political establishment is regarded with distrust.<sup>101</sup>

There is no shortage of work on the spread of constitutionalism and judicial review. However, despite the close connection between peace agreements and constitutionalism, the evaluation of judicial review and the role of courts in constitutional orders have been assumed to be focused on a goal of democratisation, rather than of peace.<sup>102</sup> Much of the key scholarship relating to courts and transitions has focused on authoritarian transitions and the role of courts as democratisers. I suggest that a distinctive set of peace constitutions exists, and that when we examine cases arising post settlement, in transitions from conflict rather than authoritarianism, peace is the foundation of the constitution and, in such cases, forms the focus of courts in judicial review.

The American example is a fascinating case of constitutional theory and practice – for the constitution, although amended, is the oldest in the world, and has even survived political collapse in the American Civil War. For these reasons, constitutional theorists are drawn to the American model, a tradition which is followed here. However, there is danger in overextending its usefulness as a case study.<sup>103</sup> Nevertheless, it is worthwhile to explore the

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<sup>95</sup> Alexander Hamilton contended that the US Supreme Court would be the 'least dangerous to the political rights of the Constitution' (Hamilton, Federalist No. 78 ([1788] 2009)). See also Bickel, *The Least Dangerous Branch* (1986) on the legitimacy and scope of judicial review by the American Supreme Court.

<sup>96</sup> Dworkin, *Law's Empire* ([1986] 1998).

<sup>97</sup> Ely Hart, *Democracy and Distrust* (1980).

<sup>98</sup> Waldron, 'The Core of the Case' (2006).

<sup>99</sup> Tushnet, *Taking the Constitution Away* (2000).

<sup>100</sup> Bellamy, *Political Constitutionalism* (2007).

<sup>101</sup> Ginsburg, *Judicial Review in New Democracies* (2003).

<sup>102</sup> See for example, Issacharoff, *Fragile Democracies* (2015).

<sup>103</sup> Tom Ginsburg makes the same case in his study of judicial review, see Ginsburg, *Judicial Review in New Democracies* (2003), ch 4 (he also includes a more detailed discussion on the foundational cases). James Madison, writing in 1830, makes the point that the American Constitution itself is 'sui generis'. The American Constitution is 'so unexampled in its origin, so complex in its structure, and so particular in some of its features, that in describing it the political vocabulary does not furnish terms sufficiently distinctive and appropriate, without a detailed resort to the facts of the case'. (James

American justification for interpreting judicial review into their Constitution. A plain text reading of the Constitution is non-determinative on this subject; however, the decision of the Marshall Court in the Case of *Marbury v Madison*<sup>104</sup> altered the reading of the constitution and consequently the overall shape of American politics. The decision taken by Justice Marshall in this case as it concerns the jurisdiction of the Court can find extra-constitutional precedent in the writings of Alexander Hamilton. Hamilton, in a most famous pronouncement on the judiciary, reasoned in the Federalist Papers that,

the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution ... has no influence over either the sword or the purse ... It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>105</sup>

The debate concerning the legitimacy of constitutional courts to practice strong-form judicial review, and whether the participation of courts in ruling on political questions benefits or hinders democracy, is contained in the debate between political and legal constitutionalism. However, this on-going debate does not address the concerns of judicial review under a peace constitution. By the nature of the negotiation, peace agreements attempt to achieve elite pacts that are comprehensive, however, there is then risk that these deals are limited. Courts often must both acknowledge and protect the elite pact while acknowledging its limited nature and the need to ultimately move beyond it.

The question as to whether the court *ought* to act in such a capacity will not be tackled directly in this thesis; however, there is already extensive academic debate on the normative role of the judiciary in a democracy. That said, I do have a normative bias towards judicial review that is clear in this thesis.<sup>106</sup> However, it is not intended to be made as an explicit argument that courts should have such a defining role in determining the meaning of a peace constitution, and through that interpretation, the meaning of peace. The position in this thesis is not that courts are the best institution to interpret the constitution, but that they are often put into a privileged place to do so as part of the constitutional arrangement. This is particularly so for constitutions drafted as part of a political settlement process where political institutions are viewed with suspicion.

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Madison to Daniel Webster, May 27, 1830, *Madison Letters*, 4, 85 quoted in Hendrickson, *Peace Pact* (2003), 16). The tensions between comparative analysis and context is discussed in the methodology section above.

<sup>104</sup> *Marbury v Madison*, 5 U.S. (1 Cranch) (1803) 137.

<sup>105</sup> Hamilton, Federalist No. 78 ([1788] 2009).

<sup>106</sup> As Mark Tushnet comments: ‘every approach to comparative constitutional law carries with it some ideological baggage’ for example, ‘ideologies associated with the field are cosmopolitan and liberal constitutionalism’. This study is no different in holding some bias, although the intention of the thesis is not to up hold that bias, rather, it is to begin to lay the groundwork to considering courts as actors in the peace process, whether that influence is useful or not. (Tushnet, *Advanced Introduction* (2014), 8).

## Conclusion

Part of the original contribution of this thesis is analysing the political settlement process – from negotiation of the peace agreement to the judicial interpretation of the subsequent constitutional documents – the outcome of which may influence those involved in the initial stage of constructing the peace agreement. The parties at a peace process are required to make numerous compromises in the interest of finding an approved settlement. To find agreement between warring parties, third party states or organisations, and non-combatant actors is, to say the least, hard. To begin a search for agreement without fully appreciating the implications of that agreement places an additional burden on the parties. Accordingly, this thesis attempts to navigate the process from negotiation to interpretation to supplement the comparative constitutional literature with a theory on peace jurisprudence.

This thesis aims to explore how peace constitutions are interpreted, holding that interpretation of a constitution grants the constitution agency and transforms it into an on-going activity rather than a one-time event. More specifically, it is through the language of interpretation that the peace constitution finds agency and activity. It is also through the language of interpretation that the peace constitution is (re)negotiated. Judicial review is not necessarily good but rather facilitates a language through which to assess the meaning of the political settlement and by which the political settlement can be (re)negotiated. The peace constitution is one arrangement represented in the broader political settlement that transitions a state from conflict to peace. The judiciary, and, as importantly, the legislature and executive, are also represented in the political settlement and have a role in its implementation.

## Chapter One: Peace Agreements in Law

DAVID HUNTER MILLER, a legal advisor to the American delegation at the 1919 Paris Peace Conference, wrote a decade after the drafting of the Covenant of the League of Nations, that '[t]he truth is that the Covenant, as a political document, has worked about as it was written, subject as any such Treaty, of necessity, must be, to the shifting political actualities of the times'.<sup>107</sup> This, he accepts, 'could not be otherwise in an imperfect world', and that the correspondence of 'George Washington as President discloses many similar doubts and hesitations in early American history'.<sup>108</sup> This statement conveys, in many ways, the assumption made in this thesis that peace treaties are imperfect documents, drafted by negotiation and out of necessity. The Covenant of the League of Nations was a defining document in international law, and yet, was, as Miller recalls, an imperfect political document drafted to prevent the possible resumption of war that cost the lives of millions.

The reality of the Covenant was subject to the politics of the time. It was as vulnerable to the political disputes between states, as all peace agreements are vulnerable to tensions between its parties, and ultimately, may very well be incapable of preventing a return to war. Miller, writing in 1928, could not have foreseen the collapse of the League or the start of the Second World War, but, even then, believing in the experiment of a peaceful international organisation, he accepted that on paper it was something different from practice, in much the same way, he says, as the American constitutional project. This light reference to the American constitution makes his insight particularly appropriate. Although Miller did not understand the Covenant as a constitution,<sup>109</sup> his remarks hint at the similarity between peace agreements and constitutions, both imperfect texts, drafted out of necessity, and, so in writing and interpretation, subject to political reality.

This chapter is concerned with the peace process and their agreements under the framework of international law.<sup>110</sup> The laws of war and peace are necessary to think about in this discussion. First, to give clarity to the concept of peace, which becomes relevant later in this thesis when discussing the reasoning of the apex courts in Northern Ireland, Bosnia-

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<sup>107</sup> Hunter Miller, *The Drafting of the Covenant* (1928), 551.

<sup>108</sup> *Ibid*, 551.

<sup>109</sup> For example, the global constitutionalism argument compares the UN Charter to a constitution.

<sup>110</sup> Databases of peace agreements have been compiled by Conciliation Resources (Accord), the USIP, the United Nations Department of Political Affairs (Peacemaker), the Uppsala Conflict Database Program and the PA-X database hosted by the Political Settlements Research Programme at the University of Edinburgh (this database currently hosts agreements that reference women and gender, however it is an ongoing project). INCORE and the Transitional Justice Institute at the University of Ulster host the Peace Agreement Database. Most agreements used in this thesis were found on the Peacemaker website (UNDPA).

Herzegovina and Colombia. Second, as peace agreements are negotiated and exist within the space between war and peace, the legal status of both, and the agreement itself, are important to understand the function and capacity of a peace agreement, and its relationship to the constitution and peace jurisprudence of the courts. In keeping with the international legal approach in this chapter, the first section includes a summary on the distinction between international armed conflict (IAC) and non-international armed conflict (NIAC), with particular regard to how international law applies to NIAC.<sup>111</sup> This section then, briefly, looks to the emerging international norms (or laws) of peace-making, before turning to a discussion on the legal status of peace agreements. This includes a discussion of the status of peace agreements as international treaties. This chapter also touches on questions of self-determination and power-sharing arrangements, relevant topics in many peace negotiations, including those in Bosnia-Herzegovina and Northern Ireland. International law, especially human rights law, has bearing on the negotiations of peace agreements and their implementation. Where these points of law are not covered directly in this chapter, it will be touched on later in the thesis.<sup>112</sup> As Miller recognised, peace agreements are political documents and so are vulnerable to political action. The concluding section, therefore, turns to an evaluation of legal and political authority and the problem of legitimacy held by peace agreements.

### Laws of War and Peace

Peace is a contested term and an ambiguous concept. In an unsophisticated narrative, war is nothing more than the absence of peace and peace the absence of war.<sup>113</sup> Yet, the meaning of peace is ephemeral, moving with international political shifts, so that where a state of peace was once thought of as contrary to a state of war, the present understanding of peace is more complex. Peace requires the achievement of a certain level of development, satisfying the rule of law, and recognising and complying with basic human rights norms. Furthermore, peace

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<sup>111</sup> The terms international armed conflict (IAC) and non-international armed conflict (NIAC) are those used in the Geneva Convention (1948). I use them interchangeably with interstate conflict and intrastate conflict, respectively.

<sup>112</sup> For example, under the 1991 Colombian Constitution, the Court extended the ‘bloque de constitucionalidad’ (constitutional block) doctrine under Art 93, which allows the Court to ‘block’ a constitutional amendment if it conflicts with international law, which in accordance with this doctrine is incorporated into the constitution. However, in the cases considered below the Court found in favour of peace over principles of international law. Amnesties for the highest level of crimes are inconsistent under international humanitarian and human rights law, however, the Court found in favour of the ‘Legal Framework for Peace’ constitutional amendments, although they allowed for limited amnesties (see chapter four). For more on the block doctrine and its migration from Europe to Latin America see Góngora Mera, *Inter-American Judicial Constitutionalism* (2011), 167-198.

<sup>113</sup> Mac Ginty, *No War, No Peace* (2008), 18 and Richmond, ‘Understanding Peace’ (2005), in this paper, Richmond’s paper looks of the consequences of understanding peace as a ‘liberal peace’ (or negative peace). The paper predates some of his (and R Mac Ginty’s) later work on the critique of liberal peace.

must not be thought of as a momentary event but rather as a process, without a clearly defined (or definable) endpoint.<sup>114</sup>

The ideological grounding of peace is also at issue. There are many who object to the imposing of a 'liberal' peace, suggesting that the high level of involvement by the international community has led to imposed, top-down (and, thus, often unstable) peace, rather than encouraging grassroots peace processes as a more suitable means to provide permanent peace.<sup>115</sup> While the critique of liberal peace is broadly accepted in the literature, it can however, tend towards generalisations, and inflate the involvement and influence of the international community in peace processes and agreements.<sup>116</sup> The UN, although without doubt an organisation with reach and influence in peace-making, the presence or participation of the UN in peace agreements is not commonplace.<sup>117</sup> Empirically, the UN may have limited formal involvement in many peace processes, however, it (and other international organisations and actors) have broad influence in the peace and constitution-making processes. There is certainly scope to challenge this involvement on normative and practical.<sup>118</sup> Nonetheless, the liberal peace critique literature is useful in combating the preconceived notions of what is required for negative peace; however, the approach adopted here shifts away from this perspective, in part, as it accepts a legal and constitutional point of view.<sup>119</sup>

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<sup>114</sup> The recognition that peace is a process is reflected in the idea of the political settlement, which conceives of the peace agreement, constitution and on-going political transition as a continuous negotiation process (Fritz and Menocal, *Understanding State-Building* (2007)). So that even those states that are not engaged in violent conflict are based on a political settlement (Brown and Grävingsholt, *From Power Struggles* (2011), 9). Many states (the US or Australia, for example) exist in a state of peace, however, there is also constant contestation in the political space that has the potential to trigger political violence or rupture (however mild). For example, there have been past and ongoing racial tensions in the US and continuing discrimination against indigenous communities in Australia, which have implications on the constitution in both cases. There are also concerns with structural violence that exist long after the cessation of conflict. There is, however, more space and time for constitution drafting or amending where there is no violence or near-violence.

<sup>115</sup> See the work by Roger Mac Ginty (and others) on 'hybrid peace' (for example, Mac Ginty, 'Hybrid Peace' (2010)).

<sup>116</sup> See discussion on the role of the international community in chapter two.

<sup>117</sup> Of the 585 agreements signed between 1 January 1990 and 1 May 2010, the UN was a signatory or mediator in only 196 agreements (33.5 percent), Bell and O'Rourke, 'Peace Agreements or Pieces of Paper?' (2010), 958.

<sup>118</sup> See Tushnet, 'Some Skepticism' (2008), who cautions against giving advice (Tushnet is speaking of constitutional advice in his argument, but the same case may be made of about peace agreements) as such 'reflection and choice' must be made on the ground, so that outside opinion is 'pointless'. Again, see chapter two for more of a discussion on this point.

<sup>119</sup> For a very useful summary of the critique of liberal peace – including the arguments that have been made for and against, and the list of achievements that have emerged from the literature (along with a bibliography of relevant material) see Richmond and Mac Ginty, 'Where Now for the Critique of Liberal Peace?' (2015).

There are assumptions in some of the literature (and in practice) that peace and democracy are synonymous, assumptions are challenged in this thesis. The argument that peace agreements always conform to a liberal framework, is likewise, over generalised. Power sharing arrangements allow for an illiberal organisation of government on the grounds of ethnicity (in the instance where ethnicity is the identity factor at stake in the conflict, opposed to political power sharing arrangements, which have different implications).<sup>120</sup> Such consociational, or power-sharing arrangements, are common in peace agreements,<sup>121</sup> although they are often used alongside other arrangements. In making this case, it is not to dismiss the problems that come from the forced inclusion of liberal norms in peace agreements or the lack of legitimacy that arises from negotiations being held between elite stakeholders, often outside the country in which the conflict is taking place, making grassroots participation more difficult.

### *The History of War and Peace*

War, in medieval thinking, was an aberration of the natural condition of peace, although it was the general and expected state of international life. This outlook was held until the 17th century when a new conception of the state of nature being in perpetual war became more widely believed. This conception of the international system regards each state as acting in perpetual competition and thus being in constant jeopardy of returning to war. The 19th century jurist conceived of war as a legitimate and rational state policy, rejecting previous convictions that this was in consequence of man's natural state of being.

Only in the 20th century was peace, not war, thought to be the natural condition of the international system. Within this paradigm, the League of Nations was established as an international collective security mechanism. War, under the League, was a permitted state policy, although only in the case where all peaceful means of resolution had been exhausted. In accordance with Article 10:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.<sup>122</sup>

The adoption of the phrase 'external aggression' is noteworthy. External was included to avoid the extension of the Covenant to intrastate wars and the concept of aggression was a contentious term. The Covenant set up a mechanism for potential collective enforcement, which up to then had not been present in the international legal system. This provision was included in Article 11, which reads as follows:

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole

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<sup>120</sup> See, for example, Levitt, *Illegal Peace in Africa* (2012).

<sup>121</sup> Choudhry, 'After the Rights Revolution' (2010).

<sup>122</sup> *Covenant of the League of Nations*, Article 10.

League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.<sup>123</sup>

The Kellogg-Briand Pact (General Treaty for Renunciation of War as an Instrument of National Policy, 1928) was the first international treaty to make war or the use of force unlawful outside of self-defence,<sup>124</sup> allowing states to resort to war only for selfless reasons, that is, not in the pursuit of national interests.<sup>125</sup> The start of WWII demonstrated the impossibility of holding states to account to this higher ideal of international relations. Acknowledging the failure of the League to maintain international peace, the victors of the Second World War made a second attempt to restrict the *jus ad bellum* under the UN Charter, prohibiting states from resorting to armed conflict, outside of an act of self-defence or sanction by the Security Council. The Charter, however, has no recourse to ban war within state borders. In fact, the Charter, under Article 1(7), prevents the UN from intervening ‘in matters which are essentially within the domestic jurisdiction of any state or [from requiring] the Members to submit such matters to settlement’.

The laws of war were principally developed as categories under the law of nations (*jus gentium*). However, war between states has become gradually less frequent since the end of the Cold War. Although intrastate war often involves, in some capacity, international actors or third-party states, armed conflicts largely occurs within states between government forces and rebel groups.<sup>126</sup> The application of international humanitarian law has been gradually, but not completely, applied to non-international armed conflicts. The Geneva Convention, under Common Article 3,<sup>127</sup> is the first instance in international humanitarian law in which intrastate war was recognised. The law applicable in the case of non-international armed conflict was limited in the Geneva Conventions, however, in 1977 the Additional Protocol II

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<sup>123</sup> *Covenant of the League of Nations*, Article 11.

<sup>124</sup> That the Kellogg-Briand Pact outlawed war (or aggression) was argued at Nuremburg, however, whether this was the case continues to be disputed.

<sup>125</sup> The language of the Pact suggests that its terms were limited to relations between signatories, and thus, parties could use force against non-signatories without being in violation of the agreement (for example, Article I was limited to signatories ‘relations with one another’).

<sup>126</sup> Rebel and insurgent are often used interchangeably, and for the purposes of this discussion, I will continue to do so, while accepting that upon deeper exploration there may be differences in the definitions of each.

<sup>127</sup> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria ... The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

to the Geneva Convention, further extended the principle of humanitarian law applicable in conflict not of an international character.

The Geneva Conventions, in addition to extending international humanitarian law to non-international armed conflict under Common Article 3, formalised the custom concerning declarations of war, extending the application of the conventions to all armed conflict, irrespective of whether a state of war had been legally declared. From the late middle ages to the 20<sup>th</sup> century, the legal traditions on the declaration of war were well established. A state of war did not exist until a formal declaration had been proclaimed.<sup>128</sup> The legal convention where a declaration of war formally moved two, or more parties, into a legal state of war declined after the official outlawing of war in the Kellogg-Briand Pact (1928) and the UN Charter (1945). Currently, there is no clear definitional line between existing in a state of war and a state of peace.

In part for this reason, the application of the laws of war and peace have become tangled. The International Court of Justice (ICJ), in its advisory opinion of the *Legality of the Threat or Use of Nuclear Weapons*, determined that ‘the protection of the International Covenant on Civil and Political Rights<sup>129</sup> does not cease in a time of war’.<sup>130</sup> The Court again found that a situation may exist in which both humanitarian law and human rights law are applicable in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>131</sup> In the judgment of the Court,

[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet other may be matters of both these branches of international law.<sup>132</sup>

Further, the Court determined that international human rights law is applicable to states in the exercise of their power outside their own territory.<sup>133</sup> In a third case regarding the applicability of international humanitarian and human rights law, the Court, in the *Armed*

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<sup>128</sup> See, for example, Neff, *Justice among Nations* (2014) and Lesaffer ‘Peace Treaties and the Formation of International Law’, in *The Oxford Handbook of the History of International Law*, edited by Fassbender and Peters (2012), 72.

<sup>129</sup> The International Covenant on Civil and Political Rights (ICCPR) is one half of the so called ‘International Bill of Rights’. Human rights documents are categorised under the laws of peace.

<sup>130</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para 25.

<sup>131</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136.

<sup>132</sup> *Ibid*, p. 178, para. 106.

<sup>133</sup> The ECtHR has made similar judgments on the extraterritorial application of the Convention. Some notable decisions include: *Al-Skeini and Others v. the United Kingdom*, *Behrami and Behrami v. France and Bankovic et al. v. Belgium et al.* For more, see Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

*Activities* case, applied the reasoning from *Legal Consequences*, finding that both branches of law would have to be taken into consideration in determining the outcome of the case.<sup>134</sup> In this case, the Court concluded that Uganda was responsible for the humanitarian law and human rights law violations committed by the Ugandan People's Defence Force (UPDF) on the territory of the DRC. The judgments of the Court illustrate the merging in the application of international human rights and international humanitarian law, and the confusion that remains in the applications of the laws of war and peace.<sup>135</sup>

### *Jus Post Bellum*

The law of peace is as old as the law of war, however, the laws after war (*jus post bellum*) have been given scant attention in comparison to the laws of war – *jus ad bellum* and *jus in bello*.<sup>136</sup> The laws after war ought to be applicable following the termination of the conflict and throughout the transition to peace. This proposed branch of law finds its philosophical origins<sup>137</sup> in the writings of Alberico Gentili,<sup>138</sup> Hugo Grotius<sup>139</sup> and Emmerich de Vattel,<sup>140</sup> and in the moral philosophy of Immanuel Kant.<sup>141</sup> Finding its theoretical home within this tradition, the legal and philosophical literature of *jus post bellum* uses just war doctrine to argue for the establishment of a new body of law to be applied after conflicts. While much of the debate on this topic is normative, there is some legal evidence to suggest the existence of a *jus post bellum*. In the case that the law after conflict might be said to create obligations on peace-making, such obligations have principally emerged from a liberal, positivist concept of the law. In the same way that international human rights law is notionally universal, believed to go beyond the positivist, liberal international order, but is 'fundamentally prone to becoming part of that very order',<sup>142</sup> *jus post bellum* may suffer the same fate. The suggestion of a *jus post bellum* has been related to transitional justice, defined as 'the normative

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<sup>134</sup> *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v. Uganda]*, Judgement, ICJ Reports 2005, 168, p. 243, para. 216.

<sup>135</sup> Christine Bell refers to this idea as 'regime merge', Bell, *On the Law of Peace* (2008), ch 12.

<sup>136</sup> See Orend, 'Jus Post Bellum' (2007) and Stahn, 'Jus Post Bellum' (2008).

<sup>137</sup> The just war tradition can, in fact, find its natural home in medieval Christian thought. The legal and moral tradition that emerged in the 17th and 18th centuries increasingly moved away from this outlook, founded largely on principles of natural law, toward a conception of just war rooted in the law of *nations* (for more see Neff, *War and the Law of Nations* (2005), ch 3). It is this later outlook of just war that has relevance here, and in most present conceptions of just war theory, rather than the archaic sentiments of the Middle Ages (that said, many just war theorists refer to Augustine, Thomas Aquinas, Cicero and other eminent theologians and scholars of the era).

<sup>138</sup> Lesaffer, 'Alberico Gentili's ius post bellum' in *The Roman Foundations*, edited by Kingsbury and Straumann (2010).

<sup>139</sup> Grotius, *On the Law of War and Peace*, ed./annot. Neff, ([1625] 2012).

<sup>140</sup> de Vattel, *The Law of Nations*, ed./intro. by Kapossy and Whitmore, ([1758] 2008).

<sup>141</sup> 'The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during War*; and 3. Right *after War*, the object of which is to constrain the nations mutually to pass from this state of war, and to found a common Constitution establishing Perpetual Peace' (Kant, *The Philosophy of Law*, trans. Hastie (1887), 214).

<sup>142</sup> Mégret 'The Apology of Utopia' (2013).

considerations that apply to a society that is moving from a repressive, non-democratic society to one that is non-repressive and democratic',<sup>143</sup> finding common points between both.<sup>144</sup>

Christine Bell has advanced the concept of *lex pacificatoria* against the emerging arguments for a *jus post bellum* as a set of legal practices and customs that do not amount to codified international law.<sup>145</sup> The *lex pacificatoria* is intended as more of a guide to peacemakers thereby according them the necessary movement needed in negotiation, while giving direction toward a general conception of peace building. While there may not be sufficient justification to support the established place of *jus post bellum* in international law, there is evidence of the internationalisation of public law. The emerging field of international constitutional law sees evidence of constitutional borrowing by domestic courts and the internationalisation of certain human rights, which may amount to an emerging province of law after conflict in constitution-making and design.

### Legal Status of the Peace Agreement

While legal status often remains unclear,<sup>146</sup> the peace agreement is both a legal and a political document, and as Bell argues 'peace agreement solutions cannot be understood as a common set of conflict resolution techniques, but must be understood as a distinctive form of constitutionalism'.<sup>147</sup> Agreements are only concluded when a new institutional and power arrangement is reached and this is often formalized in a renewed or altered constitution that recognises the *post bellum* political situation. Peace agreements as new constitutional arrangements however have the potential danger of solidifying the divisions that caused the conflict. The same discordant structures may be transferred to the constitution, which, in theory at least, is intended to be a permanent document.

The way war concludes impacts the resulting peace. From 1945, negotiated settlements have been as commonplace as military victory in ending interstate war.<sup>148</sup> From the close of the Cold War, a comparable trend has appeared in intrastate wars. Peace agreements are contractual arrangements concluded at a point in the conflict as a part of the negotiation stage. The agreement – arguably nothing more than a piece of paper<sup>149</sup> – comes about as a part of a process that includes pre-negotiation, ceasefire,<sup>150</sup> negotiation, implementation

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<sup>143</sup> May and Forcehimes, 'Introduction', in *Morality, Jus Post Bellum, and International Law*, edited by May and Forcehimes (2012), 1.

<sup>144</sup> See also May and Edenberg, eds., *Jus Post Bellum and Transitional Justice* (2013).

<sup>145</sup> Bell, *On the Law of Peace* (2008) argues that the *lex pacificatoria* relates to three areas of law – self-determination, transitional justice, and third party enforcement – in a process of 'hybrid constitutionalism'.

<sup>146</sup> See Bell, 'Peace Agreements' (2006).

<sup>147</sup> Bell, *On the Law of Peace* (2008), 200.

<sup>148</sup> Walter, 'The Critical Barrier' (1997), 335.

<sup>149</sup> Bell and O'Rourke, 'The People's Peace?' (2007).

<sup>150</sup> Page Fortna defines a ceasefire as 'an end to or break in fighting, whether or not it represents the end of the war' (Page Fortna, 'Agreement and the Durability of Peace' (2003), 349.) Page Fortna

agreements<sup>151</sup> and constitution-making itself as a peace agreement.<sup>152</sup> A peace agreement is a negotiated settlement. The outcome of the negotiation process is often a compromised and messy document, which has been shaped by the context of the situation. This makes comparison between agreements from different conflicts difficult, however, there are certain international organisations and global norms which shape the agreements giving them some characteristics of similarity.

### *Legality under International Law*

Peace agreements hold a unique status under international law. As agreements signed by state and non-state parties, peace agreements are *sui generis* under treaty law as codified by the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention – and customary international law – recognise only states as capable of concluding treaties under international law.<sup>153</sup> Rather ambiguously as regards peace agreements, Article 3 of the Convention does accept that while ‘the present Convention does not apply to international agreements concluded between states and other subjects of international law or between such other subjects of international law... [this] shall not affect ... the legal force of such agreements’.<sup>154</sup> This provision still leaves unclear what category of ‘subject’ may be considered applicable, but leaves open the possibility of recognizing peace agreements signed by non-state actors as having international legal force.

There are three groups which are generally accepted to hold international personality and therefore the capacity to sign peace agreements<sup>155</sup> – these are rebel/insurgent groups,<sup>156</sup> indigenous people,<sup>157</sup> and minority groups. The international legal system is understood as a

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quantitatively analysed ceasefire agreements and the frequency with which parties return to war, considering what she calls ‘situational or structural factors’ and ‘deliberate attempts to enhance the durability of peace’ (Page Fortna, *Cease-fire Agreements* (2004), 2). Her conclusions suggest that the mechanisms that are most effective in maintaining a ceasefire are: troop withdrawal, demilitarized zones, third-party guarantees, peacekeeping deployment, joint commissions and specificity of terms (210). Although her research is limited to interstate wars, some of the conclusions she draws may be applicable to intrastate conflict.

<sup>151</sup> Walter holds that the implementation phase of the peace process is the ‘most difficult to navigate and the reason why so many civil war negotiations have failed’ (Walter, ‘The Critical Barrier’ (1997), 20). Walter rejects the ‘ripeness’ theory, which posits that peace agreement are only successful where the necessary conditions are met, see Zartman, *Ripe for Resolution* (1989).

<sup>152</sup> John Darby and Roger Mac Ginty divide peace processes into five phases - ‘preparing for peace, negotiations, violence, peace accords, and peacebuilding’ (Darby and Mac Ginty, ‘Introduction’, *Contemporary Peacemaking*, edited by Darby and Mac Ginty (2008), 1). Bell, on the other hand, distinguishes three types of agreement within the peace process: pre-negotiation, framework or substantive and implementation (Bell, *Peace Agreements and Human Rights* (2000), 20–29).

<sup>153</sup> *Vienna Convention on the Law of Treaties* (1969), Article 2.

<sup>154</sup> *Vienna Convention on the Law of Treaties* (1969), Article 3.

<sup>155</sup> Bell, ‘Peace Agreements’ (2006), 381-2.

<sup>156</sup> Cassese, ‘The Status of Rebels’ (1981).

<sup>157</sup> Anaya, *Indigenous People in International Law*, (2004), 189.

system of states, where non-state actors have limited international legal entitlement.<sup>158</sup> An exception was raised in the 1977 II Additional Protocol to the Geneva Conventions (1949) which elevated wars of national liberation – considered narrowly as wars against colonial domination, alien occupation or racist regimes<sup>159</sup> – to the status of international conflict, thereby conferring legal personality onto parties in such conflicts. In the same tradition, the right of peoples to self-determination accords legal recognition to people – particularly indigenous peoples – through the UN Charter. The applicability of the law of self-determination is not fully formed – having originally been conceived as applying to the process of decolonisation. While this branch of law is relevant to understanding the applicability of international law to post-conflict situations, it does not have the force to grant legal recognition to non-state actors on the international level. Self-determination law has, however, become very relevant in determining the appropriate institutional arrangements to be included in peace agreements. As an accepted, though not fully formed, branch of international law, the law of self-determination has constitutional implications for the existence of a *jus post bellum*.<sup>160</sup>

### *Peace Agreements as International Treaties*

The international legal status of a domestic peace agreement was at issue before the ICJ in a case concerning the sovereignty and armed activity on the territory of the DRC.<sup>161</sup> The Court heard arguments from both parties on the jurisdiction and admissibility of the claim brought by the DRC against Rwanda for violations of international humanitarian law and human rights in breach of the International Bill of Rights, other international instruments, and mandatory Security Council Resolutions. In its claim, the DRC argued that the Court held jurisdiction over the dispute in accordance with, *inter alia*, the Vienna Convention on the Law of Treaties, which grants the Court jurisdiction over violations of peremptory norms of human rights as reflected in international instruments.<sup>162</sup> Rwanda counter-claimed that none of the provisions cited by the DRC in its application or customary international law granted jurisdiction to the Court in this matter. The Court, having entertained the separate arguments put forward by the DRC, found that the Court held no jurisdiction in this case.

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<sup>158</sup> See Cassese, ‘The Status of Rebels’ (1981).

<sup>159</sup> *Protocol Addition to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)*, 8 June 1977, Article 1, para. 4.

<sup>160</sup> See above.

<sup>161</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) [Democratic Republic of the Congo v. Rwanda]*, Jurisdiction and Admissibility, Judgment, ICJ. Reports 2006, p. 6.

<sup>162</sup> The DRC also claimed that Court held jurisdiction in accordance with Article 22 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 29, paragraph 1, of the *Convention on the Elimination of All Forms of Discrimination Against Women*; Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide*; Article 75 of the *Constitution of the World Health Organization*; Article XIV, paragraph 2, of the *Constitution of UNESCO* and Article 9 of the *Convention on the Privileges and Immunities of the Specialized Agencies*; Article 30, paragraph 1, of the *Convention against Torture*; and Article 14 of the *Montreal Convention for the Suppression of Unlawful Acts against The Safety of Civil Aviation*.

While the application was not heard on its merits, the relevance of this case stands on the legality of the peace agreement. The DRC claimed that Rwanda had violated the Genocide Convention. Under Article IX, the Court has jurisdiction over any dispute in respect to the Convention.<sup>163</sup> When Rwanda acceded to the Convention in 1975, they placed a reservation on Article IX. The DRC claimed that the reservation was no longer in effect and so the Court had jurisdiction in this matter. In so doing, the DRC argued that the Arusha Peace Agreement had constitutional status. As a part of the peace process, Rwanda signed a Protocol, committing them to removing all reservations on human rights instruments.<sup>164</sup> The DRC maintained that the government was adhering to the Protocol when it adopted an executive decree in February 1995.<sup>165</sup> In support of their argument, the DRC observed that the Arusha Agreement (of which the Protocol formed a part) was more than a domestic political agreement between the parties, but a part of the “constitutional ensemble”.<sup>166</sup> In contention, Rwanda argued that the Agreement did not amount to an international treaty and so did not create any obligations for Rwanda with other states or the international community.<sup>167</sup> The Court held that the decree was not recognised under international law; however, it did not directly address the question of whether the Arusha Agreement could be recognised as an international treaty, thereby creating international obligations with other states. Nonetheless, this case is of relevance as both sides contested the international legal status of a peace agreement. This issue has since been dealt with by other international courts.

The Special Court for Sierra Leone (SCSL) was required to consider the legal status of the Lomé Agreement. The Court accepted that insurgents are bound by Common Article 3 of the Geneva Conventions, however, the requirement to comply with international humanitarian law does not, in the opinion of the Chamber, convey international legal personality which prevents the party from entering into an internationally bound and recognised treaty.<sup>168</sup> The issue before the Court concerned the amnesty provision of the Lomé Agreement (signed between the government of Sierra Leone and the Revolutionary United Front (RUF)), which raised the question as to whether the RUF had treaty-making capacity. To that end, the Court concluded that “[i]nternational law does not seem to have vested [the RUF] with such

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<sup>163</sup> Article IX reads: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

<sup>164</sup> The Broad-Based Transitional Government shall ratify all International Conventions, Agreements and Treaties on Human Rights, which Rwanda has not yet ratified. It shall waive all reservations entered by Rwanda when it adhered to some of those International instruments.

<sup>165</sup> See *Armed Activities on the Territory of the Congo (New Application: 2002) [Democratic Republic of the Congo v. Rwanda]*, Jurisdiction and Admissibility, Judgment, ICJ. Reports 2006, p. 6, para. 4 which gives the text of the decree.

<sup>166</sup> *Ibid*, para. 31.

<sup>167</sup> *Ibid*, para. 34.

<sup>168</sup> *Prosecutor v. Kallon, Kamara, Decision on Jurisdiction*, Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) (Mar. 13, 2004).

capacity. The RUF has no treaty-making capacity as to make the Lomé Agreement an international agreement'.<sup>169</sup> The Court continued,

The conclusion seems to follow clearly that the Lomé Agreement is neither a treaty nor an agreement in the nature of a treaty. However, it does not need to have that character for it to be capable of creating binding obligations and rights between the parties to the agreement in municipal [domestic] law. The consequence of its not being a treaty or an agreement in the nature of a treaty is that it does not create an obligation in international law.<sup>170</sup>

The decision of the Court concerning the legal validity of the Agreement had bearing on its determination in the case, as the Court was bid to determine the validity of Article IX (concerning pardon and amnesty) of the Agreement which fell under international and not domestic law.

The Court's ruling is important for two reasons; it sets a precedent for the legal validity of peace agreements and on what may be included in a peace agreement under existing international law. For instance, under international law, a treaty cannot derogate from a recognised peremptory norm (or principle of *jus cogens*). In accordance with the Vienna Convention of the Law of Treaties (1969):

A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>171</sup>

In other words, a peace agreement must be considered a treaty under international law for international treaty law to apply. As the Special Court for Sierra Leone (SCSL) found in the *Kallon Case*, peace agreements may not hold such status under international law. The Court, in addition to determining the treaty-making capacity of the insurgent group and the legal form of the peace accords, was had to determine if the Court held jurisdiction in this case. The defendant's counsel argued that Article 10 of the Statute of the SCSL, disallowing the use of an amnesty against prosecution under the Court, conflicted with the Lomé Agreement, which provided amnesties in some instances, thereby barring the Court from hearing the case. In their findings, the Court concluded that: 'The Lomé Agreement is not a treaty or an agreement in the nature of a treaty. The rights and obligations it created are to be regulated by the domestic laws of Sierra Leone'.<sup>172</sup> While the Court found the peace agreement under

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<sup>169</sup> *Ibid*, para. 48.

<sup>170</sup> *Ibid*, para. 49.

<sup>171</sup> UN Charter, Article 53.

<sup>172</sup> *Prosecutor v. Kallon, Kamara, Decision on Jurisdiction*, Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) (Mar. 13, 2004).

consideration in this case not to have standing as an international legal treaty, there are legal arguments which would make the opposite case. Peace agreements are fashioned as legal treaties between states to grant them international legal standing, while incorporating non-state entities as parties. For example, the Comprehensive Political Settlement of the Cambodia Conflict (1991) was signed by the Supreme National Council on behalf of Cambodia and other state parties. The Dayton Peace Agreement (1995) was signed by the Republic of Croatia, the Federal Republic of Yugoslavia, and the Republic of Bosnia-Herzegovina, a state recognised by the peace agreement. Similarly, the Belfast (Good Friday) Agreement (1998) between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland is a multiparty agreement between Northern Irish domestic parties and an interstate treaty between the UK and Ireland.<sup>173</sup>

If the peace agreement is accepted as a treaty under international law, it raises questions as to whether the subsequent constitution has any obligation to follow international law. If this is the case, peace agreement and post-conflict constitutions would need to observe general principle of international law. However, whether international law places concrete requirements on peace constitutions is not clearly established in practice or law. Even if the legal status of a peace agreement is in dispute, all states hold certain obligations under international law, and a peace agreement, whether signed by state or non-state parties, must comply with general international law.

The requirement to fulfil any commitments under international human rights law, particularly political rights, is far less certain. As an example, in the *Armed Activities* case, Uganda counter claimed that the Lusaka Agreement (1999) legally sanctioned the presence of Ugandan troops on the territory of the DRC for the duration of the period ending 180 days from the signing of the agreement. The Court, however, rejected the counter claim, stating: The provisions of the Lusaka Agreement thus represented an agreed modus operandi for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this modus operandi, the DRC did not “consent” to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.<sup>174</sup>

In its judgement, the Court determined that Uganda was in breach of its obligations under international human rights law and international humanitarian law, and was in violation of the principles of non-intervention and non-use of force. While finding in this case that the peace agreement in question did not impose norms on a state contrary to international law, the Court did not go any further in evaluating the legal status of i) the Lusaka Agreements,

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<sup>173</sup> Bell, *On the Law of Peace* (2008), 146.

<sup>174</sup> *Armed Activities on the Territory of the Congo [Democratic Republic of the Congo v. Uganda]*, Judgement, ICJ Reports 2005, 168, p. 243, para. 99.

ii) the parties to the accord, or iii) whether either party was in violation of the terms of the ceasefire. In other words, the Court refrained from clarifying many of the legal ambiguity of peace agreements under international law. What the Court did confirm, however, was that peace agreements, like other international treaties, cannot contravene international law.

#### *Power-Sharing Arrangements and the Law of Self-Determination*

The principle of self-determination is significant in a post-conflict state – although the principle is far from clearly established. The principle of self-determination was initially championed by Woodrow Wilson and Vladimir Lenin in the early 20<sup>th</sup> century.<sup>175</sup> The principle is, however, contested. Self-determinations of peoples was ultimately included in UN Charter in Article 1(2)<sup>176</sup> and later in the two 1966 International Covenants on Human Rights in common Article 1(1).<sup>177</sup> While the provision on self-determination inserted into the 1966 Covenants is more far reaching than that included in the UN Charter, it falls far short of a clear and definite law on the rights of peoples.

On the face of it, as Ivor Jennings contended, self-determination ‘seemed reasonable: let the people decide. [However, it] was in practice ridiculous because the people cannot decide until someone decides who are the people’.<sup>178</sup> The ICJ has ruled on self-determination in four instances. The Court in the Namibia Case (1971)<sup>179</sup> accepted, *in obiter dictum*, a substantive right to self-determination in positive international law. The issue came before the Court again in 1975 in the advisory opinion on the question of Western Sahara.<sup>180</sup> In this instance, the Court departed from its earlier judgment, in recognising self-determination as procedural, rather than substantive; moreover, it termed self-determination a principle, rather than as a right. The ruling of the Court in the *East Timor* case was clearer on the status of the principle of self-determination, finding in support of Portugal that ‘the right of the peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an *erga omnes* character’.<sup>181</sup>

The Court referred to self-determination in the Frontier Dispute case – concerning a frontier dispute between Mali and Burkina Faso<sup>182</sup> – although in this cases self-determination was peripheral to the issue before the Court, considering the right of peoples to self-determination

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<sup>175</sup> Cassese, *Self-Determination of Peoples* (1998).

<sup>176</sup> ‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace’.

<sup>177</sup> ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

<sup>178</sup> Jennings, *The Approach to Self-Government* (1956), 56 cited in Mayall, ‘Nationalism, Self-determination’, in *Settling Self-Determination Disputes*, edited by Weller and Metzger (2008), 7.

<sup>179</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16.

<sup>180</sup> *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12.

<sup>181</sup> *East Timor [Portugal v. Australia]*, Judgment, ICJ Reports 1995, p. 90.

<sup>182</sup> *Frontier Dispute [Burkina Faso v. The Republic of Mali]*, Judgement, ICJ Reports 1986, p. 554, para. 20.

against the legal principle of *uti possidetis*. The law of self-determination exists in tension with the recognised rule of *uti possidetis* – a legal principle which emerged during the process of decolonisation. The ICJ, reasoned that:

the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontier following the withdrawal of the administering power.<sup>183</sup>

The effect of this rule is that applications of self-determination that do not comply with the conservative requirements of colonial self-determination or constitutional self-determination<sup>184</sup> are not generally recognised in international law. There are, however, very limited examples of where the full self-determination of people has been recognised – the most recent being the case of South Sudan, but also Eritrea and East Timor - two cases that were in fact lingering decolonisation bids. The one prominent exception in which self-determination was claimed out with constitutional or colonial self-determination was the independence of Bangladesh, which seceded from Pakistan only with the backing of India.<sup>185</sup>

The legal meaning of self-determination has implications for constitution-making – for example, democratic participation in the constitution writing process and passage of the final document are possibly required depending on the reading of self-determination law. Vivien Hart and Thomas Franck both argue that there is a right of democracy in international law. Hart's argument builds on the work of Franck's 1992 article on the emerging right of

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<sup>183</sup> *Ibid.*

<sup>184</sup> Constitutional self-determination differs from colonial self-determination as the latter is 'based directly in international law, [while] the claim to [constitutional] self-determination is derived from a constitutional arrangement that established a separate legal personality for component parts of the overall state' (Weller, 'Why the Legal Rules of Self-Determination', in *Settling Self-Determination Disputes*, edited by Weller and Metzger (2008), 31.) There are three accepted categories of constitutional self-determination: (i) express self-determination status; (ii) effective dissolution of a federal-type state; and (iii) implied self-determination status (*ibid.*, 32). The cases of Yugoslavia, the USSR, and Czechoslovakia followed the constitutional self-determination principle where the emerging states maintained the territorial boundaries of the dissolved federation.

<sup>185</sup> The partition of India in 1947 divided the British Indian Empire into the Dominion of Pakistan and the Union of India which became the recognised territorial boundaries at independence. James Crawford addresses the instances in international where self-determination has been invoked in defence of intervention (Crawford, 'The Right to Self-Determination' in *Peoples' Rights*, edited by Alston (2001), 39-47).

democratic governance under international law.<sup>186</sup> Franck's argument rests on the principles of liberal democracy and is supportive of the 'liberal peace' that liberal democracy is favourable to peace. This position on the merits of liberal democracy has also been criticised for its impact on the use of force doctrine and intervention, as it has no clear framework for introducing liberal democracy. It did, however, address a paradigm shift on the constraints in international law – legal scholars would have previously understood domestic institutions to be beyond the scope of international law and in the realm of constitutional law.

Hart's case rests on the meaning of 'democratic participation' in the UN Declaration of Human Rights<sup>187</sup> and Article 25 of the International Covenant on Civil and Political Rights, which reads,

Every citizen shall have the right and the opportunity, without any of the distinctions ... and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

The effect of Hart's argument is that a constitution that is not inclusive is not legitimate, or legal under international law. Normatively, public participation in the constitution-drafting process lends the constitution authority and legitimacy, however, in what way, at what point, or to what extent the public should participate in the constitution-making process is not clear for its effect on violence or its influence on the type of constitution that is negotiated. The principle of self-determination is far from clear legally or politically, and currently is not able to address questions on participation in constitutional politics and drafting.

Self-determination is also relevant to the form of institutional arrangements that are put into place in the final agreement and the constitution. Power-sharing is a commonly used form of institutional arrangement in post-conflict settings, which grants recognition to certain groups. Power-sharing provisions may also allow for the creation of partially autonomous regions, reflecting the restricted self-determination of a people. The evidence emerging from such institutions is mixed, with the rights of self-determination potentially in tension with the provision of the peace agreements maintaining the territorial unity of the state. The benefits of power-sharing arrangement are highly contested for many reasons beyond this

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<sup>186</sup> Franck, 'The Emerging Right to Democratic Governance' (1992) Franck's argument rests on the principles of liberal democracy and is supportive of the 'liberal peace' that liberal democracy is favourable to peace. This position on the merits of liberal democracy has also been criticised for its impact on the use of force doctrine and intervention, as it has no clear framework for introducing liberal democracy. It did, however, address a paradigm shift on the constraints in international law – legal scholars would have previously understood domestic institutions to be beyond their scope and in the realm of constitutional law (this shift has impacted on the fusion between the two branches of law).

<sup>187</sup> Article 21 of the UN Declaration of Human Rights.

immediate tension.<sup>188</sup> Power-sharing arrangements, on the other hand, may also be the most reasonable approach to allow access to state institutions for minority groups. Consociational or federal power sharing arrangements grant some limited self-determination to groups, while maintaining territorial unity and upholding the principle of *uti possidetis*. The international legal norm of *uti possidetis* is evidence of the strength international law holds over political outcomes of non-international armed conflict.

### Political and Legal Authority and Legitimacy

Legal and political authority of a peace agreement have no enforcement mechanism. All parties must equally accept the authority of the agreement for it to have any real effect, so that authority of the agreement is secondary to its enforcement, which is often weak or non-existent. Further, peace agreements may bring into existence governments or institutions that did not previously exist, thereby establishing the authority that would hold the right to grant legitimacy to the agreement. Then again, where the legal authority of a peace agreement is contentious, the force of authority relies on political authority, as, in most instances, there is no legal enforcement mechanism. The institutional arrangements determined in the peace accord are temporary and functionally dependent upon the ability of the parties to the settlement to cooperate.

Peace processes are intensely political acts that create political and legal documents. Not unlike the source of authority of a revolutionary constitution, peace agreements locate authority by the act of creation and the action of making peace. The force of the agreement is in each signature, the signatories being those who are party to the conflict, rather than third party actors, mutually undertaking to bind, impose and promise to perform or refrain from certain acts. In signing the agreement, they are consenting to its authority.

Although there are many obstacles to the implementation of the agreement and the commitment by the parties may not be genuine, the text of the agreement is drafted with the belief it is final and binding. The moment a peace agreement is signed it can only hold the intention for peace, as it, in itself, cannot, in that act of signing, bring peace. Peace is, in the action of drafting and signing a peace agreement, nothing more than a promise. A promise that, like the Declaration of Independence, finds in the imagination the authority to constitute the peace agreement and, then, the new or revised constitution. Taking the argument Arendt developed in *On Revolution* further, a peace agreement may hold authority, not simply through its constitutional foundation, but through the later augmentation and amendment to that constitution, arguably, by way of judicial review.<sup>189</sup>

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<sup>188</sup> Sisk, 'Power Sharing in Civil Wars' in *Contemporary Peacemaking*, edited by Darby and Mac Ginty (2008), who argues that power sharing is only successful in the short term.

<sup>189</sup> 'The very concept of Roman authority suggests that the act of foundation inevitably developed its own stability and permanence, and authority in this context is nothing more or less than a kind of necessary "augmentation" by virtue of which all innovations and changes remained tied back to the foundation which, at the same time, they augment and increase...the very authority of the American

Peace agreements are negotiated outside the domestic law of the state, still, in being implemented they are required in some way to fit into the domestic legal apparatus. Linking the agreement to a constitution is one such way of introducing binding domestic legal authority. Legal authority may also be acquired if the peace agreement obtains status as a constitutional document, and, in this way, gains *ex post facto* legal standing under the domestic law of the state.<sup>190</sup> A peace agreement process is an instrument of conflict resolution, designed to find a compromised settlement between previously warring parties that differs in some form from the *status quo ante*, and which operates as a constitutional (re)arrangement.<sup>191</sup> Peace agreements are, therefore, in substance and form constitutive documents, which may confer authority and legitimacy.<sup>192</sup> The constitution also find authority in the peace agreement, making the peace agreement and constitution mutually constitutive. There is, however, a danger is subscribing constitutional status to the peace agreement, rather than undertaking a separate constitutional process (that may include legitimating factors as public participation).

The other place authority can be located is in third party enforcement; either by a third-party state, an international peacekeeping force, or by international legal authority. For this reason, this chapter gives over much space to the concept of international legal authority. International legal authority may be externally imposed by the passing of a Security Council resolution giving force to the agreement.<sup>193</sup> The UN Security Council has also authorised missions to oversee the implementation of a peace agreement, thereby underwriting the agreement, yet acting and existing outside and apart from the status of the agreement.<sup>194</sup>

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Constitution resides in its inherent capacity to be amended and augmented' Arendt, *On Revolution* ([1963] 2006), 194.

<sup>190</sup> However, this may not always be the case – for example, the Dayton Peace Agreement and the Constitution for Bosnia and Herzegovina, included as annex 4 to the agreement, were not ratified by a domestic legislative body of BiH as the agreement itself brought into being the new state and its institutions. This quandary highlights the problem raised by Jacques Derrida in his essay on the Declaration of Independence: 'The "we" of the declaration speaks "in the name of the people". But this people does not yet exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not as *such*. If it gives birth to itself, as free and independent subject, as possible signed [of the declaration], this can hold only in the act of the signature. The signature invents the signer. This signer can only authorize him- or herself to sign once he or she has come to the end, if one can say this, of his or her own signature, in a sort of fabulous retroactivity'. Derrida, 'Declarations of Independence' (1986), 10 quoted in Honig, 'Declarations of Independence (1991), 104.

<sup>191</sup> Bell, 'Peace Agreements' (2006), 374 and Lesaffer 'Peace Treaties and the Formation of International Law', in *The Oxford Handbook of the History of International Law*, edited by Fassbender and Peters (2012), 92.

<sup>192</sup> Raz, 'On the Authority and Interpretations' in *Between Authority and Interpretation* edited by Raz (2009).

<sup>193</sup> For example, UN SC Res 1023 (1995) concerning the Croatian Erdut Agreement of 1995 and UN SC Res 1244 (1999) concerning the situation in Kosovo and the Rambouillet Accords (see Bell, *On the Law of Peace* (2008), 156-157).

<sup>194</sup> For example, UN SC Res 745 (1992) which established the UN Transitional Authority in Cambodia (UNTAC) to ensure and oversee the implementation of the 1991 Comprehensive Peace

Peace agreements may also be categorised as treaties under international law resting their authority (and legitimacy) on this branch of law.<sup>195</sup> These categories of legalization<sup>196</sup> are limited, however, as none provide force.

The discussion of authority raises the analogous question on legitimacy. In practical terms, the legitimacy of peace agreements is suspect, as many are negotiated, drafted, and implemented by parties that hold power through violence rather than authority. Although not democratic, the act of making written promises may be sufficient as a source of legitimacy.<sup>197</sup> Legitimacy is also granted through the involvement of the people (although in what form this participation occurs will also have implications of the legitimacy of the agreement). The outside intervention of third parties, for example, the UN acting as the voice of the international community and representative of its normative beliefs, may also bring legitimacy to the agreement. Finally, in the act of violence, the legitimacy of authority is uncertain, by restoring peace, the agreement may find own self-fulfilling legitimacy.

### Conclusion

Peace agreements, as much as the peace they are aiming for, are elusive. Peace agreements are written documents agreed by the parties to a conflict with the intention of ending that conflict. Peace is, in the action of drafting and signing a peace agreement, nothing more than a promissory act, but by the very action of making it, grants authority for its implementation and authorizes the constitution that follows it. A constitution, or any law, may also be thought of as an act of promise. All laws are a promise, or contract, between the people and the state. A constitution is a higher form of that promise, one that is intergenerational and temporal. It is a promise by the drafters to the present and the future, and to the future, those not yet even born, to the past. It is a promise across people of a state to hold to the aspirations and intent of the constitution, and to abandon a state of violence for that of peace.

The distinction between war and peace is legally vague, yet the laws of war and peace have a long legal standing. The purpose of this brief review of the laws of war and peace is to untangle the legal ambiguity between states of war and states of peace, a distinction that informs the legal status of a peace agreement. Paradoxically, international law is critical to

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Agreement, which under Annex 5 set out principles of the constitution. UNTAC concluded its mission following the adoption of the new constitution and formation of the new government in September 1993. A similar example is Timor Leste, where the UN established the UN Transitional Administration in East Timor (UNTAET) following the peace agreement between Indonesia and Portugal on the self-determination of Timor Leste which took administrative responsibility over the territory for its transition (UN SC Res 1272). UN involvement in post-conflict Afghanistan followed a similar process (*ibid*).

<sup>195</sup> This status is more complicated as both state and non-state actors are parties to the treaties, and some non-state actors are not recognised under the Law of Treaties (see section on the legality of peace agreements under international law). However, UN Security Council Resolutions have the force of law, so that treaties may become recognised under international law through this process.

<sup>196</sup> See Abbott *et al.*, 'The Concept of Legalisation' (2000).

<sup>197</sup> Honig, 'Declarations of Independence' (1991), 103.

the formation of peace agreements while, on the other hand, peace agreements have been an 'informative and constitutive source' of international law. International treaty law established obligations between states only, and as such sits in awkward tension with peace agreements negotiated in intrastate conflicts – the form of conflict now more common than interstate wars. Thus, the ambiguous status of peace agreements under international law raises questions as to their legitimacy and authority.

Peace agreements are hybrid international and domestic legal treaties. As international legal treaties, with both international, domestic state and non-state actors, negotiated outside the domestic law of the state, they may hold legal status under international law and in accordance with the Vienna Convention on the Law of Treaties and customary law (as upheld by international law courts). As legal documents binding domestic actors to a resolution of a conflict, they are also required in some way to fit into the domestic legal system. It is by incorporating the peace agreement into the constitution, or in the action of the peace agreement and constitution being mutually constitutive, that the agreement finds authority in the domestic legal structure. The next chapter turns to defining the peace constitution. The intention of the chapter is to consider the dilemmas that are attached to drafting such constitutional arrangements, including, questioning the role of the international community, political and military, the sequencing of the political settlement, and issues of participation and inclusion.

## Chapter Two: The Peace Constitution

CONSTITUTIONS ARE OFTEN promulgated in moments of political crisis<sup>198</sup> or violence, be it a revolution, a transition to democratic rule, a rebellion against colonial occupation to self-rule, or at the end of war. The constitutions adopted by post-colonial states were greatly influenced by the system of their former colonial power. British colonial states often adopted systems of parliamentary sovereignty, exported by legal jurists such as Sir Ivor Jennings. The constitutions in many of these newly independent states were quickly replaced after the (violent) overthrow of the first post-colonial government or following civil war. Constitutions, for example, were also drafted as a response to the Arab Spring revolutions and the fall of the old dictatorial regimes. The transitions in Iraq<sup>199</sup> and Afghanistan,<sup>200</sup> following the international-led interventions, included constitution-making processes to lend legitimacy to the new governing regimes and to introduce stability to the war-torn states. New constitutions were also necessary in transitioning post-Communist Eastern European states.

A compromise constitution cannot be understood as an end-point if it is to function in a deeply divided state emerging from high-level conflict. To view the constitution as a process (a ‘means’) rather than a codified set of rules (an ‘end’), perhaps requiring several iterations, breaks with the traditional understanding of the constitution as an entrenched and lasting document. An enduring constitution has value by promising stability and democracy. However, it may also have the harmful effect of holding the constitutional settlement to a moment of time, one constrained by necessary compromise. Constitution-making in a divided society may allow for an intermission, an occasion to craft some sort of national identity – or at the very least, civility. Beyond the functionality of the constitution-making process, Sujit Choudhry suggests that ‘against the backdrop of division and a lack of trust, the process of debating and negotiating a constitution can also help to create the political community on whose existence the constitutional order which results from that process depends’.<sup>201</sup> While a constitution may be intended to create and capture the emerging political settlement that is

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<sup>198</sup> Ackerman, ‘The Storrs Lectures’ (1984) on the ‘constitutional moment’. The archetypical examples of constitutions written following a resolution are the French and American cases in the 18th century. The Arab Spring revolutions in Egypt and Tunisia, as more recent examples, would also be included in this category.

<sup>199</sup> Ginsburg *et al.*, ‘Baghdad, Tokyo, Kabul’ (2008), 1139 suggest that the 2005 Iraqi Constitution ‘has not been able to ameliorate, and may even have exacerbated, a problem of instability and political disintegration’. Iraq is a case where the constitution is tied to violence, an issue that is addressed in this thesis.

<sup>200</sup> Their, ‘The Making of the Constitution in Afghanistan’ (2007).

<sup>201</sup> Choudhry, ‘Introduction’, in *Constitutional Design for Divided Societies*, edited by Choudhry (2008), 6.

the result of a peace process, and in so doing, to find a (re)newed commitment to the political pact, a peace constitution is, by necessity, a compromised and imperfect document, more of a 'dirty deal than a commitment to the political right.'<sup>202</sup> The drafting process may not be one of high-minded negotiation but a continuation of the conflict through other means,<sup>203</sup> which may not allow for the national healing that many hope it could be.

Constitutions are very rarely (if ever) drafted under ideal conditions. As Jon Elster wrote, 'the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making.'<sup>204</sup> Peace constitution must balance against competing time pressures, between the need to find a resolution to the conflict, and the space required to find compromise. Adding to these pressures is the international community, which often imposes deadlines on parties at both the peace-making and constitution-making stages. The requirements made by the international community are often tied to financial and strategic support. While the international community frequently becomes involved in the political settlement process in some capacity, it is without any accountability. The role of the international community brings normative benefits and can lend some legitimacy to the process; however, they also hold to certain normative requirements, such as participation, which may be harmful to the process. These three dilemmas, timing and sequencing, the role of the international community and participation and inclusion, are each considered in this chapter.<sup>205</sup>

Since 1990, twenty-three cases of peace and constitution-building would recognizably be defined as 'peace constitutions'. These are: Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Central African Republic, Chad, Colombia, Comoros, the DRC, El Salvador, East Timor, Egypt, Guinea, Iraq, Kenya, Kosovo, Madagascar, Mozambique, Nepal, Bougainville (Papua New Guinea), Rwanda, South Africa and Zimbabwe.<sup>206</sup> There are also cases where constitutions are currently being drafted alongside a peace process, these are Yemen, Somalia, and Libya. This chapter will refer to several of these processes in addressing the dilemmas that are present in the political settlement and peace constitution-making process.

However, attention will be given to three of these examples, Burundi, the DRC and Nepal, in the last section to illustrate the importance of continued violence for peace constitutions. Violence and peace are always in tension, and where peace does exist (even in its most basic

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<sup>202</sup> Bell 'Bargaining on Constitutions' (2017), 21.

<sup>203</sup> A peace constitution and the constitutionalization of conflict is 'a language and a set of institutional arrangements contrived to deliver the continuation of the conflict through politics' or 'Clausewitz in reverse' (Bell, *On the Law of Peace* 2008, 200).

<sup>204</sup> Elster, 'Forces and Mechanisms' (1995), 394.

<sup>205</sup> This section (and conclusions of the thesis) are influenced by the outcome of a workshop held by International IDEA on political settlements in December 2015. See Sapiano *et. al.*, 'Constitution-Building in Political Settlement Processes' (2016). The report identifies the same three themes in the political settlement process (timing and sequencing; participation and inclusion; and the role of the international community).

<sup>206</sup> There are the twenty-three cases identified by the authors if the International IDEA policy paper, 'Bell and Zulueta-Fülsher, 'Sequencing Peace Agreements' (2016).

form) it is at risk of collapsing in violence, especially in a place where conflict is recent or systemic. A peace constitution, as a part of the political settlement, is intended to bring an end to the physical violence of conflict, and to capture the underlying political settlement. Nepal and the DRC, particularly, have had heavy outside involvement, from both the UN, regional states, and the wider international community. Further, Burundi and the DRC are examples of where incumbent leaders are attempting 'constitutional coups' (the President of Burundi has been more successful in this than his counterpart in the DRC). Finally, Burundi is a strong example of where constitutional courts can be used by the government to undermine the political settlement, by acting against the purpose of the peace constitution. The background of the three cases is considered briefly to provide context, before turning to dilemmas that are distinct to peace constitutions: process and timing; the international community; and participation and inclusion.

### The Peace Agreement as a Constitution

The authority of the peace constitution is valid, in part, because the previous constitutional order lacked authority. However, if the violent (and then peaceful) replacement of the old constitution held authority, and if the peace agreement framed itself as existing beyond that constitutional order, then locating authority for the new constitution may lack the necessary grounding. Bell makes this argument:

Framing peace agreements as constitutions can also be counter-productive in terms of compliance. Constitutional status gives rise to questions about the relationship of the peace agreement constitution to the past constitutional order. Peace agreement constitutions tend to supplant existing constitutions outside their established processes for revision or replacement. The constitution of the [Dayton Peace Agreement], for example, did not refer to or acknowledge the previous Bosnian constitution, or attempt to work within its legal framework. Peace agreements in Liberia explicitly provided that they were 'extra-constitutional', while agreements in Sierra Leone framed themselves as outside the pre-existing constitutional order more implicitly. A peace agreement's claim to constitutional validity lies in the lack of legitimacy of the previous constitution (and by implication the state), and the need to negotiate an end to the violence which reflects the question-mark over the state's legitimacy.<sup>207</sup>

The granting of authority to the new constitution, however, may also provide legitimacy to the new political leaders, who under the previous order were rebels or warlords.<sup>208</sup> So that while a new constitution may be a break from the past, unless there is a complete destruction

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<sup>207</sup> Bell, *On the Law of Peace* (2008), 152.

<sup>208</sup> Again, Gathii, 'Popular Authorship and Constitution Making' (2008), 1111 makes this point, citing Uganda and the DRC as examples where the new constitution legitimised former warlords through elections.

of the old order, something of the past must be brought into the new settlement.<sup>209</sup> A peace constitution can never fully disentangle itself from its violent origin or the political power structure that existed as part of the conflict. Still, a constitution may find authority (and legitimacy) if it is able to constrain the power of the former warlords and rebels, that is, if the constitution becomes self-enforcing.<sup>210</sup> This may be the peace constitutions most likely route to legitimacy – however, if it is unable to constrain violence as it was intended to do, it may quickly lose that legitimacy, putting the whole of the political settlement in jeopardy.

A peace constitution is intended to be an actual as well as a symbolic rejection of violent politics and way of doing business in the past. The promises in a new constitution may break the authority of the past constitution. The South African Constitutional Court made this point in a judgment on the constitutionality of the death penalty:

The South African Constitution ... represents a decisive break from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>211</sup>

A peace constitution is, potentially, a mechanism of conflict resolutions; however, there is equal cause to warn against seeing the peace constitution in this way, as constitutions negotiated during violence or the continued threat of a return to violence, will have ‘heavily negotiated outcome[s]’, often involving an exchange of incommensurables rather than a

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<sup>209</sup> See Ginsburg *et al.*, ‘Baghdad, Tokyo, Kabul’ (2008), 1143 on constitution making in occupied states, comparing the experiences of Japan in the 1940s and Iraq in 2003-5.

<sup>210</sup> *Ibid.*

<sup>211</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 262. This case is particularly relevant in the context of this thesis. First, the issue of the death penalty was an example of where it was generally thought to be supported by public opinion, however, the Court determined in this case that the use of the death penalty (under the Criminal Procedures act 1971) violated the Constitution (right to life and cruel, inhuman or degrading treatment or punishment). The use of the death penalty was not included in the new 1993 Constitution – this is an example where the commitment to public participation in constitution-making can be at odds with international liberal norms (see Sapiano *et al.*, ‘Constitution-Building in Political Settlement Processes’ (2016), 17) – however, the Court determined that they held jurisdiction (rather than leaving the issue to Parliament) – see para 87-89. In so doing, the Court referred to the first case before the newly established Constitutional Court (*S v Zuma and Two Others* 1995 (2) SA 642 (CC)) in which the judgment referred to *R v. Big M Drug Mart Ltd.* [1985] 1 S.C. R. 295, p. 34 in support of the position that the purpose of the constitution (and context in which it is drafted) is relevant. This case is also relevant for referring to the aspirations of the Constitution – a topic discussed below. Finally, the judgment of this case refers to foreign jurisprudence and law, and international law, as a clear example of constitutional borrowing.

coherent plan for conflict reduction'<sup>212</sup> which may include 'partial or even conflicting innovations'.<sup>213</sup>

### ***Process and Timing***

A peace constitution is a constitution that is, in some way, attached to the peace-making process; however, the sequence of the peace agreement and constitution are not necessarily linear. Still, the concept is in some ways conditioned on a peace agreement having been drafted before the constitution, for without the institutional and transitional arrangements of the peace agreement settled, the foundation of the constitution is hard to locate, and the structure of the *post bellum* state is impossible to know. Nonetheless, the process does not necessarily follow this sequence. The ideal political settlement process would be mapped out and contingent on the requirements of the situation and the capacity of the parties (especially, the level of engagement from the international community). The intention of the process often is to be logical; however, the always moving situation on the ground, and the continuing tensions between ending violence and establishing longer term peace, the demands of inclusion against those of the political and military elite, the potentially damaging impact of spoilers, the pressures of time and the engagement, financially, militarily (peacekeeping) and politically, of the international community will influence the sequencing of events.

Broadly, there are four categories of sequencing within which most political settlement processes would fit.<sup>214</sup> A partial peace agreement (or ceasefire) may require a new constitution (or the amendment of an old constitution). A transitional political arrangement may also be put in place which will be followed by a new constitution. An interim constitution may act as a peace agreement, and followed by a final constitution. Finally, a combination of a transitional constitutional arrangement and then an interim constitution may precede a final constitution.

The usefulness of the political settlement process is that it allows for a space to be established that is distinct and separate from the violence and conflict.<sup>215</sup> This space, possibly facilitated by the international community, or a third-party actor, allows for the development of trust and cooperation to develop between parties. This consensus-building however requires time, which may not be available because of the more immediate demands of ending the conflict. The timing, and the imposition of deadlines, is a constant trade-off that needs to be based on the context of the situation.

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<sup>212</sup> Horowitz, 'Conciliatory Institutions' (2008), 1230.

<sup>213</sup> *Ibid*, 1226-7.

<sup>214</sup> Bell and Zulueta-Fülsher, 'Sequencing Peace Agreements' (2016). The four categories listed in the report were based on the analysis of the twenty-three cases listed.

<sup>215</sup> While the political settlement process is intended to promote trust between parties, this is almost immediately put to the test with elections where parties must then engage in 'friendly' elections. I owe this point to Charmaine Rodrigues (2015 ICON-S Conference, NYU Law School).

There is uncertainty as to what point in the process the parties should turn to constitution-drafting. Premature constitution-drafting processes are being held in Libya, Yemen and Somalia, while the conflict in each of these states is not yet settled; consequently, there are concurrent processes of constitution-making and peace-building in these three states. This now also seems to be the strategy in Syria. The timeline for the peace process set out by International Syria Support Group (ISSG) in the Vienna communique of 14 November 2015 and in United Nations Security Council Resolution 2254 was that an inclusive national dialogue would be set up following the cessation of conflict and the establishment of a transitional government. However, in March 2016, it was announced that Russia and the United States would cooperate with Syria to produce a new constitution by August 2016. A constitution has yet to be produced. Current peace talks are also stalemated.

Protracted conflicts, like that in Syria, may take years to settle. For example, the sixty-year civil war in Colombia has broken down over time. The Movimiento 19 de Abril (April 19 Movement, M-19), and other rebel groups, moved into politics as part of the 1991 constitution-writing process, which were boycotted by the FARC and Ejército de Liberación Nacional (National Liberation Army, ELN). The peace process with the FARC was resumed in 2012, under the current government, and finalised in a deal (rejected in the October 2016 referendum) in September 2016. Negotiations with the ELN are currently taking place in Havana.

As an example of a temporary constitutional measure, an interim constitution was adopted in Nepal following the signing of the peace agreement. The interim constitution was completed by a 15-member commission over July and August 2006, based largely on the 1990 Constitution, was passed on 15 January 2007. The interim constitution was silent on some key issues because of a lack of agreement, including the role of the monarchy. The decision to remove the monarchy was eventually voted on at the first meeting of the elected Constituent Assembly. Significantly, the 2007 Constitution (and the 2015 Constitution) reworded the preamble, towards more inclusive language that gave authority to the people.

### ***The International Community***

The role and impact (both in the short and long term) of external actors in the political settlement process needs to be better understood. Engagement with and management of the parties involved in a conflict and the civilians who have been its victims, is an involved process and requires highly skilled mediator(s).<sup>216</sup> For example, a necessary consideration for those managing a peace process is which parties should be allowed to sit at the negotiation table.<sup>217</sup> There is a lingering fear that one or more parties may disrupt or destroy the process once a compromise has been reached for their own gains. Parties may also choose to manipulate the process. Ceasefire agreements, as an example, are as much a tactic of war as they are a means

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<sup>216</sup> Several scholars have written on this matter, to name but a few, IW Zartman, J Bercovitch, and TD Sisk.

<sup>217</sup> See Stedman, 'Spoiler Problems' (1997).

of halting fighting.<sup>218</sup> Another consideration, politically and legally, is the granting of amnesties to those alleged to have committed atrocities<sup>219</sup> in the broader interest of bringing all parties to the negotiating table.<sup>220</sup> The impact of these decisions bears heavily on the final agreement and the success of the peace.

The UN is the principal international legal and administrative institution in managing conflict resolution and post-conflict recovery; it and other international actors and states have become increasingly involved in these previously sovereign processes. The management of a peace process is not a simple exercise, and often draws in third-party actors and interlocutors. The UN, as an assuming neutral party, frequently holds this place. As a project, the UN was founded to use peaceful means to prevent the eruption of war, requiring all members to do so under Article 2(3).<sup>221</sup> The Charter further requests that:

[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>222</sup>

In its first decades, the activity of the UN, in the context of the Cold War, was, if not gridlocked, chiefly reactive. In its efforts to stave off war, the UN moved further from its target of international peacemaker toward attempts to affect the peace through Chapter VII missions (although rare) and the improvised institution of peacekeeping.

The UN, however, is inching in the direction of its early *raison d'être*, having launched the Department of Political Affairs (DPA) as its pioneering unit of preventative diplomacy and

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<sup>218</sup> As one example, the parties to the Lusaka Ceasefire Agreement (1999) were not genuinely committed to end the hostilities but rather a deliberate strategy to realign the military and political balance so that within months the Agreement became irrelevant, Roessler and Prendergast, 'Democratic Republic of the Congo', in *Twenty-First Century Peace Operations*, edited by Durch (2006), 223.

<sup>219</sup> This issue was given some consideration in this thesis, albeit tangentially, as it concerned the *Kallon Case* before the Special Court for Sierra Leone. The purpose of addressing the case in this context is the reasoning of the decision on the international legal validity of the Lomé Agreement; however, the case was also concerned with the legality of the amnesties included in the agreement.

<sup>220</sup> There is a continuing and ardent academic and practical disagreement on the value of 'peace vs justice' (see, as one example, Lekha Sriram, *Confronting Past Human Rights Violations* (2004.)). The literature in this debate is considerable and is not engaged with here; however, the narrative will come up again in evaluating the possible existence of a *jus post bellum*. If such a body of international law exists (and if the granting or not of amnesties is legally proscribed) the appeal of the law becomes normative.

<sup>221</sup> 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. (Article 2(3), UN Charter, 1945)

<sup>222</sup> Chapter VI (Pacific Settlement of Disputes) Article 33(1).

peace-making.<sup>223</sup> The DPA is now the face of the Secretary-General ‘good offices’ initiatives and contains the Policy and Mediation Division (PMD). The Mediation Support Unit (MSU) is under the organisation structure of the PMD. The Unit is the ‘central hub for mediation support’, providing three key services: ‘(1) technical and operation support for peace processes; (2) strengthening of mediation capacity of the United Nations, its partners, and parties to a conflict; and (3) development and dissemination of mediation guidance,<sup>224</sup> lessons learned and best practices’.<sup>225</sup> The Unit is also home to the Standby Team of Mediation Experts, established in 2008, which is set to intervene in a peace process with a set stock of competencies to aid the parties through the negotiations. On the stand-by team, there is an expert in constitution-making, alongside specialists in process design, gender and social inclusion, natural resources, security arrangements, and power-sharing.<sup>226</sup> The first General Assembly Resolution on peace mediation was passed in June 2011,<sup>227</sup> which called on the Secretary General to develop guidance on this issue. In 2012, the UN published, as an annex to the Secretary General’s report ‘*Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*’<sup>228</sup> and the *United Nations Guidance for Effective Mediation* handbook ‘to support professional and credible mediation efforts around the world’. Added to the recent efforts of the UN in pushing mediation as a mechanism of conflict resolution, the Peacebuilding Commission was formed in 2005 by mandate of the Security Council<sup>229</sup> and the General Assembly<sup>230</sup> to coordinate resources and to advise on post conflict recovery. All this activity is in addition to the UN’s more long-established<sup>231</sup> role in international peacekeeping.

The United Nations Development Programme has separate staff and offices for the peace-making and constitution-making programmes. However, the UN<sup>232</sup> is beginning to

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<sup>223</sup> ‘Role of the Department of Political Affairs’, UN Department for Political Affairs website, <http://www.un.org/undpa/overview>

<sup>224</sup> United Nations Guidance for Effective Mediation, issued as an annex to the Secretary-General Report, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* (A/66/811, 25 June 2012).

<sup>225</sup> ‘Mediation Support Activities and Services’, UN Peacemaker website, <<http://peacemaker.un.org/mediation-support/activities-and-services>>.

<sup>226</sup> See UN Peacemaker website <<http://peacemaker.un.org/mediation-support/stand-by-team>> for a list of the 2016 standby team, including specialities and bibliographies.

<sup>227</sup> General Assembly Resolution 65/283.

<sup>228</sup> Secretary-General Report, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* (A/66/811, 25 June 2012).

<sup>229</sup> Resolution 1645 (2005), 20 December 2005.

<sup>230</sup> General Assembly Resolution 60/180, 20 December 2005.

<sup>231</sup> Peacekeeping is an improvised institution having been originally shaped as a solution to a specific political problem; however, the deployment of peacekeeping missions in regular practice by the Security Council, often following a ceasefire or peace accord between the parties. For this reason, peacekeeping is viewed as an accepted practice of the UN.

<sup>232</sup> Includes: Department of Political Affairs (DPA); Department of Peacekeeping Operations (DPKO);

concentrate resources on constitution-building projects, as part of their comprehensive peace building program.<sup>233</sup> The inclusion of international actors in the peace process has allowed for more international involvement in the constitution-drafting process. There is, however, a danger of the international community taking on too large a role in this process, raising questions of authority and legitimacy of the constitution.<sup>234</sup>

But the UN Charter is not the only international organisation that includes a reference to the peaceful resolution of conflicts in its charter. There are similar provisions in the Constitutive Act of the African Union,<sup>235</sup> the Charter of the Arab League,<sup>236</sup> and the Charter of the Organisation of American States.<sup>237</sup> These organisations, along with the Organisation of Security and Cooperation in Europe (OSCE),<sup>238</sup> the European Union (EU),<sup>239</sup> and the Economic Community of West African States (ECOWAS)<sup>240</sup> have also acted as mediators in the resolution of civil and international conflicts.

There has been renewed attention in the past few years on military interventions (for example, the case of Libya under NATO). Despite the best efforts of the UN, there continues

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Office of the High Commissioner for Human Rights (OHCHR); UN Development Programme (UNDP); UN Children's Fund (UNICEF); and UN Women. Together these six entities produce the UN Constitutional (a newsletter on UN constitutional support), <<http://peacemaker.un.org/Constitutions/Newsletter>>.

<sup>233</sup> Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes.

<sup>234</sup> This topic has been looked at quite widely (although not in the context of a peace constitution). See, for example, al Ali and Thiruvengadam, 'The Competing Effect of National Uniqueness' in *Routledge Handbook of Constitutional Law*, edited by Tushnet, Fleiner and Saunders (2013), 46; al Ali, 'Constitution Drafting and External Influence', in *Comparative Constitutional Law*, edited by Ginsburg and Dixon (2011).

<sup>235</sup> Article 4(e): 'peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly'. The Constitutive Act of the African Union also condemns and rejects unconstitutional changes of government (Article 4(p)).

<sup>236</sup> Article V: 'Any resort to force in order to resolve disputes between two or more member-states of the League is prohibited. If there should arise among them a difference which does not concern a state's independence, sovereignty, or territorial integrity, and if the parties to the dispute have recourse to the Council for the settlement of this difference, the decision of the Council shall then be enforceable and obligatory... The Council shall mediate in all differences which threaten to lead to war between two member-states, or a member-state and a third state, with a view to bringing about their reconciliation'.

<sup>237</sup> Article 25: 'The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time'.

<sup>238</sup> The OSCE has been involved in the peace processes in the South Caucasus.

<sup>239</sup> The EU, for example, mediated the conflict between Georgia and Russia in 2008.

<sup>240</sup> ECOWAS participated in the peacekeeping, mediation and/or preventative diplomacy efforts in Liberia, Guinea-Bissau, Sierra Leone, Niger, Côte D'Ivoire, Togo, Guinea and Mali. ECOWAS established the Mediation Facilitation Division in June 2015, on the back of a 2012 Assessment Workshop. For more see Odigie, 'The Institutionalisation of Mediation Support' (2016).

to be a global need to rethink how to better resolve conflict, to find more productive methods of resolving war, and to explore more likely ways to prevent conflicts from emerging. International intervention in conflict has adopted the terminology of ‘Responsibility to Protect’, however, the conflicts where the doctrine was used as justification for military intervention have not been settled. This has left Libya, where the doctrine was used to support UN sanctioned airstrikes against the Qaddafi regime,<sup>241</sup> in a state of conflict while there are efforts to draft a new constitution.

There is a consensus that human rights and democratic norms are legally binding on states, and that they are, therefore, required to introduce those norms into their domestic constitution.<sup>242</sup> However, there is some tension between the demands made by international law and the international community on the content of the constitution and the normative belief that the constitution ought to be drafted by the people and for the people. That is not to suggest that the two should be in tension, but rather that the foundation of the constitution is uncertain when the source of its authority is in question. There are also necessary questions that must be asked about the role of the international ‘expert’. Again, there is a tension between the generalizable advice that such an outside participant can provide and the local context that must be brought into the constitution to speak to both the past and the future.<sup>243</sup> How these tensions can be reconciled is a critical area of continuing research that sits alongside issues on comparative methodology and the ability to account for both the commonalities and the differences.<sup>244</sup>

### ***Participation and Inclusion***

In peace processes and agreements, like constitutions, the inclusion of ‘the people’ is (or ought to be) necessary. Peace agreements are often conducted behind closed doors, which may be required for the success of the outcome. However, the secrecy in which these documents are negotiated and drafted may have a deleterious effect on their perceived legitimacy and implementation. That said, a peace agreement, even if negotiated in closed sessions, may acquire broader acceptance if it is implemented.

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<sup>241</sup> Pattison, in his introduction to a special issue on Libya and Responsibility to Protect in *Ethics and International Affairs*, suggests that ‘[t]he RtoP doctrine was invoked in Security Council Resolutions 1970 and 1973 and, more generally, in the political and public debates on the crisis and the subsequent intervention. Libya, then, is likely to be perceived as the first major case—and perhaps the test case—of the doctrine’. Pattison, ‘Introduction’ (2011), 2. However, in his contribution to the issue, Pattison is apprehensive of the ethics of the NATO-led intervention.

<sup>242</sup> See Franck ‘The Emerging Right to Democratic Governance’ (1992) and Hart, ‘Constitution-Making and the Right to Take Part’ in *Framing the State*, edited by Miller (2010) and Hart, ‘Constitution-Making’ (2001). See also Franck and Thiruvengadam, ‘Norms of International Law’, in *Framing the State*, edited by Miller (2010) and Saunders, ‘The Impact of Internationalisation on National Constitution’, in *Constitutionalism in Asia*, edited by Chen (2014).

<sup>243</sup> See al Ali, ‘Constitutional Legitimacy in Iraq’ in *Constitutionalism in Islamic Countries*, edited by Grote and Röder (2012).

<sup>244</sup> See Saunders, ‘Towards a Global Constitutional Gene Pool’ (2009).

There is, however, concern that inclusion in the political settlement process may introduce instability and prevent a settlement from being agreed. There are also concerns as to who should be included. For example, which civil society groups can claim to be representative and how is that claim to be assessed. Where the constituent assembly (or legislature) is elected, can civil society make a claim to be more representative than those that have been elected? There is danger that those who are included are the ones with the most power or authority. Further, the presence at the table does not necessarily result in access to power or a voice in the process.<sup>245</sup>

However, there has been a move towards increased participation and inclusivity since the post-apartheid South African constitution-making process. For this reason, the same measures that were imposed on the Bosnian peace process, the holding of the negotiations on a US military base with no participation by the population, could not be replicated.<sup>246</sup> Nicolas 'Fink' Haysom, currently the Special Envoy for Sudan and South Sudan (previously the Special Representative of the Secretary-General for the UN Assistance Mission in Afghanistan (from 2014, and Deputy from 2012); Director for Political, Peacekeeping and Humanitarian Affairs in the Executive Office of the UN Secretary-General from 2007 to 2012; and Head of the Office of Constitutional Support for the UN Assistance Mission for Iraq (UNAMI) from 2005 to 2007) noted in an interview with UN Constitutional Newsletter:

If the object of a constitution is an inclusive, democratic society, then the process must also encourage broad ownership and participation. The notion of a few wise "men" drafting a good constitution has been broadly rejected – no matter how technically sound the result... [I]n regard to both design and substance, constitution-making can be a profoundly disaggregating, fragmenting experience. This is especially so in post-conflict countries, the ones most likely to relapse into conflict. Divisions will manifest and indeed be brought out sharply - as they must be. For this reason, one should approach constitution-making with the twin obligations of: (1) transparent and candid engagement of the country's divisive problems; (2) but also of maximizing the nationbuilding moment of constitutionmaking, the celebration of shared and common values<sup>247</sup>

The constitution-drafting process in Tunisia was participatory and inclusive, and the resulting constitution has so far been considered a success. The Tunisian National Dialogue Quartet (a coalition including the union federation UGTT, the employers' institute, the Tunisian human rights league and the order of lawyers) was awarded the Nobel Peace Prize

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<sup>245</sup> See, for example, some of the feminist literature on political settlements, such as Ní Aoláin, 'The Relationship of Political Settlement' (2016).

<sup>246</sup> The US attempted to do this in Iraq in 2005 by moving the negotiations to the US embassy in Bagdad, allowing them to control who (physically) participated in the negotiations. Although this strategy worked for Bosnia (as well as in Japan and Germany after the Second World War), it failed in Iraq. See Haysom *et al.* *History of the Iraqi Constitution-Making Process* (2005).

<sup>247</sup> available at

<<http://peacemaker.un.org/sites/peacemaker.un.org/files/UNConstitutional-Issue1.pdf>>

in 2015 for its work in facilitating dialogue that led to the adoption of the 2014 Constitution. The new Constitution has created a strong Constitutional Court, with guardianship over the constitution.<sup>248</sup> On the other hand, the process in Egypt has been more fraught.<sup>249</sup> A second constitution was adopted in 2014 following the ousting of Mohamed Morsi in July 2013. A new constitution for Morocco was passed in 2011. The new constitution is tentative in its reforms, preserving the authority and place of the monarchy and holding to a notion of ‘national sovereignty’ rather than ‘popular sovereignty’. However, the constitution was approved in a referendum and enshrines a set of human rights norms that were not recognised in the previous document. Syria is a very different case. Protests began in Syria in March 2011. The protests (unlike the other states experiencing Arab Spring revolutions) led to a violent backlash from the state, leading to what is now a six-year civil war. Having refused to leave office al-Assad appointed a constitution drafting committee in November 2011, adopting a new constitution (following a referendum) on 27 February 2012 to replace the 1973 Constitution. The new constitution allows the president to be elected for seven-year terms, renewable once (this means that Al-Assad may stay in power constitutionally until 2028 as he was last elected in 2007 and will be able to run for a second term). The constitution also makes no mention of the current conflict.<sup>250</sup>

The most recent peace agreement reached between the Colombian government and the FARC must first be approved in a referendum, which is to be held on 2 October 2016. Early in the peace negotiation President Santos announced that the process would include ‘a mechanism for citizen endorsement’. This later became a point of disagreement between the government and the FARC. The government proposed a referendum, while the FARC endorsed the setting up of a constitutional assembly in accordance with Article 376 of the Constitution<sup>251</sup> to redraft the constitution to incorporate the peace agreement. There was no mechanism under existing law to fulfil the legal and political challenge of introducing a participatory mechanism. Congress, therefore, amended the constitution to allow for a ‘special plebiscite on peace’. The peace agreement will be voted on in its entirety in a ‘yes or no’ question. To succeed the yes votes must outnumber the no votes, and be at least 13% of registered voters (or 4.4 million of 33 million eligible voters). The amendment was, by process, referred to the Constitutional Court (both sides having agreed to commit to its ruling), which was upheld, with some conditions. For example, the decision of the referendum would be binding only on the executive and not on other branches of government, and the agreement, if approved, would not automatically be incorporated into the constitution or law.<sup>252</sup> In June 2016, Congress passed temporary constitutional amendments to allow them to expedite the

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<sup>248</sup> See Mekki, ‘The Tunisian Constitutional Court’ (2016).

<sup>249</sup> See Lang Jr., ‘From Revolutions to Constitutions’ (2013) which covers the constitutional history of Egypt, with the focus on the (first) post-Arab Spring constitution of 2012.

<sup>250</sup> For more on the 2012 Syrian Constitution see ConstitutionNet.org, ‘The New Syrian Constitution’ (2012).

<sup>251</sup> ‘By means of a law approved by the members of both chambers, Congress may direct that the voters participating in the popular balloting decide if a Constituent Assembly should be called with the jurisdiction, term, and makeup as set forth by said law’.

<sup>252</sup> For more on the ‘special plebiscite’ and the Constitutional Court decision see Maya, ‘Analysis: Colombian Peace Hangs on a Very Special Plebiscite’ (2016.).

approval procedure for the agreement and to grant the President powers to issue a decree to enforce the agreement.<sup>253</sup> Although there was great hope for the agreement, it was rejected in the referendum on 2 October 2016.

Public participation efforts can also be conducted through a constituent assembly. In Nepal, the parties signed the Comprehensive Peace Agreement (CPA) on 22 November 2006. In accordance with the terms of the peace agreements, a Constituent Assembly (CA) was elected to draft a new constitution on 10 April 2008. The Assembly also acted as the Interim Legislature and included representatives from twenty-five political parties. A mixed system of first-past-the-post and proportional representation was used to elect the 601-member assembly (which included 26 nominated members) including a wide representation of castes, ethnic groups and women.<sup>254</sup> The CA was replaced in a second election in November 2013, having been dissolved for failing to produce a working draft in June 2012, having already extended the deadline four times. This second CA, elected through the same process as the first in November 2013, was less representative than the previous body, for example, it did not include the required number of women members. Although the second CA faced political deadlock it agreed on a draft constitution in July 2015 following the negotiation of the 16-point Agreement between the major political parties, including the Madhesi party, on substantive issues concerning the establishment of a federal state, institutional arrangements, the judiciary and electoral systems. The final constitution of Nepal was promulgated on 20 September 2015.

The groups that tend to be marginalised the most in such processes are women and indigenous groups. Indigenous groups have standing as ‘subjects of international law’<sup>255</sup> and recognised as peoples under the law of self-determination. The legal status of indigenous groups is not well defined, in part, because there is no general agreement as to its meaning or the process by which such status can be conferred.<sup>256</sup> A peace agreement signed by an

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<sup>253</sup> Although the referendum failed to pass, it is useful to clarify, for future processes, how the outcome of the referendum, as the participatory element of the process, was to be implemented. The amendment designated that the agreement (once passed in the ‘special plebiscite’ and implemented) would be a ‘special agreement’ in line with Common Article 3 of the Geneva Convention and that it is to be incorporated into the ‘constitutional block’. (A ‘constitutional block’ is the granting of constitutional status to international human rights treaties. The Colombian Court has understood Art 93 as creating a ‘constitutional block’ (Constitutional Court of Colombia, Decision C-488 de 2009)). Again, had the referendum passed, these amendments would have been subject to review by the Constitutional Court. Had the Court had the opportunity to respond, it may have gone some way to shoring up its role as the guardian of the peace, reinforcing this function that the Court has already taken on itself.

<sup>254</sup> In accordance with the Interim Constitution, one third of the members of the CA were women.

<sup>255</sup> See Anaya, *Indigenous People in International Law*, (2004), 189. Convention concerning Indigenous and Tribal Peoples in Independent Countries (No 169) 1989, 28 ILM 1382 (1989); United Nations Declaration on the Rights of Indigenous peoples, adopted by the UN General Assembly on 7 September 2007, UN Doc A/61/L.67

<sup>256</sup> See Kingsbury, “‘Indigenous Peoples’ in International Law’ (1998) who distinguishes between positivist and constructivist definitions of ‘indigenous peoples’.

indigenous group has the effect of concurrently recognising the group's status under international law (which includes the right to self-determination) and protecting their legal rights within the state.<sup>257</sup>

Modern constitution must also incorporate human rights standards accepted at the international level. This includes the gender based rights set out in article 27 of the Geneva Conventions, which extends protection to women in armed conflict, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1995 Beijing Platform for Action, UN Security Council Resolution 1325 (2000), and UN General Assembly Resolution on Women's Political Participation. The UN, in Security Council Resolution 1325 (2000),<sup>258</sup> addressed the issues of women's inclusion into the peace process and agreement, calling on,

actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia ... during repatriation and resettlement ... in all of the implementation mechanisms of the peace agreements, [and in the] protection of and respect for human rights of women and girls, particularly as they relate to the constitution.<sup>259</sup>

The Security Council has since passed seven resolutions, and the General Assembly has passed three resolutions calling for more effective participation of women in peace-making.<sup>260</sup> There is also a push by the UN to include more women in the mediation and negotiation processes.<sup>261</sup> However, despite the passage of Resolution 1325, the inclusion of women into the peace process, both before and after its adoption, continues to be minimal.<sup>262</sup>

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<sup>257</sup> Example of treaties between governments and indigenous people in the context of conflict are between the Mexican government and the Zapatista National Liberation Army (the Chiapas peoples); the government of Bangladesh and the indigenous people of the Chittagong Hill Tract; the Indian government and the tribal groups of the Northeast; the government of France and the Kanaks of New Caledonia; and the Guatemalan government and the Unidad Revolucionaria Nacional Guatemalteca (URNG).

<sup>258</sup> Paragraph 8 of Security Council Resolution 1325 also calls on actors to include 'measures that ensure the protection of and respect for human rights of women and girls, particularly as they relate to the constitution'.

<sup>259</sup> Security Council Resolution 1325 (2000).

<sup>260</sup> Security Council Resolution 1820 (2008), Security Council Resolution 1888 (2009), Security Council Resolution 1889 (2009). There are also other international agreements/documents that promote gender equality in peace-building, such as, the Beijing Declaration and Platform for Action, Chapter IV, Strategic Objectives and Actions, 1995; Women and Armed Conflict, adopted at the Fourth World Conference on Women 1995; and the Outcome Documents of the Twenty-Third Special Session of the General Assembly, 'Women 2000: Gender Equality, Development and Peace for the Twenty-First Century'.

<sup>261</sup> UN Guidance on Gender and Inclusive Mediation Strategies. This builds on the UN Guidance for Effective Mediation (2012).

<sup>262</sup> There are several publications on the inclusion of women in the peace process, for example, Bell and Rourke 'Peace Agreements or Pieces of Paper?' (2010), UN Women, *Preventing Conflict*,

Peace processes in which women participate tend to be more stable and enduring. Yet, despite efforts such as Resolution 1325, women's participation in formal peace negotiations is underrepresented. Women's inclusion in the peace and constitution-making processes, as a population affected by the violence and as agents in the conflict, is both empirically and normatively necessary for the sustainability of the peace constitution. A gender sensitive constitution is:

a constitution resulting from a process in which relatively equal numbers of women and men, drawn from many sectors of life and many classes, together and on terms of equality, discuss, draft, and agree on basic provisions to express the foundational idea of equality of women and men and to create a workable government that will enable men and women to lead good and meaningful lives.<sup>263</sup>

Gender equality provisions are more frequently included in new constitutions, however, women continue to be underrepresented (or even unrepresented) in most countries in the constitution-making process and in positions of political and legal authority. Nevertheless, a gender sensitive constitution, in process, language, and design can be a mechanism through which to address gender inequality and to promote women's agency – although for the constitution to have impact, it must also be implemented and interpreted in a gender sensitive way.

A constitution cannot make claims to be democratic (although not all constitutions necessarily do so) if it fails to adequately represent women – and in fact all people – in the constitution-making process. An emerging global consensus on human rights and democracy have trickled down into domestic constitution making, especially since the successful and inclusive constitution-making process in post-apartheid South Africa. Now, constitution-making that does not include some form of participatory process will lack legitimacy. The method of popular participation can be a referendum (as was the case in Kenya) or a consultation process (as in Zimbabwe and South Africa). Women (and minority groups) must also be sufficiently represented in constitution-drafting commissions and/or constituent assemblies.

Issues concerning women's daily lives are often disregarded as part of the 'private' or traditional sphere, and therefore can be excluded from the constitution. Constitutions protect a range of human rights, including gender equality and non-discrimination on the grounds of

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*Transforming Justice, Securing Peace* (2015). For more on the inclusion of women in peace processes see Bell, *Unsettling Bargains* (2015), Bell, *Text and Context* (2015), McWilliams, 'Women at the Peace Table' in *Gender and Peacebuilding*, edited by Flaherty *et al.* (2015) and Ellerby, 'A Seat at the Table is Not Enough' (2016). It is necessary to make a distinction between the inclusion of women in the peace process as representatives of women as a social group and individual women working as mediators or political actors. However, in both cases women are underrepresented. See UN Women, *Women's Participation in Peace Negotiation* (2009).

<sup>263</sup> Jackson, 'Feminism and Constitutions' in *The Public Law of Gender*, edited by Rubenstein and Young (2016), 43.

sex<sup>264</sup> (which should be explicitly listed), however, they often tend to be silent on issues that have direct impact on women, such as questions of reproductive rights and sexual autonomy and violence (where these decisions are left to the legislatures or courts). In comparison, a gender sensitive constitution recognizes the distinct positions of women and men in society, going beyond the standard inclusion of non-discrimination clauses. In some measure, a constitution must include positive measure to promote gender equality and agency, in response to historic and social inequalities. For example, the Canadian Constitution requires that gender equality protected by the constitution be implemented:

(1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... sex ... (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of ... sex ...' (Art 15).

The language used in the constitution must also reflect the objectives of gender equality. It should not be assumed that pronouns (such as men/man) are gender-neutral. Where pronouns can be avoided, they must instead be substituted with words such as 'person' or 'individual'. The use of non-gendered language is always useful in moving towards the recognition of cisgender persons.

The language of a constitution must also be clear to avoid ambiguity and the possibility of gender protections being unravelled by constitutional interpretation. The first draft of the Tunisian constitution used language that was open to suggestion that women were not equal to men, for example, that women are 'true partners to men in the building of the nation and as having a role complementary thereto within the family'. In the final draft the language was changed so that the article committed the State 'to protect women's accursed rights and to work to strengthen and develop those rights' (Art 46).

Another mechanism to promote the inclusion of women as active participants in politics is the inclusion of legislative quotas. For example, the Rwanda constitution includes such a provision:

The State of Rwanda commits itself to upholding the following fundamental principles and ensuring their respect: (4) building a state governed by the rule of law, a pluralistic democratic Government, equality of all Rwandans and between men and women which is affirmed by women occupying at least thirty percent (30%) of positions in decision-making organs' (Art 10 (4))

The constitution also makes similar (although not numerically specified) requirements of political organisations (Art 56).

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<sup>264</sup> Constitutions often use the term sex when enumerating categories of rights. I have used the term gender throughout this piece, however, I use the terms sex and gender to have the same meaning.

## Continuing Violence under the Peace Constitution

Constitutions are being looked to by development and peace building agencies as a potential solution for fragile states.<sup>265</sup> The DRC and Nepal are two such cases that ‘appear to defy all attempts to promote transition’, while, Burundi, initially categorised as a success, is now backtracking.<sup>266</sup> As Christine Bell warns, the traditional understanding of the constitutions as a ‘social contract’ that ‘create[s] both the vertical relationship of restraint between the individual and the state necessary to democratic practice, but also the potential for a wider horizontal relationship for civic trust necessary to minimising violent conflict’,<sup>267</sup> is limited in its state building capacity. Although faith is being put into constitution-making to provide a solution for political transitions, violence in post-conflict states has continued even after the implementation of the peace constitution.

### *The Democratic Republic of Congo*

First, the constitution in the DRC was negotiated as part of the peace process, that began in 1999 with the Lusaka Ceasefire Agreement.<sup>268</sup> The Lusaka Agreement committed the parties to the establishment a political process under the Inter-Congolese Dialogue within forty-five days from its signing. The Inter-Congolese Dialogue was intended to be a transitional arrangement, aimed at integrating a new national army (to include the armed opposition groups that signed the ceasefire), the agreement on new political institutions to advance good governance, the holding of national elections, and the drafting of a new constitution to be implemented after the elections. The ceasefire also committed the parties to adopt all the resolutions agreed to as part of the dialogue, and to hold equal status in the negotiations. Negotiations, however, did not begin in earnest until February 2002 in Sun City, South Africa<sup>269</sup> which did not result in a settlement. The delay in the start of the Inter-Congolese Dialogue was caused, in part, by Laurent-Désiré Kabila, who did not want to see an end to his political rule. The process moved forward only after Kabila was replaced by his son, Joseph Kabila.<sup>270</sup> The second round of negotiations began in 2002 in Pretoria, South Africa. In

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<sup>265</sup> Bell, ‘Bargaining on Constitutions’ (2017), 15.

<sup>266</sup> *Ibid*, 16-7. Bell also identifies Bosnia-Herzegovina and Northern Ireland as ‘stuck’ with ‘their apparently liberal democratic institutions in an uneasy relationship to still tense power-sharing governments’. Colombia has also become ‘stuck’ since the failed referendum on the peace agreement with the FARC in September 2016.

<sup>267</sup> *Ibid*, 19.

<sup>268</sup> In accordance with the Agreement, the UN deployed a peacekeeping mission to the DRC to oversee its implementation. The Agreement stipulated that: ‘The United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the [Organisation of African Unity], shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement.’ The Security Council passed UNSC Res 1258 on 6 August 1998, followed by UNSC Res 1279, 30 November 1999, establishing the UN Mission in the DRC (MONUC). The successor to that mission, the UN Stabilization Mission in the DRC (MONUSCO), continues to operate as one of the largest ever deployed peacekeeping missions.

<sup>269</sup> Forty out of 340 delegates in Sun City were women.

<sup>270</sup> Laurent-Désiré Kabila was assassinated by his bodyguard in January 2001.

December that year, the government of the DRC, and several armed and unarmed opposition groups<sup>271</sup> signed The Global and Inclusive Agreement agreeing to the cessation of hostilities, the establishment of a transitional government, the creation of a restructured national army and the organisation of free and transparent national elections. The final accord to emerge from the multi-lateral peace negotiations was The Final Act, signed in April 2003, in which the parties accepted the resolutions made during the Inter-Congolese Dialogue, reaffirmed their commitment to the Global and Inclusive Agreement and accepted the Constitution of the Transition, which was previously agreed on 1 April 2003.<sup>272</sup> On 4 February 2014, the parliament approved a bill granting amnesties covering acts of insurgency or war (excluding genocide or war crimes) from 2006. Continued efforts to end the conflict in eastern Congo led to joint military operations between the FARDC (Congolese national military) and the UN peacekeeping mission. The UN mission established an 'intervention brigade' in March 2013 which held the 'responsibility of neutralizing armed groups' and the 'objective of contributing to reducing the threat posed by armed groups to state authority and civilian security'.<sup>273</sup>

In post-conflict states such as the DRC the constitution has been manipulated by long-term rulers who are vying to stay in power, making the constitution central to the outbreak of violence. In accordance with the post-conflict 2005 constitution, the current President of the DRC, Joseph Kabila, will not be able run in the next presidential election in November 2016, as he has already served two five-year terms. The first multiparty elections since independence in 1960 were held in July 2006, following the passage of the final constitution in a referendum in the previous December, and was won by Joseph Kabila. This election was widely held to be free and fair by the UN and other international observers. The constitution was amended in January 2011, to allow for the President to be elected by a simple majority, rather than a system of absolute majority that required a second election to be held in the instance that a candidate did not receive over 50% of the vote, a first-past-the-post system that favours the incumbent. Elections were again held in November 2011, which were won by Kabila. The results of the election were questioned by opposition leader Etienne Tshisekedi. International observers also noted that there were irregularities, a lack of transparency, and electoral violence, however, the outcome of the voting was accepted.

In the run-up to the next round of elections, Kabila was making overtures to extend his tenure as president past 19 December 2016, when his term expires. In the 2014-2015 extraordinary session of parliament, the government attempted to alter to the electoral law. The draft law proposed to connect the electoral register to the national census. This change would have caused severe delays to the holding of an election, as an updated census would take years to complete,<sup>274</sup> in effect, extending the term of President Kabila. The law passed through the

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<sup>271</sup> The parties to The Sun City Agreement included the same parties to the Lusaka Ceasefire Agreement, plus the RCD-N and the Mayi-Mayi.

<sup>272</sup> For a history of the Lusaka Ceasefire Agreement and the Inter-Congolese Dialogue, see Rogier, 'Democratic Republic of Congo' (2006).

<sup>273</sup> UNSC Resolution 2098, 28 March 2013, para 9.

<sup>274</sup> The government's spokesperson, Lambert Mende, suggested that the delay would result in the election being postponed until 2017.

National Assembly on 17 January 2015. This was met with widespread protesting. The bill was amended by the Senate, removing the link between the voter roll and the census, and including a provision that the voter roll must comply with all legal and constitutional requirements. In response, the National Assembly removed the entire section of the bill.<sup>275</sup> Concern that Kabila still intends to remain in power pasts his term continue. In May 2016, the Constitutional Court, clarifying the meaning of the Constitution, ruled that the president could remain in power until a new president could be elected.<sup>276</sup> The timetable to hold these elections on schedule is now impossible. A political dialogue was agreed in early September to determine a timetable for elections, however, protests have again erupted in the capital, Kinshasa, on 19 September 2016.

### *Burundi*

The Constitutional Court of Burundi has a history of becoming involved in the conflict.<sup>277</sup> In the wave of democratisation that was happening, elections were held in Burundi in 1993, which were won by the FRODEBU candidate (a predominately Hutu party). Shortly after, the military orchestrated a coup. This prompted widespread violence that left tens of thousands dead. The military claimed that it was justified in its actions, while undermining the election and the legitimacy of FRODEBU ('the *acquis de juin* 1993 (the electoral victory) is counterbalanced by the *acquis d'octobre* (the genocidal plan allegedly concocted by FRODEBU)').<sup>278</sup> The constitution called for the Speaker of the National Assembly (and then the Deputy Speaker) to replace the president if he dies in office, however, both were killed in the coup. As it was also impossible to call elections, the National Assembly amended the Constitution to allow it to appoint a new President. The National Assembly elected a member of FRODEBU. The Constitutional Court, however, exercised its authority to block the election. The Court, like the state, was divided by the ethnicity of its judges. The (majority) Tutsi judges – who would likely have found the amendment (and therefore the election) unconstitutional – were dismissed, which allowed the new President to be appointed. Reyntjens calls this 'constitutional guerrilla warfare'. A second constitutional impasse was triggered after the death of the FRODEBU president in April 1994 (when the President of Rwanda's plane was shot down). The reinstated Constitutional Court ruled on 12 April that there was a vacancy for presidency, however, on 18 April (by only the Tutsi judges) ruled that the original constitutional amendment appointing the president after the coup was not valid. This second decision increased the already high tensions in the country.

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<sup>275</sup> See ICG, 'Congo: Is Democratic Change Possible?' (2015).

<sup>276</sup> The relevant constitutional articles are Art 70 which reads: The President of the Republic is elected by direct universal suffrage for a mandate of five years renewable a single time. At the end of his mandate, the President of the Republic remains in [his] functions until the effective installation of the newly elected President.' However, under the Constitution, the Electoral Commission must hold an election 90 days before the end of the President's term (Article 73).

<sup>277</sup> See Reyntjens, 'Constitution-Making in Situations of Extreme Crisis (1996).

<sup>278</sup> *Ibid*, 240

The attempt to amend the constitution to remain in power has become a commonplace tactic of regional leaders. The President in neighbouring Republic of Congo, Denis Sassou-Nguesso, in a bid to extend his presidency held a constitutional referendum in October 2015, to allow for a third-term. In a similar attempt, Burkina Faso's president Blaise Compaore was ousted by popular uprisings in November 2014. Constitutional change to remove or amend presidential term limits were successful in Uganda in the 1980s, which has made President Yoweri Museveni effective president for life, with his having won his fifth term in February 2016.<sup>279</sup> Rwanda has also had a successful referendum to remove the two-term limit in the constitution. Such moves amount to an effective 'constitutional coup'.<sup>280</sup>

The 'constitutional coup' that was effected in Burundi was, in part, facilitated through the constitutional court, which sided with the President in his bid for a third term. Burundi, like all the cases considered in this thesis, was effected by a civil war (with similar dynamics to Rwanda). The Arusha Peace Agreement was signed in 2000, and introduced a power-sharing arrangement. While it was not without serious shortcomings – including the fact that several parties placed reservations on signing – it was applauded as a success. The constitution was adopted in March 2005, following the adoption on an interim constitution by parliament on 20 October 2004. The interim constitution was passed through a referendum in February 2005, being adopted as the final constitution the following month. The adoption of the peace agreement in 2000 and constitution in 2005 was heavily indebted to the pressure put on the parties by the international community, in particular South Africa.

In following a constitution trend, the Burundian Constitution introduced presidential term limits to check the authority and power of the executive: 'The President of the Republic is *elected by direct universal suffrage* for five years renewable once'.<sup>281</sup> However, as a transitional constitution, it included a provision on the first government to operate under the new constitutional order:

*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,*

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<sup>279</sup> The Ugandan parliament voted in a constitutional amendment (alongside a constitutional referendum on multipartyism) to remove presidential term limits. Museveni became president following a coup in 1986. He won his first democratic presidential election in 1996.

<sup>280</sup> Similar 'constitutional coups' have taken place in Ukraine and Hungary. There has been marked violence in the former since the ousting of President Viktor Yanukovich during the Euromaidan protests in November 2014. The violence in Ukraine after the change in government is heightened by the accusations of Russian interference in Ukraine and the effective civil conflict in the east that has since broken out. The situation in Hungary has deteriorated over the past few years, despite initial high hopes for the country following its democratisation process in the early 1990s. See Scheppele *et al.*, 'Disabling the Constitution' (2012). The ruling party (elected with a majority in the 2010 general election) could pass amendments to the Constitution which required a 2/3 majority in parliament. They could dismantle the constitutional court, limit the separation of powers, and amend the constitution to allow them to draft a new document. The new Constitution of Hungary was passed with no public participation and with the support of only the ruling party.

<sup>281</sup> Section 96, emphasis added.

with a majority of two thirds of the members. If this majority is not obtained on the first two ballots, it immediately proceeds to other ballots until a candidate obtains the suffrage equal to two-thirds of the members of the Parliament. In the case of vacancy of the first President of the Republic of the post-transition period, his successor is elected according to the same modalities specified in the preceding paragraph. The President elected for the first post-transition period may not dissolve the Parliament.<sup>282</sup>

In May 2015, despite having served two terms as President, Pierre Nkurunziza was nominated by his party, the National Council for the Defense of Democracy — Forces for the Defense of Democracy, to run for a third term. Supporters of the President argued that his first term in office was by election of the National Assembly and Senate, rather than by universal suffrage (as per article 96) and was therefore allowed to run for a third term. His opponents contested this reading of the Constitution as it contravened the spirit of the Arusha peace agreements. The question of whether the President Nkurunziza could run for a third-term was put to the Constitutional Court.<sup>283</sup> The Court, in its judgment, stressed the importance and status of the peace agreement in the constitutional order of the state:

Considering that, though the Arusha Peace and Reconciliation Agreement is not supra constitutional, it is nonetheless the Constitution's bedrock particularly the sections relating to constitutional principles... That whosoever violates the main constitutional principles of the Arusha Agreement cannot claim to respect the Constitution.<sup>284</sup>

However, in their interpretation of section 96 and 302 of the Constitution, and considering the reading of the Arusha Agreement, the Court found:

That though the Arusha Peace and Reconciliation Agreement had recommended that no President serves two terms, the vague nature of Article 302 of the Constitution made a third term possible for a president who headed the first post-transition period.<sup>285</sup>

The Court could have applied the principle of peace jurisprudence to rule against the President rather than in favour of his running for a third term, which would have held to the principles and values of the peace agreement. While the Constitution could have been read to allow for the current president to run for a third-term, the decision of the Court undermined the intentions of the peace agreement. It had been suggested that the 'changes in Burundi's

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<sup>282</sup> Section 302, emphasis added.

<sup>283</sup> The case was brought to the Court by 14 of the 41 Senators. In accordance with the Constitution, the Court must decide on a matter if one-quarter (or 11) Senators refer it to the Court. In its judgement, the Court ruled on its jurisdiction and competence on the question.

<sup>284</sup> Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303, 4 May 2015.

<sup>285</sup> Decision of the Constitutional Court of the Republic of Burundi in Case Number RCCB 303, 4 May 2015.

constitutional design have helped to buffer the shock of democratic elections, thereby contributing to a sharp reduction in ethnic violence.<sup>286</sup>

President Nkurunziza was elected in July 2015, following an attempted coup in May 2015. Tensions between the ethnic Hutu and Tutsi, thought to have been resolved with the Arusha Accord, have been begun to re-emerge. The government suspended the opposition party, the Movement for Solidarity and Democracy, in April 2017, claiming it has acted against the constitution by forming a rebel group. As political tension continues, cracks have also begun to show in the Burundi army, which was integrated under the Arusha Accords, and which was a primary achievement of the peace agreement.<sup>287</sup>

### *Nepal*

Nepal is valuable as a case study to consider the merits and purpose of interim constitutions, which is relevant to considerations of sequencing and timing as well as to assess the role of the international community in the peace agreement and constitution making processes. The 2015 Constitution was the outcome of a lengthy process that was begun following the signing of the Comprehensive Peace Agreement (CPA) in November 2006, between the Communist Part of Nepal (Maoists) and the Nepali government, ending a decade long civil war.

The constitutional history of Nepal is a principal factor in explaining the conflict and the current tensions since the adoption of the latest constitution.<sup>288</sup> The 1948 post-colonial constitution remained in place until 1990, when the *Jan Āndolan* (People's Movement) pushed for a return to democratic government, which led to a constitution-making process. The King appointed Constitution Recommendation Commission (CRC) produced a draft constitution based on the 1959 Constitution fashioned on the Westminster model of parliamentary democracy and constitutional monarchy. The new constitution institutionalised a Hindu,<sup>289</sup> linguistically Nepali<sup>290</sup> nationalist identity that protected the Hindu Shah monarchy.<sup>291</sup> As Mara Malagodi argues, '[c]onstitutional reform in Nepal has acquired a central place in the discourse about socio-political change in the country since 1990

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<sup>286</sup> Reyntjens, 'Burundi' in *Constitutions and Conflict*, edited by Kuperman (2015). Reyntjens' conclusions were, however, premature as violence has since broken out in Burundi. Still, the current conflict, while underscored by long-standing tensions, may be considered a separate conflict because of the 'constitutional coup' rather than because of ethnic violence.

<sup>287</sup> ICG, 'Burundi: The Army in Crisis' (2017).

<sup>288</sup> For a good overview of the history of Nepal leading up to the adoption of the 1990 Constitution and for a throughout analysis of the constitution from 1990 to 2007, see Malagodi, *Constitutional Nationalism and Legal Exclusion* (2012).

<sup>289</sup> Art 4(1): Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom.

<sup>290</sup> Art 6(1): The Nepali language in the Devanagari script is the language of the nation of Nepal. The Nepali language shall be the official language.

<sup>291</sup> Art 27(1): In this Constitution, the words "His Majesty" mean His Majesty the King for the time being reigning, being a descendant of the Great King Prithvi Narayan Shah and an adherent of Aryan Culture and the Hindu Religion.

... One of the significant aspects of the Nepali case study is the primacy that has been given to institutional reform as a tool for conflict resolutions, anchored in the belief that significant and durable *socio-political* change can be achieved primarily by *legal means*.<sup>292</sup> The social and legal exclusion written into the constitution<sup>293</sup> reflected levels of exclusion already present in Nepal, which had been expressed in the *Jan Āndolan* of April 1990. The entrenched exclusion of the constitution was also a cause for the conflict that began in 1996 between the Maoists and the Nepali government. The Maoists put forward a 40-point demand in February 1996 before launching their insurgency,<sup>294</sup> that included a demand for a new, democratic and republican constitution to be drafted by elected representatives.

The Seven Party Alliance (a coalition of those political parties elected to the House of Representatives in the 1999 election) and the Maoists negotiated and signed a 25-point ceasefire on 26 May 2006. This was followed by the 8-point agreement signed on 16 June, in which the parties agreed to dissolve parliament and form an interim legislature to include the Maoists and to request the assistance of the UN to monitor and manage the arms and armies of both parties.<sup>295</sup> A civilian peacekeeping mission was established by the Security Council on 23 January 2007. The UN Mission in Nepal (UNMIN) was mandated with monitoring the management of arms and armed personnel as set out by the peace process; to monitor the ceasefire; and assisting with the planning and preparation of an election for the constituent assembly.<sup>296</sup>

Like other cases discussed in this thesis, the Supreme Court of Nepal has been an activist court, which like India, introduced a basic structure doctrine under the 1990 Constitution, protecting the spirit of the Preamble.<sup>297</sup> The 2007 Constitution replicated the 1990 strong form judicial review sections. Although, as a temporary document, without a strong *constituent power* to provide authority, the 2007 Constitution did not hold to the basic structure doctrine as it did under Article 116 of the 1990 Constitution. Malagodi argues that the inclusion of

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<sup>292</sup> Malagodi, 'Constitutional Change' in *Rights in Divided Societies*, edited by Harvey and Schwartz (2012), 171-172.

<sup>293</sup> See Malagodi, *Constitutional Nationalism and Legal Exclusion* (2012), ch 4. Malagodi considered case law from the Supreme Court on issues of religion, language and gender.

<sup>294</sup> Available in an annex in Hutt, ed., *Himalayan 'People's War'* (2004). See points 10, 16, 18 and 22 as those mentioned here.

<sup>295</sup> The process at this stage was very contentious, especially around the question of the disarmament and cantonment of the Maoists army. For more on this period see reports from International Crisis Group, in particular, ICG, 'Nepal: From People Power to Peace?' (2006) and ICG, 'Nepal's Peace Agreement' (2006).

<sup>296</sup> The mission to Nepal is a unique peacekeeping mission as it was made up of active and former military officers, unarmed and in civilian dress. Nepal is one of the largest contributors to UN peacekeeping, which made it reluctant to have a full peacekeeping mission deployed on its territory. India, which shares an open boarder with Nepal, was also hesitant about a peacekeeping mission in Nepal. See Martin, 'The United Nations and Support to Nepal's Peace Process', in *Nepal in Transition*, edited by von Einsiedel, *et al.* (2012).

<sup>297</sup> For more on the import of the basic structure doctrine, see Malagodi, *Constitutional Nationalism and Legal Exclusion* (2012), 172-173.

this article on constitutional amendments in the 1990 Constitution was to protect the multiparty democracy and constitutional monarchy that was central to the political settlement. The Maoists and other left parties, however, were suspicious of the court having such a role, holding to more popular notions of sovereignty.<sup>298</sup> Article 116 of the 1990 Constitution has been replaced in the 2015 Constitution in Article 274 protecting ‘the sovereignty, territorial integrity, independence of Nepal and sovereignty vested in the people.’

In Nepal, the new 2015 constitutional arrangement, particularly the inclusion of federalism, has caused violence to breakout along the border with India. While the 2015 Constitution is more progressive on some issues than the 1990 Constitution, it has backtracked in other areas compared to the 2007 Interim Constitution. In the end, the final constitution was pushed through by conservative sections of the CA, who took advantage of the destruction and diverted attention caused by the April 2015 earthquake. While the constitution includes some provisions that are quite progressive – including the recognition of sexual minorities in the list of protected groups under its right to quality provision<sup>299</sup>, as well as adopting quotas for women and minorities groups in the legislature – its passage caused protests in the mostly the Terai region, which runs along Nepal’s southern border with India, that caused the death of 45 people, both police officers and civilians, in August and September 2015.<sup>300</sup>

Protests from the Madhesi,<sup>301</sup> beginning in January 2007, were concerned with inclusion in the constituent assembly. Their demands were met by proportionally allocating seats in the constituent assembly and inserting a commitment to federalism into the interim constitution. However, after the passage of the constitution in September 2015, the Madhesi, Tharu and Janajati people protested against continued structural discrimination in the constitution, which include the proposed regional boundaries of the new federal state and to the clause in the constitution that does not allow women who are married to a non-Nepali to pass on their citizenship to their children.<sup>302</sup> Protests left over 50 people dead and to a 135-day blockade

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<sup>298</sup> Email exchange with M Malagodi, 8 September 2016, on file with author.

<sup>299</sup> See Art 18(3). In a case brought before the Supreme Court, Sunil Babu Pant and Others v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007), sexual minorities were granted legal recognition under the Interim Constitution. The decision, which was brought until Art 107(2) of the Interim Constitution granting to Court jurisdiction over Public Interest Litigation cases, also required the government to recognise a third gender. The protection of sexual minorities was brought forward into the 2015 Constitution.

<sup>300</sup> Human Rights Watch, “‘Like We Are Not Nepali’” (2015)

<sup>301</sup> The Madhesi are the indigenous people of the Terai region, also known as the ‘plain-dwellers’. The people of Madhesi includes many religious, linguistic, caste, and ethnic groups. They do, however, have a common identity as non-Pahari (‘hill-dwellers’), who have been excluded by the government, and in this regard, are also like the Janajati. See Malagodi, *Constitutional Nationalism and Legal Exclusion* (2012), 235-6, ICG, ‘Nepal: From People Power to Peace?’ (2006) and ICG, ‘Nepal’s Peace Agreement’ (2006).

<sup>302</sup> The discriminatory citizenship clause on basis of gender was in the 1990 Constitution (see Art 9(1)), but removed from the 2007 Interim Constitution (see Art 8(7)). While the article in the 2015 Constitution is not overtly discriminatory, it makes it more difficult for a Nepali woman who is

(partially supported by India) along the Indian border, preventing the transportation of fuel and medicine.

The government has now agreed to implement amendments to the Constitution to address these concerns. The leader of the Communist Party of Nepal (Maoist-Centre), Pushpa Kamal Dahal (known as 'Prachanda') became Prime Minister in August 2016 – replacing Khadga Prasad Sharma Oli of the Communist Party of Nepal (Unified Marxist-Leninists) who held the position since October 2015 – after the Maoist-Centre and Nepali Congress signed a three-point agreement with the United Democratic Madhesi Front. The proposed amendments are to address federal boundaries and inclusion.<sup>303</sup>

## Conclusion

There is often tension between short term provisions contained in a peace agreement, necessary to end the conflict, and the longer-term need for stability. The attempt to locate stability and endurance in a document that, in its moment of founding and in its design, is compromised by a greater need for peace, risks entrenching the divisions of the conflict. Peace agreements risk fostering the very divisions that led to conflict in the first place. If that risk materializes, the same discordant structures are then transferred to the constitution, a document intended to be permanent. There are certain gains and setbacks in associating the peace and constitution-making processes. Mary Kaldor, for example, argues that peace-making and constitution drafting need to be kept separate in the context of 'new wars'. Although, as this thesis points out, there can be tensions in linking these two processes, I do not agree with this (dated) argument. In practice, peace-making and constitution drafting often cannot be separated.<sup>304</sup> In the short-term, however, merging the peace and constitution-making processes as a tool of state-building can increase tension by introducing dilemmas and exasperating those tensions that ordinarily accompany all constitutional decision-making processes. These include choosing between short and long-term objectives, ceasing on-going violence and determining who will get a seat at the negotiating table. In the context of a peace agreement settlement and a post-conflict transition, tensions that are normally present in any constitution-making process become more acute and heightened. The ideal-type constitutional moment is one that is somehow elevated above normal politics, day-to-day political infighting and civil unrest. This moment, of course, never truly arises, and outside of imagining such an ideal moment, constitutional theory has little to say about violence in constitution-making and interpretation.

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married to a non-Nepali man to pass on Nepali citizenship to their children than it does for men under like circumstances (see Art 11). The Madhesi have objected to this article in part as there are a high number of marriages between Nepali and Indian citizens.

<sup>303</sup> This is current as of September 2016.

<sup>304</sup> Kaldor, 'How Peace Agreements Undermine the Rule of Law' (2016). See also Brandt *et al.*, *Constitution-making and Reform* (2011) 257-258 which lists both risks and opportunities of linking conflict resolution and constitution-making and Widner, 'Constitution Writing and Conflict Resolution' (2005) who looks at the relationship between constitution-writing and violence.

A peace constitution must find some balance between the elite bargain and the will of the people; local initiatives and international consensus on human rights and liberal democracy; and between the past, present and future. While such a claim is hard to empirically resolve, Kim Lane Scheppele makes the case that '[c]onstitutions in their moments of creation cannot be inspired solely by imagined futures. Perhaps even more crucially, they encode imagined pasts.' This, she contends, is not considered in constitutional theory, something her paper goes some way to resolving. Like the argument made in the following chapter on constitutional theory, Scheppele uses Hannah Arendt as 'both inspiration and foil'.<sup>305</sup>

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<sup>305</sup> Scheppele, 'A Constitution Between Past and Future' (2008), 1380.

## Chapter Three: Constitutional Law and Theory

A CONSTITUTION ENSHRINES the legal and political powers of the government. Yet, it is more than a legal and political treatise. A constitution articulates the idea of what a state is and how it should be. It writes a story of a state's future that is not only political and legal, but also symbolic. Constitutions enable and constrain the mechanisms of state, grant rights to individuals and shape the identity of a people and a state. However, a compromise constitution cannot be understood as an end-point if it is to function in a deeply divided state emerging from high-level conflict. To view the constitution as a process (a 'means') rather than a codified set of rules (an 'end'), perhaps requiring several iterations, breaks with the traditional understanding of the constitution as an entrenched and lasting document. An enduring constitution has value by promising stability and democracy. However, it may also have the harmful effect of holding the constitutional settlement to a moment of time, one constrained by necessary compromise.

The definition of a 'constitution' is unsettled,<sup>306</sup> although it is a document that is regularly spoken of in political discourse and daily conversation, however, at its most basic, a constitution is a legal and political document that intended to restrain the power of the state. In law, a constitution is superior to other legislation and is, in intention, stable and enduring.<sup>307</sup> Constitutionalism is then the normative principles that surround and are entrenched in the written document. A constitution is intended to set out the role of the government, to entrench the separation of powers, and to connect the government to the people, and the people to the government.<sup>308</sup> Constitutionalism, so says Charles McIlwain,

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<sup>306</sup> Several authors have considered this in depth, often tracing the changing historical meaning of the constitution, from the ancient to the modern. See Loughlin, *Foundations of Public Law* (2010), 276.

<sup>307</sup> Although, in fact, constitutions in most cases are fleeting. In one of the few quantitative studies in comparative constitutional law, Zachary Elkins, Tom Ginsburg and James Melton determined that in the period since the drafting of the US Constitution to 2009 - the year the study was completed - the average lifespan of a written constitution has been nineteen years, Elkins et. al., *The Endurance of National Constitutions* (2009).

<sup>308</sup> While it may be the intention for a constitution to limit the powers of government, this may not be the effect it has in practice. Mark Tushnet, who has written on unstable and illiberal constitutions, makes the point that '[c]onstitutions as maps of power may be somewhat inaccurate [as] the realities of power may not be fully reflected'. As an example, he gives the 'sham' Stalin Constitution of 1936 (Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2014), 11). This is as true a statement on peace constitutions, where informal networks of power may operate outside of the constitutional structure. There is (as discussed below) the potential for or the actual occurrence of violence in the constitution-making process and after its implementation. Violence is the violent representation of politics, and while Arendt (who is referenced in this chapter and other sections of this thesis) thought of violence and power as being distinct, the use of violence against or in reaction

‘is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will, instead of law’.<sup>309</sup> This very understanding of constitution is grounded in a normative assumption of democratic values, in the concept of legitimacy and the consent of the people. While having different characteristics, the constitution, in its most elementary sense, was present in the ancient Greek and Roman empires.<sup>310</sup> The first (or at least one of the first) versions of a constitution as a written document is *Magna Carta*<sup>311</sup>, signed by King John I in 1215 and fully incorporated into English law later in the 13<sup>th</sup> century.<sup>312</sup> *Magna Carta*, as is typical of constitutions, limited the authority of the monarchy and granted rights to (free) persons. The scope of *Magna Carta* was narrow; however, its impact was broad, as articles of *Magna Carta* were reproduced, in part, in the American Declaration of Independence (which influenced the American Constitution), and which continue to be present in modern British constitutional law.

The modern understanding of the constitution emerged in the late eighteenth century with the French and American Revolutions, which broke with the ancient notion of the constitution as being external to the people. The rupture from this earlier concept of the constitution was, in part, the foundation of the revolutions. The modern constitution takes its authority from and is bound to and by the will of the people, rather than the people being, in Alexander Hamilton’s phrase, ‘forever destined to depend for their political constitution on accident and force’.<sup>313</sup> This is the foundational argument upon which the authority of the American constitution was grounded. It was a constitution connected to the people, who were real and were held sovereignty, unlike the constitutional order from which they were separating, where sovereignty was held by the Commons (and before that the Monarchy). Thomas Paine, in his treatise, *The Rights of Man*, rebuffed Edmund Burke’s justification of the British constitution on these grounds. Paine argued that,

A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organised, the powers it shall have, the mode of elections, the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have;

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to the constitution (which represents a higher – or extraordinary – category of politics) is an expression of power being unconstrained by the constitution.

<sup>309</sup> McIlwain, *Constitutionalism, Ancient and Modern* (1940), 21.

<sup>310</sup> *Ibid.*

<sup>311</sup> Although I want to be cautious in overextending the scope of my argument, the *Magna Carta* was a peace settlement between the Barons and the King, and so fits nicely into the argument of my thesis.

<sup>312</sup> See Hazell and Melton, eds., *Magna Carta and Its Modern Legacy* (2015).

<sup>313</sup> Hamilton, Federalist No. 1 ([1788] 2009).

and in fine, everything that relates to the complete organisation of a civil government, and the principles on which it shall act, and by which it shall be bound.<sup>314</sup>

This understanding of a constitution is generally accepted. However, even such an accepted definition on the attributes of a constitution does not satisfy the ambiguities of authority or legitimacy, nor does it reconcile the temporal and authoritative tension of the constitutional moment and constitutional interpretation. On the question of constitutional authority, legal theory tends to presuppose a break from a prior source of legal authority. Authority is created in, and in some way linked to, the ‘constitutional moment’ of the founding, through the authority of the constitution maker or from the consent of the people. This new constitution is often enacted in the name of the people, either as a collective or through the actions of the constitution makers. For example, the US Constitution is often presented in a manner that denies or underplays the prior authority of the Articles of Confederation to play up the ‘Founders’ or ‘the People’ as themselves the only source of authority.

The question of authority is necessary to consider, as ‘the grounds for the authority of the law help to determine how it ought to be interpreted’,<sup>315</sup> which has bearing on this thesis and will be considered below. The questions on constitutional authority sit within the theory on the nature of law. Philosophical questions on the nature of law also inform the debate on constitutional interpretation. The theory of law, further, looks to power and morality for a source of justification. However, there is no consensus from what source the authority, and thus legitimacy, of law can be located.

Although the full debate is far beyond the scope of this thesis, as the history of legal theory has some bearing on questions of constitutional authority, a very short introduction will be given. Early Christian legal theories looked to the divine as the source and authority of law. It was from God, so they held, that all laws derived. In the 17<sup>th</sup> century, there was a paradigm shift in understanding the source of the law. In 1651, Thomas Hobbes’ *Leviathan* broke from the Aristotelean conception of law as being in pursuit of the ‘good life’ which was commonly held to be the same by all under nature and God.<sup>316</sup> Hobbes, seeing the natural state of man as bad, accepted the law as a command of the authority, be it just or not, and not derived from the divine. Hobbes was not the only philosopher to break with the natural law tradition. Hugo Grotius in similar, although not exact ways, began to develop positivist theories on the authority of the law.

The utilitarian legal philosophers, Jeremy Bentham and John Austin, writing two centuries later, pushed the understanding of the law further from that of morality. The law, they believed was a question of what the law *is*, rather than what the law *ought* to be. Law for Bentham, Austin and many that followed in their legal doctrine, was not void of morality, but

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<sup>314</sup> Paine, *The Rights of Man*, ed./intro by Philp (1995) 158.

<sup>315</sup> Raz, ‘On the Authority and Interpretations’ in *Between Authority and Interpretation* edited by Raz (2009), 332.

<sup>316</sup> Coyle, *Modern Jurisprudence* (2014) 53.

was only that which had been posited. So that ‘in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law’.<sup>317</sup> H.L.A Hart and Lon Fuller engaged in an academic debate concerning the influence of morality in law, using in their exchange the legal validity of the laws of Nazi Germany and their status after the defeat of the Germans and the instituting of The Basic Law.<sup>318</sup>

### Constitutions and Democracy

The modern variation of a constitution is based on the revolutionary ideas that came out of (and were the motivation for) the French and American revolutions. These revolutionary constitutional moments removed the authority of the constitution and the state (or government) from above and placed it in ‘the people’. For this, the modern constitution is often associated with democracy. However, constitutions can disagree with the requirements of democracy, for example, in what David Landau has termed ‘abusive constitutionalism’,<sup>319</sup> a mechanism by which the state uses constitutional replacement and amendment to weaken or remove democratic institutions and standards. There is also the suggestion that constitutionalism can exist under authoritarianism.<sup>320</sup> Some liberal freedoms and reasonably free and fair elections are protected under authoritarian constitutionalism. The acceptance of an ‘authoritarian constitutionalism’ is in tension with Charles McIlwain’s definition of constitutionalism as ‘a legal limitation on government’.<sup>321</sup> There is absolutist constitutionalism (with an absolute monarchy) and mere rule-of-law constitutionalism (which fulfils rule of law requirements but does not fully satisfy the normative understanding of constitutionalism). Absolutist and rule-of-law constitutionalism hold to some characteristics of McIlwain’s definition, but not all. There has been a turn in the comparative constitutional law literature on authoritarian constitutionalism (including judicial review under authoritarian constitutionalism).<sup>322</sup>

The law is constitutional, not because it is democratic or legitimate, or morally superior, but because it can be interpreted in the text of the constitution. Lawrence Tribe, in an article critical of Bruce Ackerman’s theory of ‘constitutional moments’, writes that ‘[i]f the

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<sup>317</sup> Hart, ‘Separation of Law and Morals’ (1958), 599.

<sup>318</sup> *Ibid*, 593 and Fuller, ‘Positivism and Fidelity to Law’ (1958).

<sup>319</sup> Landau defines abusive constitutionalism as ‘the use of the mechanisms of constitutional change – constitutional amendment and constitutional replacement – to undermine democracy.’ This form of constitutionalism is increasingly common. Landau point out that ‘[w]hile traditional methods of democratic overthrow such as the military coup have been on the decline for decades, the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent’. Landau, ‘Abusive Constitutionalism’ (2013).

<sup>320</sup> See Thio, ‘Constitutionalism in Illiberal Polities’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012).

<sup>321</sup> McIlwain, *Constitutionalism, Ancient and Modern* (1940), 21 quoted in Tushnet, ‘Authoritarian Constitutionalism’ (2015), 394.

<sup>322</sup> See Ginsburg and Moustafa, eds., *Rule by Law* (2008).

constitution is law, and if we are trying to interpret that law, then the claim that a particular governmental practice, domestic or international, is efficacious, is consistent with democratic theory, and is in some popular or moral sense “legitimate” just doesn’t cut much ice when the question before us is whether that practice is constitutional.’<sup>323</sup> The balance between what is constitutional and what is right or legitimate is always changing, and so the constitution must somehow change to respond to the shifting morals and politics of society. This is the tension that is ever present – the endurance of the constitution against the moving will of the people expressed in a democracy. The assumption that constitutionalism and democracy are synonymous or easily combatable is fallacious, as the term ‘constitutional democracy’ would suggest. Democracy is assumed under a constitutional order, which as Mark Tushnet and others have argued, may discount the place of constitutions under authoritarian regimes. Constitutional courts, it is also suggested, may act, not just as guardians of the constitution, but active participants in the consolidation of democracies.<sup>324</sup> There are concerns, related to the arguments made by the political constitutionalist, about courts taking on this political purpose. This concern is particularly salient in evaluating the role of courts in democracy consolidation.

As a part of the phenomenon of the judicialization of politics, courts have also become more common under authoritarian constitutions.<sup>325</sup> This again suggests that there is not a necessary connection between constitutions and democracy. A court can act to uphold the constitution, even if that constitution is non-democratic. Courts can then act to protect the foundation of peace in a constitution, even if that is counter to or at the expense of democracy. Even with the close connection between peace agreements and constitutionalism, evaluation of judicial review and the role of courts in transitional constitutional orders have focused on democratisation rather than peace. In this thesis, I suggest that a distinctive set of peace constitutions exist and that when we examine cases arising post transition from conflict rather than authoritarianism, ‘peace’ is the foundation of the constitution and so becomes the concern of courts in ways which produce distinct jurisprudential needs and responses.

In post-conflict cases, such as Northern Ireland, Bosnia-Herzegovina and Colombia, peace is at much at stake as democracy. However, the demands of peace and the demand of democracy may be in tension, as much as they can be mutually dependant. Democracy is hard to achieve without peace, but the ending of conflict can require limits to be placed on democracy in the interest of finding a resolution. The tensions between peace and democracy and the higher order difficulty of maintaining both, means that traditional approaches of both political and legal constitutionalists are incomplete.

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<sup>323</sup> Tribe, ‘Taking Text and Structure Seriously’ (1995), 1302.

<sup>324</sup> For more on this argument see Daly, *Judging Democratisation* (2015) and Issacharoff, *Fragile Democracies* (2015).

<sup>325</sup> Although there has been a general turn in the comparative constitutional literature towards courts and as well as constitutions under non-democratic regimes, there has been little work on courts in authoritarian regimes. As Ginsburg and Moustafa point out this omission is odd, especially as those who are sceptical of judicial review believe it to be undemocratic Ginsburg and Moustafa, ‘Introduction’ in Ginsburg and Moustafa.

## Legal and Political Constitutionalism

In the context of the disagreement between political and legal constitutionalist, there is an assumption that all citizens are equal. For the political constitutionalist, Bellamy whose bases his theory on republicanism, no one citizen should be given higher authority to determine constitutional disagreement. However, judges hold such a position and therefore have a higher status than the individual citizen,<sup>326</sup> and so this model is not legitimate, or democratic. But the assumption that this reasoning relies on, that all citizens are equal in status, and that the ordinary citizen does not view themselves as different from the politician. However, in post-conflict-state, the politician may be a former military commander who is not trusted by the citizen. The very foundations of constitutionalism are unique after peace. It is therefore necessary to conceive of a different normative basis through which to evaluate the arguments of political and legal constitutionalism.

There are broad concerns of the ‘judicialization of politics’<sup>327</sup> which has moved political decision making out of the power of the legislature and executive and into the courts. However, as Hannah Arendt attests to, courts may have authority but they do not hold any power.<sup>328</sup> Nevertheless, there is reasonable disagreement on the legitimacy of courts to practice strong-form judicial review<sup>329</sup> and on the democratic legitimacy of courts to rule on political questions. This disagreement is played out between the legal and political constitutionalists. I suggest that the disagreement between the two camps is unable to address the particular concerns of judicial review of peace constitutions, as courts are often asked to rule on ‘first-order questions about the structure of government’<sup>330</sup> and on questions of peace. Peace constitutions attempt to achieve elite pacts that are more inclusive than before, but risk becoming limited deals. Courts often must both acknowledge and protect the elite pact while recognising its limited nature and the need to ultimately move beyond it. This involves a difficult type of balancing act which arises directly at the political interface between opposing elites with opposing constitutional preferences.

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<sup>326</sup> Bellamy, *Political Constitutionalism* (2007), 166. See also Mac Amhlaigh, ‘Putting Political Constitutionalism in its Place’ (2016) who critiques the positions of Jeremy Waldron and Richard Bellamy, proposing that a ‘minimal theory of legitimacy’ ought to be incorporated in Waldron’s and Bellamy’s political constitutionalism to salvage it.

<sup>327</sup> See Shapiro and Stone Sweet, *On Law, Politics and Judicialization* (2002).

<sup>328</sup> Arendt, *The Human Condition* (1958).

<sup>329</sup> I borrow Mark Tushnet’s definition of strong-form judicial review: ‘the courts have general authority to determine what the Constitution means... [w]hatever limits there are on that authority, such as those imposed by the political question doctrine or interpretive approaches counselling deference to the policy judgments of the other branches, originate from the courts themselves’. Tushnet, ‘Alternative Forms of Judicial Review’ (2003), 2784.

<sup>330</sup> I use Samuel Issacharoff’s phrase to draw attention to his argument that while ‘it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence [there are] difficulties in confronting an area without clear markers in either legal or political theory’ (Issacharoff, *Fragile Democracies* (2015), 266). Issacharoff is sceptical of courts engaging with such first-order question, reserving the situations in which courts should ‘override local political arrangements’ (263).

There are many who are sceptical of the excessive faith placed in courts in new democracies and suggests that the view of courts as central engines of successful democratisation rests on rather slim evidence.<sup>331</sup> However, regardless of any academic hesitations as to the expected task of a constitutional court, courts with strong-form judicial review are commonplace in new constitutions, including those drafted as a part of a peace process.<sup>332</sup> In negotiating a political settlement, elite actors bargain intensely to protect their political positions, and in agreeing to the inclusion of strong constitutional courts may be motivated by self-interest. Ran Hirschl<sup>333</sup> and Tom Ginsburg<sup>334</sup> argue that parties contending for power make pragmatic decisions in the course of negotiating the constitutional settlement. It may also be that the internationalisation of many peace and constitution making processes has led to the ‘constitutional migration’<sup>335</sup> of strong judiciaries. International actors may also push for robust courts with judicial review of rights, as a rule of law ‘safeguard’ that is particularly necessary in cases where the power-arrangements constitute a tightly scripted ‘elite pact’.

No matter what the motivation for the adoption of strong courts into peace constitutions, the current discourse on the legitimacy of judicial review is measured against democratic values, and is unable to assess the place of courts in balancing the demands of peace in holding together the political settlement. Political constitutionalists see democracy as being facilitated primarily through representative, elected legislatures and governments, and so are cautious about the authority and oversight of courts.<sup>336</sup> Legal constitutionalists, in contrast, have understood rule of law and rights-based judicial review as central to democracy.<sup>337</sup> The argument between political and legal constitutionalists is concerned with the sense and functions of democracy. Political constitutionalists ground their position in a majoritarian model of democracy, holding that legislatures are the more legitimate institution to protect and interpret the constitution and are sceptical that judges can, or should, hold strong interpretive powers. Legal constitutionalists, on the other hand, look to courts to secure the constitution as a legal document that ascribes authority to other political institutions. Political and legal constitutionalists also disagree on the equality of citizens. Where political constitutionalists look to the democratic process and the will of the majority to provide equality through the electoral system, legal constitutionalists believe that constitutionalism, through judicial review, protects the equality of all citizens by preventing the tyranny of the majority.<sup>338</sup>

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<sup>331</sup> See for example, Daly, ‘The Alchemists’ (2017).

<sup>332</sup> Ginsburg, ‘The Global Spread of Constitutional Review’ in *Oxford Handbook of Law and Politics*, edited by Whittington and Keleman, (2008). This trend is also present in constitutions written as part of democratic transitions.

<sup>333</sup> Hirschl, ‘The Political Origins of Judicial Empowerment’ (2000).

<sup>334</sup> Ginsburg, *Judicial Review in New Democracies* (2003), 21–34.

<sup>335</sup> See Choudhry, ed., *The Migration of Constitutional Ideas* (2007).

<sup>336</sup> See, for example, Waldron, ‘The Core of the Case against Judicial Review’ (2006), Tushnet *Taking the Constitution Away from the Court* (2000) and Bellamy, *Political Constitutionalism* (2007).

<sup>337</sup> See, for example, Dworkin *Law’s Empire* ([1986] 1998) and Ely Hart, *Democracy and Distrust* (1980).

<sup>338</sup> Bellamy, *Political Constitutionalism* (2007), 5.

Advocates and opponents of judicial review look to the American and British constitutional systems, respectively, in support of their arguments. Both positions, however, assume a 'reasonably well-functioning' liberal democracy.<sup>339</sup> These arguments may need to be evaluated differently in post-authoritarian periods of democratic consolidation. I go further to suggest that the political and legal constitutionalism literature arguments on judicial review is unable to assess constitutional courts and peace constitutions, as the demands of peace may be different from (and, possibly, opposite to) the demands of democracy. That is not to say, however, that the demands of both may not also be the same in many ways.

### Peace Constitutions as a Distinct Type of Constitution

Peace constitutions are not just transitional constitutions (as, for example, are transitional constitutions from authoritarian to democratic rule) but are constitutions that follow on from a period of protracted and wide-spread conflict. For this reason, peace is the underlying requirement of the peace constitution. The foundations of the constitution rest with the peace agreement, and so, hold a distinctive type of authority that may be linked to traditional forms of authority stemming from the processes through which they are made - the author, or the previous legal regime - but rather by their goal of peace, in whatever compromised form that may take because of the peace process. In the same way, constituent power is not present in peace constitutions in the same way as traditional constitutions. Constituent power derives from the collective desire for peace and the avoidance of the return to war. It is this that grounds the constitution and that which captures and creates constituent power, in a way that is like the revolutionary language of equality and independence in the Declaration of Independence is reflected and underpins the language and authority of the American Constitution.

#### *Authority*

A constitution may possess authority if it is the case that the authors of the constitution possessed such authority. The authors of the constitution must further be seen to be acting as the representative of the collective unity. Joseph Raz contends that 'if new constitutions may derive their authority from the authority of their makers, old constitutions, if morally valid at all, must derive their authority from other sources' as 'no human institution has authority to make laws which last forever, or for a very long time'.<sup>340</sup> If the authority of the constitution cannot rest on the legitimate authority of the author boundlessly, it may acquire authority, which emerges in time, rather than at the source. The American Constitution is

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<sup>339</sup> I borrow Mark Tushnet's definition of 'reasonably well-functioning': 'Reasonably-well functioning institutions are imperfect but not systematically so, nor to a large degree. Such institutions will make mistakes identifying and protecting rights, but those mistakes will be ransom (with respect to both subject-matter and the beneficiaries of rights) and they will not be of a type that leads to a downwards spiral of rights-protection' M Tushnet, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review' (2010) 30 *Oxford Journal of Legal Studies* 49, fn 10.

<sup>340</sup> Lindahl, 'Constituent Power' in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008), 343.

perhaps one such case, for as Bruce Ackerman has argued, there can be no ‘doubt that these gentlemen [convened at the Constitutional Convention in Philadelphia] were acting beyond their legal authority – especially in claiming the right to ignore both the Articles of Confederation and the state legislatures’.<sup>341</sup> Although this position is contested<sup>342</sup>, it still follows that the legal authority of the Convention, and thus the source of authority for the Constitution, is questionable. The collective authors of *The Federalist Papers*, writing under the moniker Publius, made compelling arguments, again as argued by Bruce Ackerman, ‘to solve the problem of revolutionary legitimacy’.<sup>343</sup> The solution given in *The Federalist Papers*, one which challenges the Jeffersonian and Montesquieuvian positions on the need for constant constitutional revival, is to remove daily politics to that of normal politics rather than constitutional politics, exercised through the representative of the people. The Constitution is semiotic of the people; the people cannot be a constant source of authority. The constitution itself, as the highest source of law, becomes the authority. The ‘framers of the American constitutions’, as Hannah Arendt writes, ‘were never tempted to derive law and power from the same origin. The seat of power for them was the people, but the source of law was to become the Constitution, a written document, an enduring objective thing’.<sup>344</sup>

The question of endurance, as an empirical fact and a normative possibility, is as contested now as it was in the late 18<sup>th</sup> century. Thomas Jefferson considered that those who thought the constitution was sacred were misguided and that a constitution must be redrafted for each generation, which he suggested ought to be nineteen years.<sup>345</sup> Yet, the American case is an exception in that it has survived over two centuries, unlike the 1791 French Constitution (from where Jefferson, acting as US ambassador, was writing and reflecting on the concept of constitutional longevity) that lasted only a year, and the global constitutional average of no more than two decades.<sup>346</sup> It is, as the authors of the first quantitative study on the endurance of constitutions, put it, similar to the case of an old woman who spent her life eating poorly, drinking excessively, and smoking, yet living to be over one hundred years old.<sup>347</sup> The American example is a fascinating case of constitutional theory and practice – for the constitution, although amended, is the oldest, and even survived political collapse in the American Civil War. Legal theorists are for these reasons drawn to the American model, a tradition which is followed here. However, there is danger in overextending its usefulness as a case study. The international context in which the American Revolution occurred is now *sui generis*, the late 18<sup>th</sup> century world had little of the internationalisation that influences more modern constitution making.<sup>348</sup> The source of constitutional authority – the authors and the people – at the moment of American constitution making were in violent uprising

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<sup>341</sup> Ackerman, ‘The Storrs Lectures’ (1984), 1017.

<sup>342</sup> See *ibid*, fn. 6, 1017.

<sup>343</sup> *Ibid*, 1020.

<sup>344</sup> Arendt, *On Revolution* ([1963] 2006), 148.

<sup>345</sup> Nineteen years is the same number of year that a qualitative study determined was the average lifespan of a constitution. See Elkins et. al., *The Endurance of National Constitutions* (2009).

<sup>346</sup> *Ibid*.

<sup>347</sup> *Ibid*, 65.

<sup>348</sup> The French and American revolutions and constitutional moments, however, shared inspiration, and influence one another.

against the British colonial authority, and so could not take authority from this external source.

Grounding the authority of the constitution in the authority of the authors or in consent (the people) is vulnerable to the same argument, that the living generation ought not to be ruled by those of the past. This was the position of Thomas Jefferson, who in 1789 wrote:

It may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation: they may manage it, then, and what proceeds from it, as they please during their usufruct ... Every constitution, then, and every law, naturally expires at the end of thirty-four years. If it be enforced longer, it is an act of force, and not of right.<sup>349</sup>

The principle that those who are living ought not to be ruled by the dead lessens the legitimacy of authority by consent. Although a generation today lives longer today than the mere thirty-four years given by Jefferson, renewing constitutional consent for every new generation would remove the stability needed of a constitutional order. Stability, however necessary it may be, does not provide legitimacy.

Legal authority of a constitution can also be externally sought, and is perhaps required by international norms, if not by international law, and that authority is withheld if the constitution making process excluded public participation<sup>350</sup> – so that, authority, in the case of a constitutional convention or referendum, for example, is granted from above, by the international, and from below by the people. The authority of a constitution may rest in legal authority if it can locate that authority in another legal body that already holds authority to enact such a constitution. In some cases, the new constitution may base its authority on that of an external legal authority, such as the colonial power. Take for example the constitutions of Kenya, Malaysia, India, Pakistan and Sri Lanka, which are modelled on the common law system of Britain, and which were crafted by the exiting British authorities.<sup>351</sup> Former French colonies tended, likewise, to adopt civil law codes and French style institutional systems.<sup>352</sup> Constitutions written as part of the post-Second World War decolonization process replicated the institutions and law of their formal colonizer, in most cases, which was the source of legal authority for the new constitution.

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<sup>349</sup> Quoted in Graber, *A New Introduction to American Constitutionalism* (2013), 154.

<sup>350</sup> Tushnet, *Advanced Introduction to Comparative Constitutional Law* (2014).

<sup>351</sup> In the case of Canada, Australia, New Zealand, Ireland, India, Pakistan, Sri Lanka, Ghana, Kenya, Uganda, Tanganyika (Tanzania) and the Commonwealth Caribbean States, the British first granted dominion status (with dominion constitutions), before full independence. This was the topic of discussion at a conference ('Dominion Status at the Twilight of the British Empire') I attended at The City Law School, City University, London on 10 June 2016.

<sup>352</sup> In the case of French West Africa, the colonial style constitutional arrangements that were originally put in place quickly collapsed, and were replaced by a system of judicial hierarchy. These countries returned to a French model during their post-authoritarian transitions in the 1990s. (Kante, 'Models of Constitutional Jurisdiction', in *Constitutional Courts*, edited by Harding and Leyland (2009)).

Even if the constitution finds its principal authority in morality, rather than law, the authority must be genuine, and accepted, for if the constitutions lacks authority, the laws and institutions established under it, are also without authority.<sup>353</sup> For H.L.A. Hart a legal system rest not on morality or the authority of its source, but on it popular acceptance. A constitution is accepted and followed if is it believed to hold authority and legitimacy, regardless of its provenance.

Peace constitutions are not autonomous, but are tied together with the peace agreement that enabled them and which provided legal and moral authority for their enactment. The constitution does not become dissociated from the authority of the peace agreement after its implementation. Peace agreements may continue to be binding alongside constitutions and hold independent, and reinforcing, authority to the constitution. The peace constitution may not, unlike that ideal constitutional document, find a source of authority in a collective agency or a united constitution maker.

The legal authority of a peace constitution is grounded in the authority of the peace agreement, which derives its authority in part from international law and from the participation of external actors. The peace agreement, also, in a circular way, acquires legitimacy and authority from the promulgation of a constitution, particularly in the case where there is public participation in that process. The foundation of authority and legitimacy of such documents, however, is normative. The authority of peace agreements and constitutions in post-conflict states is tenuous, as they lack the legitimacy of a constituent power, which is often internally fractious. In fact, a peace constitution is needed to establish a *demos*. This inconsistency is referred to as the ‘paradox of constituent power’.<sup>354</sup> This paradox highlights the most significant challenges of crafting a peace constitution; that is, negotiating a settlement to a civil war by (re)structuring or (re)defining the members of a state as a single community.

### *Constituent Power*

Constitutions are, in creation and design, political and legal contracts, that bind ‘the people’ to each other and the state and the state to ‘the people’.<sup>355</sup> Even as this may be the case, the authority of the people to enact a constitution is ephemeral, as the foundation of authority is circular: ‘[i]t may be claimed that [authority] cannot derive from that of their makers, for their makers, standing at the birth of their states, cannot have authority themselves ... [as a]ll authority derives from the constitution that they themselves made without prior authority to do so’.<sup>356</sup> Authority may then derive, not from the authors of the constitution, but from ‘the people’ who hold a constituent power.

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<sup>353</sup> Green, ‘Introduction’ in Hart, *A Concept of Law* ([1961] 2012), xix.

<sup>354</sup> See Loughlin and Walker, eds., *Paradox of Constitutionalism* (2008).

<sup>355</sup> For a more complete consideration of the different definitions of constitutions see Loughlin, ‘Constitutional Theory’ (2005).

<sup>356</sup> Raz, ‘On the Authority and Interpretations’ in *Between Authority and Interpretation* edited by Raz (2009), 330.

The ideal-type constitutional document finds authority in 'the people'; the people being a source of authority for a constitution that is intended to be enduring.<sup>357</sup> However, the moment of constitutional founding is limited in time;<sup>358</sup> beyond that moment, 'the people' become an abstraction rather than a continuous source of authority. In the same way, peace agreements are negotiated and signed by certain people in a moment of time, but the 'peace' they bring must be developed and tied to new constitutional arrangements that embody a new political settlement. Peace constitutions, like many constitutional documents (regardless of their origin), are typically elite brokered pacts, often negotiated and signed at the exclusion of broader participation.<sup>359</sup>

As Thomas Paine said: 'A constitution is not the act of a government, but of a people constituting a government'.<sup>360</sup> However, it is unresolved in constitutional theory who 'the people' may be and if their act of constituting a government must be real or if it may be 'hypothetical'. The constitution may locate authority from the consent of the people. The people as a source of authority is, as an abstract concept, what constitutions often proclaim to rest upon, in the iconic words '*We the People*'. The idea of the 'the people' as the constitutional authority was a consequence of the move away from the divine as the source of original authority. The ephemeral nature of the people meant that '[a]s opposed to the apparent eternity of the sovereign power mirroring that of God ('the King is dead, long live the King'), by becoming constitutional, time became finite'.<sup>361</sup> It was in the authority of 'the people' that the American and French revolutionaries grounded their constitutional moment.<sup>362</sup> The people as a mortal source of authority for a constitution that is meant to be enduring, makes 'the people' as a source limited to a moment of time, so in the time beyond that moment, 'the

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<sup>357</sup> See Varol, 'Temporary Constitutions' (2014) who makes a descriptive and normative case against constitutions written with the intention of being permanent, see fn 6, 411 for a list of those who makes a case for enduring constitutions and a brief description of their arguments.

<sup>358</sup> Loughlin, *The Idea of Public Law* (2004), ch 6.

<sup>359</sup> There are, of course, efforts to make peace processes more inclusive, see Hart, 'Constitution-Making and the Right to Take Part', in *Framing the State*, edited by Miller (2010).

<sup>360</sup> See Paine, *The Rights of Man*, ed./intro by Philp (1995) 238.

<sup>361</sup> Dupré and Yeh, 'Constitutions and Legitimacy over Time' in *Routledge Handbook of Constitutional Law*, edited by Tushnet, Fleiner and Saunders (2013), 46.

<sup>362</sup> Hannah Arendt makes a similar argument: 'Rousseau's notion of a General Will, inspiring and directing the nation as though it were no longer composed of a multitude but actually formed one person, became axiomatic for all factions and parties of the French Revolution, because it was indeed the theoretical substitute for the sovereign will of an absolute monarch. The point of the matter was that the absolute monarch - unlike the constitutionally limited king - not only represented the potentially everlasting life of the nation, so that 'the king is dead, long live the king' actually meant that the king 'is a Corporation in himself that liveth ever'; he also incarnated on earth a divine origin in which law and power coincided. His will, because it supposedly represented God's will on earth, was the source of both law and power, and it was this identical origin that made law powerful and power legitimate. Hence, when the men of the French Revolution put the people into the seat of the king it was almost a matter' of course for them to see in the people not only, in accord with ancient Roman theory and in full agreement with the principles of the American Revolution, the source and the locus of all power, but the origin of all laws as well' (Arendt, *On Revolution* ([1963] 2006), 156).

people' becomes an abstraction rather than an ever present source of authority. The people as a source of authority is temporally abstract and paradoxical. This paradox is described by Martin Loughlin and Neil Walker:

Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty'; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what, in its most elementary formulation, might be called the paradox of constitutionalism.<sup>363</sup>

The idea of the *constituent people* also finds symbolic meaning. 'The people' in '*We the People*' is an abstraction, the idea is possibly identity creating. Although 'the people' may not be a unit at the time when the constitution is written, that abstract idea of a collective, expressed in a document that creates a body of supreme and permanent law, may create that very unit that the document at once pretends to exist and vests with authority, and which is bound together under a legal order. The founding of a constitutional order cannot itself create a people, it can, however, define a constitutional identity amongst those bound, horizontally and vertically, to the legal order that the constitution establishes.

The notion of the people is again symbolic as a representational idea rather than a true reflection of the people (whomever they may be) as a unit. The attribution of a constitution to the people in using the first-person plural, '*we*' is normative, as '[t]here can be no attribution without the retrojection of an inaugural act into the past, but there is also no attribution without the projection of community into the future, such that what is held to have already taken place is what is yet to come'.<sup>364</sup> What exists before the constitutional moment may only have been believed that have existed after the constitutional moment takes place.

The idea of 'the people', inserted into the constitutional document in the language of the first person plural pronoun, '*we*', is present in the concept of *constituent power*. The authority held by the people is absolute in the philosophy of Carl Schmitt<sup>365</sup>, who saw the power of the people

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<sup>363</sup> Loughlin and Walker, 'Introduction' in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008), 1.

<sup>364</sup> Lindahl, 'Constituent Power' in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008), 19.

<sup>365</sup> Schmitt's theories are commonly considered in constitutional theory, and, so it would not be possible to exclude him in this thesis. Still, it is important to recall David Dyzenhaus's reminder that '[i]t would certainly contribute to the health of Schmitt scholarship if those who seek to extract something valuable from his work would deal frankly and fully with his anti-semitism ... Then, as now, Schmitt's categories lead inexorable to a politics that rests either on a blind hatred of the other or, perhaps even worse, to a cynical instrumentalization and manipulation of the fear of the other in

to be held outside the authority of the constitutions; so that the people could at any moment remove their consent and authority to the constitution. This conviction that the people are superior to the constitution was also held by James Wilson:

The truth is, that in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed the superiority, in this last instance, is much greater; for the people possess over our constitution, control in act, as well as right. The consequence is, the people may change constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them.<sup>366</sup>

Hannah Arendt, on the other hand, imagined the authority of the people to be limited within the law. The implications of Schmitt's case that the people are the absolute and unlimited authority is the potential for the revolutionary moment to turn to one of mob-rule and repression. The people are 'ever-changing by definition [so that] ... a structure built on it as its foundation is built on quicksand.'<sup>367</sup> Yet, Arendt sees in the people's capacity to act in concert an expression of political freedom. The implications of this understanding of freedom, as one author argues, 'is that during extraordinary politics individuals see themselves as the agents and the originators of their own political world. They become lucid and conscious historical actors'.<sup>368</sup> Freedom, as Arendt defined it, is expressed in revolution, as 'the distinctions, limitations, and inequalities that separate citizens and prevent them from acting in concert are transcended as the community participates in the deliberations and activities aiming at the genuine generation of power and the making of new fundamental constitutional essentials'.<sup>369</sup> It is in this act of political freedom that the constitutional founding is grounded. But for this act to free it must be unconstrained by all that came before; however, in performing the political act of freedom, a justification must be found to ground the act. It is this paradox in the performance of constitutionality that sits at the heart of constitutional theory. A constitution granted authority by the people, must give to the people the necessary authority to hold such standing:

Those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out

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order to blame that other, whoever it might be, for all society's social and political problems'. It is particularly striking to consider Schmitt in the context of constitutional theory in divided societies, nonetheless, it is necessary to give some room to his position, particularly in contrast to Kelsen, and in order to understand the function of law and politics in the constitution. (Dyzenhaus, *Carl Schmitt, Hans Kelsen* (1997), 101).

<sup>366</sup> Quoted in Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, ed. by McClellan and Bradford (1989), 2:432, quoted in A Kalyvas, *Democracy and the Politics of the Extraordinary* (2008), 79-80.

<sup>367</sup> Arendt, *On Revolution* ([1963] 2006), 163.

<sup>368</sup> A Kalyvas, *Democracy and the Politics of the Extraordinary* (2008), 204.

<sup>369</sup> *Ibid*

to achieve. The vicious circle in legislating is present not in ordinary lawmaking, but in laying down the fundamental law, the law of the land or the constitution, which from then on, is supposed to incarnate the “higher law” from which all laws ultimately derive their authority.<sup>370</sup>

Hans Kelsen, as a legal positivist, contends that only the law may hold the authority to be a *constituent power*, and that the people under a constitution can only be a *constituted* authority. For Kelsen there is no collective unity that can possess the power to constitute a new legal order, nor can a legal order establish a collective unity, as ‘only in a *normative* sense can one speak of a unity... the unity of the state’s legal order, which rules the behaviour of the human being subject to its norms’.<sup>371</sup> Where prior legal authority is not present, which would be absent if the constitution were an originating constitution, Kelsen turns to a presupposed norm, the *Grundnorm*, which is external to the closed normative constitutional order. The reliance on a norm exterior to the constitutional system has found criticism in not acknowledging the agency of the actor, as an individual or collective, that holds political power to act, and begin the constitutional moment.<sup>372</sup>

Carl Schmitt’s thesis is opposite to Kelsen’s. Schmitt finds ultimate authority in politics, not law. For Schmitt, Kelsen’s trust in the law as the source of authority for the state, ignores that the sovereign may enact any law, even if it is contrary to the original source of law-making.<sup>373</sup> Schmitt holds that true authority is to be found in the political, not the legal, act, but that the source of that authority would only become clear when the system was in jeopardy.<sup>374</sup> Kelsen, in placing authority in the law, does not conceive of a prior political existence of a people, which Schmitt is critical of for confusing the political and legal. Schmitt accepts as true that ‘the concrete existence of the politically unified people is prior to every norm’.<sup>375</sup> Kelsen, on the other hand, believes ‘that unity is—according to sociological findings—more a bundle of groups than a coherent mass of one and the same aggregate state’.<sup>376</sup> This understanding of the state may better explain most societies, especially, divided societies. There must exist a political unit before a legal constitution can exist, that is there

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<sup>370</sup> Arendt, *On Revolution*, ([1963] 1990) quoted in A Kalyvas, *Democracy and the Politics of the Extraordinary* (2008), 198.

<sup>371</sup> Kelsen, ‘On the Essence and Value of Democracy’ in *Weimar*, edited by Jacobson and Schlink ([1927] 1990), 89-90, quoted in Přebáň, *Sovereignty in Post Sovereign Society* (2015), 74-75.

<sup>372</sup> See Lindahl, ‘Constituent Power’ in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008).

<sup>373</sup> Dyzenhaus, ‘The Politics of the Question of Constituent Power’ in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008), 130.

<sup>374</sup> The sovereign, according to Schmitt, is ‘he who decides on the exception’ (Schmitt, *Political Theology*, ed./trans by Schwab (1985) 5 quoted in Přebáň, *Sovereignty in Post Sovereign Society* (2015), 67.

<sup>375</sup> Schmitt, *Verfassungslehre* ([1928] 1993), 121 in Lindahl, ‘Constituent Power’ in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008), 9.

<sup>376</sup> Kelsen, ‘On the Essence and Value of Democracy’ in *Weimar*, edited by Jacobson and Schlink ([1927] 1990), 89-90, quoted in Přebáň, *Sovereignty in Post Sovereign Society* (2015), 74.

must be an expression of constituent power at the centre of the constitution, according to Schmitt.

This debate sits at the heart of the discussion on constituent power and the authority of the constitution. There is little that can be added to that literature in this thesis, rather the purpose of giving space to this debate is to acknowledge the long ongoing disagreement on the place of authority, legitimacy and power in constitutional theory, including on the very basic notion of the role of ‘the people’ in the normative constitutional order.

The exact meaning and purpose of this phrase is contested, nonetheless, however it is conceived it is not synonymous with democracy. Democracy assumes some level of disagreement while *constituent power* assumes action as a unit. Martin Loughlin, whose explanation of *constituent power* is appropriate here, accepts that,

Democracy is not easily reconciled to law. It is an expression of an expansive or innovative movement that asserts the capacity of the people to decide for themselves the type of ordering under which they might live. As the primary legitimating principle of modern political order, democracy fixes on the present and is orientated to the future. Democracy reflects a principle of openness. Law, by contrast, seeks to control, regulate and divide this expansive force. Although addressing the concerns of the present, law is orientated to the past. Law seeks the closure of that which democracy tries to keep open ... This difficult relationship between democracy and law helps us to understand constituent power as the concept through which such pressures are mediated. Constituent power is the generative principle of modern constitutional arrangements. It gives juristic expression to those forces that constantly irritate the formal constitution, thereby ensuring it is able to perform its political function.<sup>377</sup>

In accepting that *constituent power* is distinct from democracy, it logically following that it is also not synonymous with participation, which is now argued to be necessary for the legitimacy (and international recognition) of a constitution. *Constituent power* is a theoretical construct, rather than an exact expression of the demands of the people, which nonetheless, is a useful concept in considering the sources of constitutional authority.

### *Violence*

Violence, like peace, is distinct to every context, yet to comprehend violence within a constitutional order, it is useful to turn to theory. The necessity of theory to make sense of practice, irrespective of its complexity, as Martha Nassbamm says, is that theory ‘involves the systematization and critical scrutiny of thoughts and perceptions that in daily life are frequently jumbled and unexamined.’<sup>378</sup> Violence is very often considered in understanding how new constitutions come to be required – through revolution or the violent overthrow of

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<sup>377</sup> Loughlin, *The Idea of Public Law* (2004), 100.

<sup>378</sup> Nassbaumn, *Women and Human Development* (2000), 35.

the government, as was the case in the archetypical examples of the French and American revolutions. However, violence is often not considered in constitutional theory, as constitutions are understood to be beyond normal political activity, and violence is outside politics. The faith that constitutions are somehow immune from violence is grounded in the belief that they are unaffected by the daily or the normal, until they are overthrown and replaced by a new document that is given the same elevated status. The belief that the constitution in some way sits above and out of reach of ordinary politics is to deny the daily impact the constitutional arrangement has on all people. The ideal-type constitution ends violence (both the actual occurrence of violence and the possibility of violence:

Constitutionalism is rooted in the fundamental rejection of violence as a means to settle political disputes. The use of violence to inaugurate a constitutional regime contradicts the very point of what a constitutional order is supposed to achieve ... A basic ambition of constitutionalism is for institutional decisions to produce political settlements. To do so, institutions and their decision-making procedures must be viewed by political actors as standing outside the terrain of politics, as constituting and regulating political life and not forming part of it, and as being indifferent among the competing political positions on the table'.<sup>379</sup>

Peace constitutions, in the same way, are intended to move contestation out of violence into ordinary politics. A constitution drafted as part of the peace process is intended to end conflict. However, the potential for and the occurrence of violence has a bearing on peace constitution drafting and implementation. Violence can be a part of the process as well as the reason for the drafting of a new constitution. The threat of violence remains throughout the peace process and constitution drafting phases, and often continues into the implementation and post-transition periods. The requirements for peace are vague, and the potential for renewed violence lingers beyond the enactment of the peace constitution.

Although there are many obstacles to the implementation of peace agreements, including the genuine commitment of the parties, the text of the agreement is drafted in the belief that it ought to be final and binding. The moment a peace agreement is signed, it can only evidence the intention for peace, but cannot, in the signing of it, bring about peace. Peace is, in the action of drafting and signing a peace agreement, nothing more than a promissory act, but by the very action of making it, grants authority for its implementation and authorizes the constitution that follows it. A constitution, or any law, may also be thought of as an act of promise. All laws are a promise, or contract, between the people and the state. A constitution is a higher form of that promise, one that is intergenerational and temporal. It is a promise by the drafters to the present and the future, and to the future, those not yet even born, to the past. It is a promise across people of a state to hold to the aspirations and intent of the constitution, and to abandon a state of violence for that of peace.

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<sup>379</sup> Choudhry, 'Civil War, Ceasefire, Constitution' (2011-12), 1908, 1918.

Traditional concerns of constitutional theory – the source of constitutional authority and legitimacy, and the idea of constituent power – are present in theory on peace constitutions, however, the distinct concerns and foundations of peace constitutions are not yet fully understood or considered in the legal or political literature. Peace is the foundation of the constitution and the grounding of its authority. Constitutional theory has a long tradition of measuring constitutions against democracy and as the outcomes of revolutions, but constitutional theory does not engage sufficiently with the concerns of peace or violence. As a corollary to peace as the authority of constitutions, the place of violence in constitutions needs to be further understood.

Imagery and faith in peace is as important as the written words of the constitution. The narrative of peace as an Arendtian fable may provide declarative authority to peace agreements; peace (or at least the promise of peace) may also find expression in the constituent power, represented by the will of the people as a unit. War, as the political expression of violence, is normatively and empirically, harmful. Peace, as the antithesis of violence, is instead, widely desired and valued. A political unit may hold to the promise or fable of peace, exercising their authority as a constituent power. If violence occurs, however, that promise of or aspiration for peace is broken, which then breaks the grounding of the constitution. Without this grounding, the constitution holds no authority, and so no meaning. Violence, however, is not unlikely or uncommon in these circumstances. It is only consequential if it crosses a certain threshold. Its impact, therefore, is a matter of degree. If the type or level of violence is enough to weigh against the peaceful foundation of the constitution, it will destroy the fable.

The belief is that a constitution sits above ordinary law and politics, and so is protected from violence which, according to some understandings of political violence, also sits outside of ordinary politics. These assumptions are grounded on a false premise that constitutions are immune from politics and politics from violence. In his *The Idea of Public Law*, Martin Loughlin, reminds us that:

politics is rooted in human conflict ... [and that conflict] may lie at the root of the political ... [so that] politics as a set of practices within a state, is as much concerned with devising forms of co-operation as with conflict over them'. This first level of politics 'conjures an image of struggle for security or for material gain, [while] the second order is played out primarily in terms of opinion and belief. ... If the first order of the political concerns struggle and the second order revolves around beliefs, then the third order—the order of constitutional law—is driven primarily by prudential considerations.<sup>380</sup>

The authority held by the people is absolute in the philosophy of Carl Schmitt, who saw the power of the people as existing outside the authority of the constitutions; so that the people could at any moment remove their consent and authority to the constitution. Hannah Arendt, on the other hand, imagined the authority of the people to be limited within the law. The

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<sup>380</sup> Loughlin, *The Idea of Public Law* (2004), 52

implications of Schmitt's case that the people are the absolute and unlimited authority is the potential for the revolutionary moment to turn to one of mob-rule and repression. Violence sits along a spectrum between all-out war and peace, so that even those states that experience relative peace, are not immune from violence, whether in the form of structural or daily criminal violence. The constitution may not actively cause violence; however, it may not act as a sufficient remedy to (structural or direct) violence. Constitutions bring order and process that allows for contestation in a non-violent way, however, structural and direct forms of violence effect those in the minority or without power. If the constitution is intended to constrain power – even if the Madisonian idea of minority protection is not included – then for violence to be present in society in a way that is widespread or entrenched, diminishes the authority of the constitution. A constitution without authority is then in danger of violent resistance.

Arendt's understanding of political action and her equal interest in violence and revolution, politics and law makes her work relevant to the theory on constitutional violence. Arendt's understanding of violence is unlike that of other constitutional theorist who assume a necessary association between power and violence. For Arendt, violence and power are opposite, so that 'violence appears where power is in jeopardy'.<sup>381</sup> Power, as Arendt conceives it, is the province of the many, not the individual, unlike violence which is a tool of political action.

Arendt conceives of violence as a tool that sits outside of political action. Violence, in her understanding, can be justified but can never be legitimate. Power, unlike violence, must find legitimacy but does not require justification being a normal human activity. Arendt's position on violence is in response to others writing around the same time who link violence and power.<sup>382</sup> Violence does not have the authority, in Arendt's account, to create institutions, rather, for this, power is necessary. It is for this reasoning, that Arendt sees violence as sitting outside of the ideal-type political activity which is realised through public deliberation.

Frantz Fanon, in contrast to Arendt, believed that violence is able to destroy (colonial) authority, which could then be replaced by a new legitimate authority. For Fanon, violence would vest the people with knowledge and power. Violence is revolution and freedom.<sup>383</sup> Arendt thought violence created violence. Violence may, for Arendt, be in opposition to power, as those who hold power have no recourse to use violence.

Yet, if power resides in the constitution (as it ought to, as an objective authority that exists beyond the realm of daily politics) the process of constitution-making is one that grants authority through the constitution to government institutions. The actors participating in the process have an interest in preserving or increasing the power granted to them in the constitution. The founding principle of the American Constitution, was not, as many would

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<sup>381</sup> Arendt, *On Violence* (1970), 56.

<sup>382</sup> For example, Walter Benjamin and Franz Fanon, who understand violence as a political activity, were drawing on a Marxist tradition in post-colonial settings.

<sup>383</sup> See Lang Jr., 'Violence and International Political Theory' (forthcoming).

think, individual rights and liberty, but the balance and separation of power between the executive, judiciary and legislature. Taking from the work of Montesquieu, the Constitution protected, in equal balance, power and freedom, on the conviction that only 'power arrests power'. Power can be destroyed by violence, for 'this is what happens in tyrannies, where the violence of one destroys the power of the many, and which therefore, according to Montesquieu are destroyed from within: they perish because they engender impotence instead of power'. Violence has command over power, which cannot be limited by the law, 'for the so-called power of the ruler which is checked in constitutional, limited, lawful government is in fact not power but violence, it is the multiplied [sic] strength of the one who has monopolized the power of the many'.<sup>384</sup> Violence is then ever present in the power of the ruler, for the ruler to exist, it must be at the exclusion of others. If power can be constrained only by power, what is to constrain violence, which can destroy power? For Arendt,

politically speaking, it is not enough to say that power and violence are not the same. Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course its end is the disappearance of power. This implies that it is not correct to say that the opposite of violence is nonviolence: to speak of nonviolent power is actually redundant. Violence can destroy power; it is utterly incapable of creating it.<sup>385</sup>

Violence may also be understood as existing in law. Walter Benjamin believed that law is necessarily coercive, that law-making imposes constraints on political life, so it must be violent. The constitution as the extraordinary law that conditions all other law, must also be violent. Perhaps extremely so, given its level of authority. Legal interpretation also reveals political violence in law:

Great issues of constitutional interpretation that reflect fundamental questions of political allegiance - [such as] the American Revolution ... - clearly carry the seeds of violence (pain and death) at least from the moment that the understanding of the political texts becomes embedded in the institutional capacity to take collective action. But it is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes legal interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism. Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law.<sup>386</sup>

Constitutional interpretation, like all legal interpretation, have consequences that go beyond the clarification or reading of the legal text. The judge must make determinations on the law that have impact on people, singularly or collectively. The level of impact of the judge's

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<sup>384</sup> Arendt, *On Revolution* ([1963] 2006), 151.

<sup>385</sup> Arendt, 'A Special Supplement' (1969).

<sup>386</sup> Cover, 'Violence and the Word' (1986), 1606.

decision will depend on the context of the case. Robert Cover argues that '[i]nterpretations in law also constitute justifications for violence which has already occurred or which is about to occur' so that '[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another.'<sup>387</sup> The interpretation of a peace constitution has capacity to cause (and prevent) violence so that the action of interpretation can be thought of as a (possible) act of political violence. Violence is not considered in constitutional theory, either in its connection to authority or as a part of a theory of interpretation. The judge is required to interpret the constitution, which can be understood as a violent act according to Cover. The law (and the constitution) is contestable, and in that contest, there is a potential 'winner' and 'loser'. The action of interpreting the law necessarily creates some harm on the 'loser'. Further the act of constitutional interpretation is an extension of the constitution, which itself is (often) the product of violence. So, while the law is interpreted, its interpretation, cannot be simply understood as the interpretation of literature, as the decision of the judge is a politically violent action.

Benjamin also locates violence in the act of myth-making. Peace and the constitutional identity it is intended to advance is based on a promise or a fable. For example, Arendt's concept of a fable suggests that authority may be located in the narrative of peace.<sup>388</sup> The authority of the constitution can be located in the performative power of the peace agreement, in the same way that Arendt finds that the Declaration of Independence, as an action that arose out of nothing except the belief that all men are created equal, was the source of authority for the American Constitution and Republic. In the case of a peace constitution, following the same logic, all that is necessary to find authority is the fable of peace itself. If the authority of the constitution is based on a fable, and the action of creating a myth is violent, as Benjamin believes, a peace constitution is violent both in its act of creation, but also in its source of authority.

Violence is ever present or lurking in even the most organised and stable of countries, and while constitutions are often violently overthrown, it is violence out of the ordinary that puts the peace constitution in jeopardy. However, violence is the breaking down of order, so even a peaceful revolution in which 'the people' reassert their constituent power, is an act of political violence; however, not one that amounts to violence as harm. A peace constitution may ultimately rest its authority on peace, however, if that authority is violent then its foundations are at odds. A peace constitution holds peace and violence in equal tension: the peace constitution constrains and enables violence as violence constrains and enables the peace constitution.<sup>389</sup> Violence, however, is a neglected concept in the current understanding

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<sup>387</sup> *Ibid*, 1601.

<sup>388</sup> Honig, 'Declarations of Independence (1991).

<sup>389</sup> This (altered) phrase is taken from Lang. Lang is evaluating violence in international politics. His argument is, broadly, that that 'violence constrains and enables politics at the same time that politics constrains and enables violence'. There is a similarity in his argument to the one being made here, although rather than international politics, I am looking at constitutions, which are an extraordinary form of politics. Lang, likewise, applies arguments on violence and domestic politics to the international. Lang Jr., 'Violence and International Political Theory' (forthcoming).

of constitutions. Violence as a fact is evident in constitution making and implementation, but the implications of this violence on the efficacy of the constitution is not fully understood.

Even as violence is better explored in political theory than it is in legal or constitutional theory, violence sits awkwardly with ideas of liberal democracy. It is assumed that the expressions that give rise to violence have another avenue for release through the democratic process. This unease between violence and democracy is a condition of the association between violence and authority, which is explored by Arendt and others. Notions of authority are based on conservative historical religious ideas, and are 'incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is of the nature of authority that it requires submission even when one thinks that what is required is against reason.'<sup>390</sup>

Although there are strong normative arguments in support of a democratic constitution-making process, public participation and inclusion has relevance in the context of violence and constitutions. There is no clear consensus on the effect of inclusion on violence, while normatively public participation is beneficial to the process, it is unclear how participation is best executed and what inclusion adds to the elite level bargain that is necessary for a deal to be agreed. There is disagreement as to the benefits of inclusion in constitution drafting. There is a 'belief that the process used to develop a new constitution exercises both an indirect effect on violence, by shaping who has a voice in choosing the substantive terms, and a direct effect, by influencing senses of inclusiveness or levels of compromise'.<sup>391</sup>

### *Interpretation*

Constitutional courts are now commonplace under new constitutions, such as those drafted for post-War and post-Communist Europe, 'third wave'<sup>392</sup> democratising states and states emerging from conflict. The reasons for the move to the inclusion of strong-form constitutional courts are, for example:

first, to ensure adherence to a new constitution and its protection against legislative majorities; second, to ensure unity and finality in interpretation, avoiding the possibility of different courts adopting different interpretations of the constitution; third, to provide a visible symbol of constitutional progress; and fourth, to ensure that judicial deferentialism, which may have characterized previous regimes of judicial review, does not undermine the constitution.<sup>393</sup>

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<sup>390</sup> Raz, *The Authority of Law* (1979) quoted in Lang Jr., 'Violence and International Political Theory' (forthcoming).

<sup>391</sup> Widner, 'Constitution Writing and Conflict Resolution' (2005), 503.

<sup>392</sup> Huntington, *The Third Wave* (1991).

<sup>393</sup> Harding, Leyland and Groppi 'Constitutional Courts' in *Constitutional Courts: A Comparative Study*, edited by Harding and Leyland (2009), 4-5.

A clear trend may be obvious, however, '[o]ne of the many paradoxes about constitutional courts is that, while their creation is usually the result of a perception that they have succeeded in other jurisdictions, their activity ... is in fact peculiarly subject to the political tensions of the jurisdiction in which they are introduced'.<sup>394</sup>

A constitution is transcribed text, conceived of in a constitutional moment that, through the act of judicial review and political amendment, moves from the settlement articulated in a plain text reading, into a broader constitutional idea. As an example, in a case contesting the meaning of 'persons' in section 24 of Canada's *Constitution Act, 1982* (known originally as the *British North America Act, 1867*), Lord Sankey delivered a judgement in which he reflected on the nature of constitutional change:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits ... Like all written constitutions it has been subject to development through usage and convention.<sup>395</sup>

The metaphor for constitutions as 'living trees' that evolve over time and become something new, is fundamental to constitutionalism. However, it is not the well-worn metaphor of the living tree, which grows yet is always rooted to its foundations that best captures the meaning of the peace constitution. A better symbol would be that of a cloud, existing in a bounded ecosystem that finds its originating and sustaining source of existence (or authority) from the water below. In this meteorological image, the constitution can only continue to exist if it is allowed to do so by that which sustains it, or by those over whom the constitution exists. The constitution, or cloud in this image, continues to exist so long as it is believed to have the authority to do so, and upholds the legitimate political and legal order. The water can be symbolic of the source of authority, whether it is the constitution maker, an earlier or external legal body, or the consent of the people; the constitution takes from these sources, but is separate and superior to them all. The cloud, or constitution, in both metaphor and reality, takes on its own shape. The constitution is at once connected and part of those over whom it holds authority, but separate and distinct from that authority.

A compromised constitution cannot be understood as an end-point if it is to function in a deeply divided state emerging from high-level conflict. To understand the constitution as an activity breaks with the more accepted understanding of the constitution as an entrenched and lasting document. A peace constitution must always be (re)negotiated through continual (re)interpretation so that it can break from its compromised founding and move beyond the divisions that were held at the moment of its signing. The symbolism of a cloud is a better illustration of how a constitution ought to be detached from its origins, rather than that of the living tree that calls to mind a document bound to its roots.

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<sup>394</sup> *Ibid.*

<sup>395</sup> *Edwards v. A.-G. Canada* [1930] A.C. 124, 217.

A constitution has no true<sup>396</sup> or correct<sup>397</sup> interpretation, it is for courts to navigate those political tensions that exist within the language of the constitution and the jurisdiction under which they sit. The grounds for constitutional interpretation are more than a theoretical preoccupation, the authority of the constitutional court's reasoning and the legitimacy of the court and the constitution is found in the justification for interpretation. The rules of interpretation are, as HLA Hart calls them 'secondary rules' (including his 'rule of recognition') which are 'concerned with the primary rules themselves'.<sup>398</sup> In the constitutional cases considered in this thesis, the reasoning of the court relied on general and abstract principles of law, not on precedent and rules alone. The legitimacy of these decisions is grounded in the legitimacy of the reasoning and rules of interpretation adopted by the court and as understood in legal theory. The decisions in the cases (and as made clear in the example of Bosnia-Herzegovina where the Constitutional Court came to a different conclusion to the European Court of Human Rights in considering the same set of circumstances and applying the same laws), did not rest on a technical reading of the text, and so there is reason to argue that the court in these cases 'made' law rather than apply or interpret the law. This would certainly have been the position of the legal realist who believes that the judge has ultimate discretion in applying the law and is unable to be bound by rules or principles of interpretation.

There are two main categories of judicial review: first, is the specialised and centralised category based on the Kelsen's theory of hierarchy of norms. The first of this type of constitutional court was set up under the 1920 Austrian Constitution and is typical under European constitutions (since the Second World War). The second, generalist and dispersed style of judicial review, is characteristic of the United States and the United Kingdom, which is further grouped into strong- and weak-form systems.<sup>399</sup> I borrow M Tushnet's definition of strong-form judicial review: 'the courts have general authority to determine what the Constitution means... [w]hatever limits there are on that authority, such as those imposed by the political question doctrine or interpretive approaches counselling deference to the policy judgments of the other branches, originate from the courts themselves'.<sup>400</sup> There are also mixed constitutional systems which provide for both abstract (Kelsenian system) and concrete ('American' system) review.

Aharon Barak outlines the methods of interpretation, between objective and subjective, outlined in the below table.

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<sup>396</sup> 'A text has no "true" meaning. ... All understanding results from interpretation, because we can access a text only after it has been interpreted' (Barak, *Purposive Interpretation in Law* (2005), 9).

<sup>397</sup> 'In terms of the positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as "correct"' (Kelsen, *General Theory of Norms*, trans Hartney ([1979] 1991), 130 in *ibid*).

<sup>398</sup> Hart, *A Concept of Law* ([1961] 2012), 94.

<sup>399</sup> See Tushnet 'Comparative Constitutional Law' in *The Oxford Handbook of Comparative Law*, edited by, Reimann and Zimmermann (2006), 1242.

<sup>400</sup> Tushnet, 'Alternative Forms of Judicial Review' (2003), 2784.

Table: Methods of Interpretation

<p><b>Subjective</b><sup>401</sup></p>	<p>The interpreter begins with language of the text to realise the author's intent, following the same track as the authors, in the other direction</p> <p>The interpreter considers the historical and psychological intent of the author to understand the meaning</p>
<p><b>Objective</b><sup>402</sup></p>	<p>The interpreter understands that the text and the intent of the author are severed after the text is written; the meaning of the text is interpreted without reference to the intent of the author</p> <p>Four subcategories of objective interpretation:</p> <p>(i) meaning of the text interpreted through intent of the author, as understood by a reasonable person (therefore, different from subjective intent)</p> <p>(ii) text is interpreted as a reasonable person would interpret the language at the time of drafting<sup>403</sup></p> <p>(iii) the meaning of the text is found in the objective purpose of the text or legal system</p> <p>(iv) the text is interpreted according to the interpreters understanding the meaning of the language of the text, rather than the author's intent or the purpose of the text, relying on the subjectivity of the interpreter<sup>404</sup></p>
<p><b>Subjective-Objective</b><sup>405</sup></p>	<p>Non-integrative subjective-objective interpretation:</p>

<sup>401</sup> Barak, *Purposive Interpretation in Law* (2005), 32-33.

<sup>402</sup> *Ibid*, 33-35.

<sup>403</sup> This is type of interpretation is called 'new textualism' and is the approach adopted by originalists, see Scalia, 'Originalism' (1989).

<sup>404</sup> This approach assumes that 'textual language is always vague and ambiguous; understanding is always a function of context, but because even context is vague and ambiguous, language does not pose an obstacle to the interpreter who seeks to realize his or her own ideas ... [so that] law becomes politics, [such that] any attempt to present objective legal doctrine [is, according to this approach,] masking the reality that the judge interprets the text according to his or her political views' (Barak, *Purposive Interpretation in Law* (2005), 35).

<sup>405</sup> *Ibid*, 35-37.

	<p>(i) two stage process, the interpreter aims to understand the author's intent, however, because of a lack of information, the interpreter must also adopt an objective approach by understanding the meaning of intent of the author as a reasonable person</p> <p>(ii) the interpreter interprets the (objective) meaning of the text given by the author (this approach is used to suggest that the drafters of the US Constitution intended for it to have an objective meaning)</p> <p>(iii) the interpreter interprets the meaning and intent of the text as it would be understood by the current legislature, rather than the legislature that adopted the text<sup>406</sup></p> <p>Integrative subjective-objective systems of interpretation the interpreter applies subjective interpretation (intent of the author) and objective interpretation (intent of the reasonable author or system)</p> <p>(i) purposive interpretation – uses a hermeneutic approach for the interpreter to use some discretion in interpreting the text, to find the objective of the text<sup>407</sup></p> <p>(ii) pragmatic interpretation – as above, except the pragmatic interpreter is not confined to finding the objective purpose of the text, but rather able to make pragmatic decision<sup>408</sup></p> <p>(iii) Dworkin's system on interpretation ('constructive interpretation')<sup>409</sup></p>
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On the theory of interpretation, I agree with Barak who argues that,

Judicial discretion exists, but it does not undermine the foundations of the interpretive project. It is rather, part of that project. Interpretive rules are

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<sup>406</sup> 'The judge can only guess as to what the ancient legislature would really have wanted, as that legislature cannot express its disagreement with the interpretation attributed to it. ... when the judge refers to the intent of the contemporary legislature, he expresses a conjecture that can be tested, because if the contemporary legislature disagrees, it can express its opinion and enact a statute governing the way statutes should be interpreted' (Perelman, *Logique Juridique [Legal Logic]* (1984 [1976]), 131 in Barak, *Purposive Interpretation in Law* (2005), 37).

<sup>407</sup> Barak, *Purposive Interpretation in Law* (2005), 288.

<sup>408</sup> *Ibid.*

<sup>409</sup> Dworkin, *Law's Empire* ([1986] 1998), 53, see also Barak, *Purposive Interpretation in Law* (2005), 290- 291.

critical to law. In the absence of interpretive rules, a legal text in the hands of the judge becomes an ax *[sic]* to grind as he or she chooses. The judge's intent supplants the intent of the author of the text. The text loses its independent character, and jurisprudence is reduced to an exercise in the psychology or sociology of the interpreter. Law becomes a caricature of itself. Anyone who recognizes the existence of law must also recognize the existence of legal rules that bind the interpretation of legal texts.<sup>410</sup>

This position sits somewhere in between Dworkin's belief in law as interpretation and his faith in the 'philosopher judge'<sup>411</sup> and the position taken by critical legal theorists that law is simply a matter of politics. Ronald Dworkin gives perhaps the best identified argument in support of judicial review in contemporary jurisprudence. Dworkin made a career of defending the institution of judicial review, asserting that '[t]he United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions'.<sup>412</sup> Dworkin argues that constitutional interpretation is grounded in a moral reading of the constitution which 'invoke moral principles about political decency and justice'.<sup>413</sup> It is, according to Dworkin, the judge who must interpret the morality of the written constitutional text:

The great constitutional clauses set out extremely abstract moral principles that must be interpreted before they can be applied, and any interpretation will commit the interpreter to answers to fundamental questions of political morality and philosophy.<sup>414</sup>

Dworkin's faith in the judge as the interpreter of the constitution rests on his belief that the judge is also the philosopher who can interpret the constitution through such a moral reading. Dworkin's theory is normative; it is advice on how judges *ought* to behave in interpreting the constitution. There are some who would disagree with Dworkin's belief in the 'philosopher judge'; however, while the judge may not be the moral philosopher wished for by Dworkin, she may consider higher principles (or purpose) in interpreting the constitution.

The language of a constitution requires interpretation, but it is not boundless. The judge cannot find in the text of the constitution something which could not be detected by a linguist. Language (and perhaps good faith in the process<sup>415</sup>) is the boundary, or frame,<sup>416</sup> that holds the constitution to its foundational meaning:

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<sup>410</sup> Barak, *Purposive Interpretation in Law* (2005), 39.

<sup>411</sup> Dworkin, *Law's Empire* ([1986] 1998).

<sup>412</sup> *Ibid.*

<sup>413</sup> Dworkin, *Freedom's Law* ([1996] 2005), 2.

<sup>414</sup> *Ibid.*, 343.

<sup>415</sup> Tribe, *American Constitutional Law* (1988), 92.

<sup>416</sup> Kelsen, *Pure Theory of Law*, trans./ed. by Knight, ([1934] 1967), 348.

[I]n interpreting a statute (in the narrow sense), one can only actualise the purpose of the legislation using its language. The language must be capable of actualizing the purpose ... words are a means of communication, and those who use them must give them a meaning that is acceptable in the language in which they are written<sup>417</sup>

The text of the constitution is a frame, as Kelsen imagines - as though the constitution is a work of art that is studied by the judge who gives some interpretive understanding to the shades of paint, the use of shadow or images drawn on the canvass. Without wishing to extend the analogy too far, the peace constitution may be like an artist's exhibit, bound together by style or period but not contained to a single work. The judge interpreting the purpose of the constitution must look to other works of art by the same artist<sup>418</sup> to draw inspiration and to comprehend the history of the original piece. In so doing, the judge considers the reasoning behind the constitution. In one of the first Charter cases, the Supreme Court of Canada, holding that the law in question was inconsistent with s. 8 against unreasonable search or seizure, emphasised that the Charter was a 'purposive document'. Justice Dickson, writing for the majority reasoned that:

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *McCulloch v. Maryland* (17 U.S. (4 Wheat.) 316 (1819)) ... The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.<sup>419</sup>

Justice Dickson, writing again for the majority, in a case concerning the application of s 2 (fundamental freedoms), repeated the Court's understanding of the Charter as a purposive document:

The proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such guarantee ... the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather

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<sup>417</sup> Barak, P., LCA 6339/97, *Roker v Solomon*, 55(1) P.D. 199 [1999], 283.

<sup>418</sup> Hart, *A Concept of Law* ([1961] 2012).

<sup>419</sup> Supreme Court of Canada, Dickson JJ, *Hunter et al. v. Southam Inc.* [1984] 2 S.C.R. 145, p. 156.

than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.<sup>420</sup>

This interpretive method used by the Supreme Court of Canada is common. The German Federal Constitutional Court, for example, took a similar approach early on in looking for the 'function' of the rule under review:

The *teleological* method is today probably the most important technique of interpretation in German constitutional law ... The teleological method might also be characterized as 'functional', because it asks for the function which a certain rule as to accomplish within the context of the Constitution ... Today the teleological method asks for the *present* purpose of the present meaning of a rule.<sup>421</sup>

The distinction between originalism and purposive interpretation is its temporal perspective. Originalism is past-looking, while purposive interpretation is future- or present-looking. Kim Lane Scheppele very helpfully makes clear the difference between the two approaches as the difference between 'because' and 'in order to'. Purposive interpretation considers the past, but does so only *in order to* imagine the future.<sup>422</sup>

#### Language, Silences and Constitutional Interpretation<sup>423</sup>

The environment in which a peace constitution is negotiated and implemented is violent (with actual violence or the threat of violence). A constitution drafted in violence requires a cautious approach, taking care in deciding where the constitution should be comprehensive and where it is better for it to be silent. There is a large body of literature that deals with negotiation and mediation in the peace process, however, as argued in the introduction, this literature (and, in fact, the practitioners involved in peace and constitution making processes) does not go far enough in considering these questions. Again, while constitutional silences were approached from a theoretical point of view in chapter two, silences in peace constitutions may be a consequence of violence, or, just as likely, may cause violence.

The closest analogy to silences in peace constitutions is to the post-colonial constitutions. Ivor Jennings, who was tasked by the British government to draft the constitutions of their former colonies – including Nepal. Jennings (and British constitutional lawyers in general) was a constitutional minimalist, reluctant to include what was not necessary. Jennings, who was not involved in the drafting of the Indian Constitution, thought it 'far too large and

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<sup>420</sup> Supreme Court of Canada, Dickson J, *R v. Big M Drug Mart Ltd.* [1985] 1 S.C. R. 295, p. 34 (emphasis in original).

<sup>421</sup> Friauf, 'The Technique for the Interpretation of Constitutions' in *Proceedings of the Fifth International Symposium on Comparative Law* (1968) in Barak, *Purposive Interpretation in Law* (2005), 372.

<sup>422</sup> Scheppele, 'Jack Balkin is American' (2013), 24.

<sup>423</sup> This section benefited from a discussion with Asanga Welikala.

therefore far too rigid'<sup>424</sup> and difficult to amend. The Indian Constitution is one of the most amended constitutions and the Supreme Court of India has been a very activist court, both things Jennings warns could not happen with such a rigid and lengthy constitution.

When '[c]onstitutional politics threatens to absorb all politics ... the coinage of constitutional protection is devalued.'<sup>425</sup> In favour of constitutional reticence, Webber argues that courts are given too much authority to determine constitutional disputes, which removes the dispute from the legislature, but also from the people:

Constitutional entrenchment, by taking the issues out of the legislative realm and placing them in the courts, can promote a more passive and less participatory approach to the issues, in which citizens leave the definition and protection of their rights to the courts. That lack of engagement may in the end undermine the very interests one wants to protect.<sup>426</sup>

The inclusion of moral values in a constitutional document can make it quickly out-of-date. For example, the Third Amendment of the American Constitution<sup>427</sup> has no modern meaning, although at the time of drafting it held value in 'the context of the war with Britain.'<sup>428</sup>

The constitution must be limited by its language. As Barak reasons 'linguistics sets the boundaries of legal interpretation [so that an] interpreter may not give a text a meaning that a linguist could not give it',<sup>429</sup> however, the meaning of the constitution may still be found in the broader constitution through its framework. As Laurence Tribe puts it:

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<sup>424</sup> Dam, 'A British Misreading' in *Constitution-Making in Asia*, edited by Kumarasignham (2016), 79. Dam's argument is that the Jennings was too focused on the text of the Indian constitution at the expense of understanding the political and legal context in which it operates.

<sup>425</sup> Webber, 'Constitutional Reticence' (2000), 127.

<sup>426</sup> *Ibid*, 141.

<sup>427</sup> The amendment reads: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

<sup>428</sup> The same case could be said of the Second Amendment – the 'right to bear arms' clause. In a 2008 judgment (*District of Columbia v. Heller*, 554 U.S. 570 (2008)), Justice Scalia, writing for the majority, held that the Second Amendment allows individuals the right to keep and bear arms, outside of service with a militia, for the purpose of self-defence, which includes possession in the home. Justice Scalia was famously identified with originalism (see Graber, *A New Introduction to American Constitutionalism* (2013)). Mark Graber makes a compelling case that the *Dred Scott* decision (*Dred Scott v. Sandford*, 60 U.S. 393 (1857)) 'may have been constitutionally right'. In this case, the Court overruled an Act of Congress contesting the American citizenship of a slave, finding that the plaintiff, Dred Scott, had no standing as he was not considered to be a citizen of the United States. The decision of the Court is an example in where the Court was less progressive than the government. Graber argument is based on the premise that the reasoning in this case is a problem of constitutional evil. For Graber, '[p]olitical orders in divided societies survive only when opposing factions compromise when constitutions are created and when they are interpreted' and that the 'price of constitutional cooperation ... is a willingness to abide by clear constitutional rules protecting evil that were laid down in the past and a willingness to make additional concessions to evil when resolving constitutional ambiguities and silences.' (Graber, *Dred Scott* (2006), 1, 3.

<sup>429</sup> Barak, *Purposive Interpretation in Law* (2005), 19.

The Constitution's 'structure' is (borrowing Wittgenstein's famous distinction) that which the text *shows* but does not directly *say*. Diction, word repetitions, and documentary organizing form (e.g., the division of the text into articles, or the separate status of the preamble and the amendments), for example, all contribute to a sense of what the Constitution is about is obviously 'constitutional' as are the Constitution's words as such.<sup>430</sup>

Interpretation of the constitution must take consideration of the language of the text in its entirety, not simply the language of the provision or rule under review, for the meaning of the document read as a whole may give rise to an interpretation that could not be found in reading a section alone. It is not to dismiss the authority of the text, or to find meaning in the language where none could be said to exist. To do so would fall into the danger of collapsing the principle of interpretation:

Language is not, however, infinitely malleable. It may be vague, ambiguous, and capable of meaning different things in different contexts. But language cannot take on any meaning an interpreter wishes.<sup>431</sup>

The language of the text is open to interpretation, and language itself is changeable.<sup>432</sup> So while the interpreters of the constitution are limited, so that they cannot find in the constitution something which any reasonable person would not read in the document, the changeability of language over time and in understanding, allows some flexibility to the interpreter. It is this that means the judiciary and the legislature may legitimately disagree over the meaning of the constitution, or courts and judges may be at odds with each other over questions of constitutional law.<sup>433</sup>

The constitution is interpreted and measured by its language, but also by its silences. The written text of the constitution needs to be interpreted, but its silences need to be given equal considerations. Those silences may be 'implicit understanding and tacit agreements that could never survive the journey into print without compromising their capacious meaning and ruining their effect as a functional form of genuine and valued ambiguity'.<sup>434</sup> The silences or spaces that are present in a constitution, most especially, in a peace constitution that is in competition with political violence, are as important to consider as is the adopted language and the constitutional canon. Constitutional silences may be intended – to leave space where

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<sup>430</sup> Tribe, *American Constitutional Law* (1988), 40 (emphasis in original).

<sup>431</sup> See Barak, *Purposive Interpretation in Law* (2005), 24 who references Moore, 'The Semantics of Judging' (1981).

<sup>432</sup> 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used' (Justice Holmes in *Towne v Eisner*, 245 U.S. 418 (1918)).

<sup>433</sup> The example that is relevant here is the opposing decisions by the Bosnian Constitutional Court and the European Court of Human Rights on the application of the European Convention.

<sup>434</sup> Foley, *The Silence of Constitutions* (1989), 9.

consensus could not be found – or accidental – as the future is open to possibility<sup>435</sup> and, like the language of the constitution, are open to interpretation. Tribe who has written on the silences in the American Constitution<sup>436</sup> makes the case that ‘[t]he text of the Constitution is not just words but also spaces, often gaps arranged in telling ways, not simply ambiguities around the edges – spaces which, it may truly be said, structures fill and whose patterns structure defines’.<sup>437</sup> The ‘unwrittenness’ within a constitution gives to it a way to transcend time, and to inject flexibility, in as much the same way as the ‘unwritten’ constitution is said to do so. The distinction between the ‘written’ and ‘unwritten’ constitution is ‘analytically redundant’ as there are very few examples of ‘unwritten’ constitutions. Foley’s study, rather, is concerned with the ‘unwritten’ notion of the constitution as a ‘constitutional abeyance’ – that which ‘represents a form of tacit and instinctive agreement to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict’.<sup>438</sup> The significance of constitutional silences or ‘abeyances’ goes beyond those constitutions that are drafted out of actual conflict. The crises considered by Foley are the years prior to the English Civil War, when ‘the English constitution could be said to be at its most unwritten’ and the American Constitution in late 1960 and early 1970, when ‘it could be said [it] was at its most written’.<sup>439</sup>

Constitutional silences are easy to misunderstand or to see. Constitution-drafters may prefer to use vague constitutional language, which may give some indication of the meaning of the constitution drafters without holding the present generation to the will of the past. However, like constitutional silences, they are open to misinterpretation, and may leave too much to the discretion of the interpreter, which in many cases is the court. Silences, on the other hand, leave more spaces for future legislatures to amend the constitution.

Constitutional interpretation, like all legal interpretation, have consequences that go beyond the clarification or reading of the legal text. The judge must make determinations on the law that have impact on people, singularly or collectively. The level of impact of the judge’s decision will depend on the context of the case. Robert Cover argues that ‘[i]nterpretations in law also constitute justifications for violence which has already occurred or which is about to occur’ so that ‘[n]either legal interpretation nor the violence it occasions may be properly understood apart from one another’.<sup>440</sup> The interpretation of a peace constitution has capacity to cause (and prevent) violence so that the action of interpretation can be thought of as a (possible) act of political violence. Violence is not considered in constitutional theory, either in its connection to authority or as a part of a theory of interpretation.

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<sup>435</sup> As Hart notes: ‘If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility’ (Hart, *A Concept of Law* ([1961] 2012), 128).

<sup>436</sup> See, Tribe, ‘Toward a Syntax of the Unsaid’ (1982) and Tribe, ‘The Curvature of Constitutional Space’ (1989) See also Tribe, *American Constitutional Law* (1988).

<sup>437</sup> Tribe, *American Constitutional Law* (1988), 47.

<sup>438</sup> Foley, *The Silence of Constitutions* (1989), xi.

<sup>439</sup> *Ibid*, 11.

<sup>440</sup> Cover, ‘Violence and the Word’ (1986), 1601.

Arguments relating to the authority of the constitution are grounded in the traditional understanding of constituent power: that the legitimacy and authority of the constitution is found in ‘the people’ who act in unison and are in agreement with the constitution. Yet the very concept of ‘the people’ is often under dispute in post-conflict transitions, both because ‘constituent power’ appears to be imposed from above and outside<sup>441</sup> and because divided societies include multiple sources of ‘constituent power’.<sup>442</sup> A peace constitution requires comprise between two (or more) ‘constituent powers’ with the intent of establishing a unified polity, rather than the constitution emerging out of a clear commitment to act as a unified ‘people or polity’. The concept of ‘constituent power’ is complicated and there can be no automatic assumption that the peace constitution is a straightforward manifestation of a common commitment to a common political community, with common values, residing inside a united territory. The commitment to any common concept of the state often remains contingent on continuing political events. In such an uneasy setting, peace constitutions potentially hold authority because they are part of the political settlement. If this source of authority is accepted, courts can claim legitimacy to preserve that settlement, even if they are acting in an activist or political way. A court becomes the instrument to continue the political settlement and to balance the elite pact needed to uphold the peace, against the broader demands of the constitution. In this setting, peace is both the necessary precondition for constitutionalism and the purpose for which the constitution exists.

Conventional discourses on constitutionalism and judicial review often understand democracy as the justification and grounds against which the political and legal constitutionalism debate is set. The reasoning of political and legal constitutionalism take democracy as the normatively appropriate end goal of constitutionalism and so disagree solely on the means to best support that goal. However, if peace is taken as the principal normative aim of a peace constitution, the grounding and reasoning of the discourse on judicial review is unable to capture the place courts hold in the political settlement. This chapter aims to outline an alternative perspective through which to read the case law of courts interpreting peace constitutions. In so doing, this thesis brings together the study of constitutional law and political settlements.

### Constitutional Identity

Each conflict has its own distinct problems and protagonists, which are reflected in the peace process, agreement, and constitution. Additionally, a negotiation process rather than principled intent guides constitutional peace processes – making both process and outcome unique to the situation. The constitutive capacity of a constitution is of as much importance as its institutional design and may - in language and tone - impact significantly on a constitution’s interpretation and survival.

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<sup>441</sup> Dann and al-Ali, ‘The Internationalized *Pouvoir Constituent*’ (2006).

<sup>442</sup> See Tierney, ‘We the Peoples’ in *Paradox of Constitutionalism*, edited by Loughlin and Walker (2008).

Aristotle believed that the identity of the state came from its constitution. Constitutional identity is different from national identity, as constitutional identity results from the very fact of the constitution, its content and the context in which it was drafted.<sup>443</sup> Constitutional identity is a relevant issue that needs more consideration in this context. Rosenfeld understands ‘the place and function of constitutional identity is determined by the need for *dialectical mediation* of existing, evolving, and projected conflicts and tensions between identity and difference—or, more precisely, identities and differences—that shape the dealings between self and other within the relevant polity committed to constitutional rule and favorably disposed toward the aims of constitutionalism’.<sup>444</sup> Whereas Gary Jacobsohn believes that constitutional identity is acquired because of the disharmonious constitution, through a dialogical process.<sup>445</sup> Constitutional identity may also be developed by constitutional interpretation.<sup>446</sup> Similarly, and more in line with the argument being made here, constitutional interpretation may be influenced by constitutional identity.<sup>447</sup>

Michel Rosenfeld, in writing on constitutional identity, reasons that the constitutional model and the circumstances under which the constitution is drafted are relevant to the resulting constitutional identity. He lists seven constitutional models. These are: (1) the German constitutional model that is defined by the *ethnos* not the *demos* (he also uses the German example in his category on war-based model); (2) the French constitutional model, that takes the *demos* as its foundation (in contrast to the German model); (3) the American model, which like the French model rests on the *demos*, however, unlike the French model, requires no pre-existing nation; (4) the British constitutional model, an immanent ‘unwritten’ constitutional model that emerges and grows over time; (5) the Spanish constitutional model (Rosenfeld uses Spain as an example of pacted transition model of constitution-making) has a multi-ethnic *polity* (unlike the US which has a multi-ethnic *society*) and imports transnational norms (in the case of Spain, European Community (now EU) norms); (6) the European transnational constitutional model, a unique constitutional model that would need to take characteristics from the other models; and (7) the post-colonial constitutional model (post-World War Two, so excluding settler colonies, such as Canada and Australia).

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<sup>443</sup> Sujit Choudhry suggests that the constitution drafting process in a divided society may allow an opportunity to craft a ‘political community’ (Choudhry, ‘Introduction’, in *Constitutional Design*, edited by Choudhry (2008)).

<sup>444</sup> Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 761, italics added.

<sup>445</sup> Jacobsohn, *Constitutional Identity* (2010).

<sup>446</sup> Rosenfeld uses the famous *Roe v. Wade*, 410 U.S. 113 (1973) decision in the US Supreme Court as an example, see Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012).

<sup>447</sup> For this, Rosenfeld cites the *Holocaust Denial Case* (BFVerfGE 90, 241 (1994)) before the German Federal Constitutional Court, as an example, see Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 771. The German Constitution may be one of the best examples of a constitution with clearly articulated hierarchy of values, which is a result of its origins as the constitution drafted after the end of the Second World War and the Holocaust.

In addition to these seven models, Rosenfeld suggests that there are six models of constitution-making. These six models of constitution-making, along with the seven constitution models, ‘substantially circumscribe the formation and evolution of the main different types of constitutional identity’.<sup>448</sup> The six models of constitution-making are: (1) the revolution based model, where the revolution causes a break from the past, however the constitution holds onto certain elements of the *ancien régime*<sup>449</sup>; the invisible British model, which is not made but grown, and where constituent power rests in the parliament, rather than the people (this model is unique to Britain, and not likely to be replicated elsewhere); (3) the war-based model, this example includes the cases of Japan and Germany, which had their constitution externally imposed after their total defeat in the Second World War<sup>450</sup>; (4) the pact transitional model, similar to revolutionary or war constitution making, except that there is no obvious winner or loser (Rosenfeld uses the case of Spain as an example); (5) the transnational model (such as the EU); and (6) the internally grounded model, where the international community has ‘initiated, guided and supervised’<sup>451</sup> constitution-making that would not have occurred absent international intervention. The result of such external intervention is the incorporation of international norms into the domestic constitution.

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<sup>448</sup> Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 766. The work on the constitutional models in the Oxford Handbook is a summary of chapter six of Rosenfeld, *The Identity of the Constitutional Subject* (2010). (All below references to Rosenfeld are to his chapter in Rosenfeld and Sajó).

<sup>449</sup> Hannah Arendt explains the failure of the French Revolution and the success of the American Revolution. The American Revolution was fought against a limited (constitutional monarchy) government, while the French Revolution was in opposition to an absolutist monarchy. The American revolutionaries used the existing structures of self-government to grant authority to the Constitution. The French Revolution removed all existing sources of authority and so left a vacuum that was filled by power, not law (Arendt, *On Revolution* ([1963] 2006), ch 4, esp 165-6).

<sup>450</sup> Again, this model of constitution-making is unlikely to be replicated. Although the American’s attempted to do the same in Iraq after the 2003 war, the effort largely failed and has is not seen as legitimate. See Ginsburg *et al.*, ‘Baghdad, Tokyo, Kabul’ (2008) who use the cases of Japan and Iraq as examples of constitution-making in occupation. They propose several reasons why the Japanese case was a success while the American involvement in the constitution making in Iraq has been problematic. One reason for the different outcomes, is that Japan was left with an ideological vacuum when the Emperor renounced his claim of divinity, while Saddam Hussein’s Iraq was not unified under his rule and other groups were present to fill the void after the dissolution of the Ba’athist party by the Coalition Forces beginning in May 2003. For more on the constitution-making process in Iraq, see Haysom *et al.* *History of the Iraqi Constitution-Making Process* (2005). According to a note included in the document: ‘This unofficial history of the Iraqi constitutional drafting process was drafted in late 2005 by the United Nations Assistance Mission for Iraq’s Office of Constitutional Support. Although it was reviewed on a number of occasions, it was never published or circulated beyond a limited number of individuals within the United Nations’.

<sup>451</sup> Rosenfeld, ‘Constitutional Identity’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 770. Rosenfeld points to Security Council Resolution 544 (1984) on South Africa in which it condemns the 1983 South African Constitution for ‘[continuing] the process of denationalization of the indigenous African majority, depriving it of all fundamental rights ... [and so] declares that the so-called ‘new constitution’ is contrary to the principles of the Charter of the United Nations’.

However, Rosenfeld cautions that for this model of constitution-making to apply, the substantive decisions on the constitution must be left to the relevant (and domestic) political actors to prevent suggestion of bias and to allow the international norms to be internalised and viewed as legitimate by the people. It is this last category of constitution-making that is being considered here.

In an article on the aspirations and values in the Australian Constitution<sup>452</sup> – a document that would not fall under the category of peace constitution, although it has a troubled past (and present) with its Indigenous Peoples that is reflected in its constitution<sup>453</sup> – it is suggested that Australian's are 'modest' about their constitution, so that it is invisible in public debate, unlike the Indian's who find aspirational values in their constitution<sup>454</sup> or the German's whose constitutional values are shaped by their violent history. The narrowness of the Australian Constitution is given as the reason for the lack of aspirational value and feelings of public sentiment toward the document. The Australian Constitution, unlike many modern constitutions, is a thin, structural constitution, dividing power at the federal level and establishing the institutions of government. Arguably, the benefit of a 'thin' constitution is to allow for debates on fundamental values and aspirations to be left to the democratic process.<sup>455</sup> This argument circles around to the debate between legal and political constitutionalists. Rather the take away is that although the Australian Constitution is procedural, it is possible, possibly necessary, to find substantive and political commitments within the constitution.<sup>456</sup> Further, that the 'thinness' of the Australian Constitution does not remove the possibility of finding within it Australian values and aspirations. Constitutional identity, values, and aspirations are embodied within the constitution, not simply with its words or provisions, but also in its silences.

## Conclusion

For any constitution, judiciaries and legislatures must always (re)negotiate and continually (re)interpret their constitution, allowing it to move from its founding political moment and adapt to address unforeseen situations and progress beyond the customs and norms that were

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<sup>452</sup> Stone and Arcioni, 'The Small Brown Bird' (2016).

<sup>453</sup> Williams, 'Why It's Time to Recognise Indigenous Peoples' (2015).

<sup>454</sup> The Indian Constitution is 'at once recognises and creates an identity, articulating a vision of what it means to be Indian. ... It is a constitutional experience that best captures the aspirations and conflicts within India because the battle for what the Constitution truly means ultimately reflects a deeper debate about what the idea of India signifies' (Khosla, *The Indian Constitution* (2012), xiii quoted in Stone and Arcioni, 'The Small Brown Bird' (2016), 62).

<sup>455</sup> This is the argument made by Webber, 'Constitutional Poetry' (1999). See also Adrienne Stone's reply to Webber in Stone, 'The Means and Ends' (2000).

<sup>456</sup> Stone and Arcioni, 'The Small Brown Bird' (2016), in particular, 66. Stone and Arcioni's argument compares the US Supreme Court's case-law on the First Amendment (specifically, *New York Times v. Sullivan* 376 U.S. 254 (1964)). The First Amendment, while protecting the substantive right of freedom of speech, is also procedural (John Ely Hart's argument on judicial review is in fact based on the belief that the US Constitution protects process – see Ely Hart, *Democracy and Distrust* (1980). Still, the First Amendment is a basis of American national identity.

held at the moment of its enactment. Likewise, a peace constitution must move on from the divisions and tensions that existed at its signing to establish a sufficient level of stability, introduce new political and legal institutions, and simultaneously accommodate warring factions while moving towards a more united national identity. However, a peace constitution is, by necessity, a compromised and imperfect document, which may not be able to overcome tensions inherent in it. Courts, in their capacity to interpret and (re)negotiate the constitution, also in a sense (re)interpret the peace agreement as they articulate the nature of the political settlement captured in the peace constitution. Courts must balance the stability of that political settlement captured in the past on the one hand, with more universal and general ways of understanding the constitution's foundation on the other, to enable its more particularistic understandings to be transcended over time.

It is a matter of contention that drafting constitutions as part of the political settlement can be a remedy for conflict, as is often hoped. However, such hope and belief is asking too much of a constitution. Violence can also be a result of constitution-making and the ongoing process of constitutional activity. While writing a peace constitution, the parties to the process are required to make numerous compromises in the interest of reaching a final agreement. The result is that the tensions normally present in any constitutional system become acute in a peace constitution context. Since most peace constitutions include strong-form judicial review, the settlement of these tensions is often left to the courts.

## Chapter Four: Courts as Peace Makers?

A PEACE PROCESS does not end with the implementation of a new (or revised) constitutional arrangement, and constitutional courts should be considered an instrumental actor in this ongoing process, and through judicial review engage as one of many actors in a continuing (re)negotiation. No matter what the original intentions of political actors to allow for a strong constitutional court, the peace agreement constitution cases under indicate that domestic courts often uphold the core tenets of peace, even when those clash with literal interpretations of the constitutional text or more absolutist notions of how human rights apply.

Court seeking grounds on which to limit constitutional rights are recognising the ending of conflict as a proper purpose of the constitution. However, introducing a requirement of proportionality also allows space for the court to maintain discretion on those rights that can be limited and the extent and time to which such limitations are valid. The use of the doctrine of proportionality is a mechanism for courts to continuously (re)negotiate the constitution, which will shift as the state transitions from conflict. The courts, in such cases, can reinterpret the political settlement between the elite driven compromise and the on-going demands of transition.

Courts are relevant actors in considering how a state transitions throughout the political settlement. They are not neutral arbitrators of the constitution but may also play a vital role as peacebuilders or spoilers of the peace agreement. They are less visible than other institutions and may uphold or unwind the political settlement more gently. Both domestic and international courts play this role. While domestic courts often are highly aware of the political context of their decisions and can produce a nuanced 'peace jurisprudence', international human rights courts, however, have often made different rulings and a review of how the same or similar cases have been dealt with illustrates examples where courts have adopted different approaches and become 'unwinders of ethnic political bargains'. Richard Pildes, as an example, uses the *Constituent Peoples Case*<sup>457</sup> in which the Bosnian Constitutional Court declared unconstitutional provisions of the entities constitutions that limited citizenship in the entity based on ethnicity. The Court found that all ethnic groups were 'constituent peoples' under the constitution. While Pildes argues that this decision dismantled part of the 'accommodationist' political settlement, the decision also entrenched the ethnic divide in the constitution, recognising collective ethnic rights of the 'constituent peoples', and

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<sup>457</sup> Constitutional Court of Bosnia and Herzegovina, *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, Case U 5/98, Partial Decision (30 Jan 2000), Partial Decision (19 Feb 2000), Partial Decision (1 July 2000), Partial Decision (19 Aug 2000). For more on this case see Mansfield, 'Ethnic but Equal' (2003).

in so doing found a balance between democratic principles and international law, on the one hand, and peace, on the other.<sup>458</sup> Christopher McCrudden and Brendan O’Leary borrow this phrase from Pildes, suggesting that courts can determine the success or failure of consociational arrangement, however, they admit that there has been very little research done on this question.<sup>459</sup> Pildes also suggests that there is a temporal element to courts acting as ‘unwinders’ – the idea of time as a crucial factor in political settlements is also reflected in the ideal of the ‘constitutional moment’, which is elusive in a peace agreement constitution.<sup>460</sup>

Courts play a necessary and balanced role in the resolution of conflict on many levels of society, which includes conflict at the highest and most dangerous level of the state. The Supreme Court of Colombia (later to be replaced by the Constitutional Court under the 1991 Constitution) emphasised in a judgement the value and strength of the Court to allow for the peaceful resolution of conflict:

Conflicts and disagreements in Colombian democracy are frequently resolved in a peaceful and legitimate manner through political participation and representation. However, these political mechanisms are not trusted by certain minorities for different reasons, or are not responsive to the expectations of the majority of the people. Therefore, other means for resolving major disagreements that divide society become important. This is specially the case in a context where unresolved conflicts may lead to the expansion of violence, as had recurrently happened in Colombia.

These other mechanisms in Colombia have been judicial avenues which provide open and easy access to constitutional justice. Thus, the Constitution becomes the ground where the battles that could have evolved into violent confrontations are fought with legal arguments. The forum for these battles are the courts.<sup>461</sup>

Although Colombia has experienced civil war for over six decades, the Court was a trusted mechanism of the people.<sup>462</sup> Trust in the court is not, however, necessarily present following conflict, and is based more on context than the institution itself. Generalisations across cases is challenging as context has more bearing on the outcome than set institutions or processes.

Peace constitutions are distinct in their source of authority and constituent power, as well as in how courts are interpreting them to balance between the elite pact and more normative requirements of constitutionalism. Still, all constitutions are in some way the outcome of violence in some form. To the extent that all constitutions have similar objective, this section

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<sup>458</sup> Pildes, ‘Ethnic Identity and Democratic Institutions’, in *Constitutional Design for Divided Societies*, edited by Choudhry (2008), 173-204, 195.

<sup>459</sup> McCrudden and O’Leary, *Courts and Consociations* (2013), 43.

<sup>460</sup> See Pildes, ‘Forward: The Constitutionalization of Democratic Politics’ (2004).

<sup>461</sup> Cepeda Espinosa, ‘The Peace Process and the Constitution’ (2016).

<sup>462</sup> See Ríos-Figueroa, *Constitutional Courts as Mediators* (2016), 65-67.

refers to constitutional principles from more settled constitutional systems, which are then applied to the cases in the following section. This thesis proposes that courts interpreting peace constitutions are engaging in a common ‘peace jurisprudence’, a judicial doctrine that is grounded in activist purposive interpretation and the principle of proportionality to protect the underlying political settlement. In what follows, I contextualise the peace jurisprudence in constitutional law, turning first to foundational cases as distinct judicial decisions made by apex courts that have an extraordinary place in constitutional jurisprudence for having heavy implications on the constitutional canon.

## Peace Jurisprudence

### *Foundational cases*

A part of the constitutional canon that goes beyond the text of the constitution which includes the peace agreement, is the judicial decisions which go to the heart of the relationship between the constitutional text and what might be understood as the political settlement. Such cases can be understood as foundational<sup>463</sup> and can be located in the jurisprudence of courts interpreting non-peace constitutions. The German Federal Constitutional Court, for example, in the first case decided after the enactment of the Basic Law, reasoned that:

A constitution has an inner unity and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles to which individual provisions are subordinate.<sup>464</sup>

The Court found, that by using this concept of unity, there were certain fundamental principles in the Basic Law that were superior to other political acts and to lesser constitutional principles, and that the federal government was bound by the decisions and reasoning of the Court. These included, for example, the federal nature of the state itself. Further, the Court in this decision asserted its authority to respond to constitutional questions at issue in the case, including questions not directly raised in the petition. In so doing, it articulated what it understood to be the essential aspects of the constitution that encapsulated the fundamental political settlement within Germany, and on which the constitution’s continued existence in that form depended.

The Indian Supreme Court used similar reasoning in its 1967 decision *Golaknath v State of Punjab*,<sup>465</sup> in which it found that constitutional amendments could not abridge or take away

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<sup>463</sup> One leading example is *Marbury v Madison* from the American Supreme Court. That decision altered the interpretation of the US Constitution by allowing courts, once petitioned, to review if legislation complied with the US Constitution. *Marbury*, like the cases considered foundational in this article, established the legitimacy of courts to conduct judicial review, but, unlike the other decisions considered here, did not go beyond that to articulate the basic meaning of the constitution.

<sup>464</sup> *Southwest State Case 1 BVerfGE 14* (1951) in Kommers and Miller, *The Constitutional Jurisprudence* (2012), 82.

<sup>465</sup> *Golaknath v. State of Punjab*, Supreme Court of India (1967) AIR 164, 1967 SCR (2) 762.

Fundamental Rights enshrined in Part III of the Indian Constitution. In a second landmark ruling that overturned the decision in *Golaknath*, the Court in *Kesavananda Bharati v State of Kerala*<sup>466</sup> protected the constitution from the proposed constitutional amendments of Indira Gandhi, finding that the basic structure of the constitution was outside the political amendment process. In this judgment, the Court established the Basic Structure Doctrine. The doctrine was subsequently applied by the Court to invalidate amendments. It has also been used to uphold the public interest litigation of the Court, which has made the Indian Supreme Court one of the most activist constitutional courts. Again, this case can and has been read as creating an understanding of the political settlement that must be preserved for the constitution to continue to exist in any meaningful form. If these cases are not to be dismissed (and all these cases remain controversial), they have to be justified in terms of an implicit hierarchy in the constitutional order that involves understanding the core conditions and values that enable the constitution.

Similarly, the French Conseil Constitutionnel struck down a law for breaching fundamental rights found in the Preamble of the 1958 Constitution and the principles of the Republic, in a case concerning the constitutionality of restrictions placed on freedom of association.<sup>467</sup> In its first decision, in 1971, the Conseil struck down a piece of ordinary legislation, and in so doing placed constraints on parliament. The effect of the decision was to read into the Constitution the declaration of 1789, the preamble of 1946, and the fundamental principles of the law of the Republic.<sup>468</sup> The Supreme Court of Israel is another example where the court has ruled on cases that are considered as 'foundational'. Here, most of these decisions were issued in the first few decades of the Court's existence and, despite the absence of a written constitution in Israel, involved limiting government power on quasi-constitutional grounds.<sup>469</sup>

Vicki Jackson and Mark Tushnet question the usefulness of categorising foundational cases;<sup>470</sup> however, I suggest that the concept remains helpful in demonstrating a distinctive form of judicial review that is focused on articulating the basic meanings of the pre-constitutional political settlement that provided authority to the constitution and which remains grounded in the constitutional text. In many of the examples given above, notably that of the Indian Supreme Court in *Kesavananda*, the decisions have had lasting and profound impact on the direction the court and on its subsequent rulings.

There are two additional principles which have been borrowed by courts in decisions on peace constitutions which have an element of similarity of approach between the peace agreement cases discussed in this paper and traditional constitutional cases, albeit operationalised in a different way in peace jurisprudence. These are purposive interpretation and the principle of proportionality.

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<sup>466</sup> *Kesavananda Bharati v State of Kerala*, Supreme Court of India (1973) 4 SCC 225.

<sup>467</sup> French Conseil Constitutionnel, Decision no 77-44 DC (16 July 1971).

<sup>468</sup> Jackson and Tushnet, *Comparative Constitutional Law* (2006), 586.

<sup>469</sup> See, for example, the Supreme Court of Israel, *Kol Ha-am case* (1953); the *Bergman case* (1969); the *Elon Moreh case* (1979).

<sup>470</sup> Jackson and Tushnet, *Comparative Constitutional Law* (2006).

### *Purposive interpretation*

‘Foundational cases’ find justification in concepts of purposive interpretation linked to the authority of the constitution. Joseph Raz, reflecting on constitutional authority and interpretation, reasons that ‘the grounds for the authority of the law help to determine how it ought to be interpreted’.<sup>471</sup> The authority of a peace constitution authority is found in the authority of the peace agreement and in the promise of peace. In intention and principle peace constitutions hold up peace, in its broadest sense, as their purpose. In all three cases cited below, the courts determined, implicitly and explicitly, that peace was the main purpose of the constitutional drafters. Locating the authority of the constitution, at least in part, in peace and following the link made by Raz, the interpretation of these constitutions rests on the same grounding.

Aharon Barak proposes that purposive interpretation can be objective and subjective.<sup>472</sup> The objective purpose being found in the ‘interests, goals, values, aims, policies, and function that the constitutional text is designed to actualize’ and understood through the language of the constitution.<sup>473</sup> The subjective purpose of the constitution is in the principles ‘that the founders of the constitution sought to actualize’.<sup>474</sup> The subjective purpose can be located in the history of the constitution, ‘including its pre-enactment history – the social and legal background that gave birth to the constitution, [including] the history of the procedures by which the constitution was founded’.<sup>475</sup> In the case of a peace constitution, its ‘history’ is the peace process and agreement. Peace agreements, however, tend to be elite driven processes, that may not be representative of the broader population. Peace agreements are also political compromises that are far from the ideal type. Again, the peace constitution, unlike the ideal constitutional document, is unlikely to find a source of authority in a collective agency or a united constitution maker. Subjective purpose constitutional interpretation, in this context, cannot be settled as the purpose of the constitution is not settled and is a matter of ongoing contestation. The use of historical intent is therefore not particularly useful or applicable to peace constitutions (and, in fact, remains contested in more settled contexts).

In both settled and peace constitutions, the trouble with according significance to subjective purposive and authorial intent is that the constitution may become stuck in time. This is perhaps best conveyed by Justice Lamer of the Canadian Supreme Court in his judgement on the meaning of the phrase ‘fundamental justice’ in s. 7 of the Canadian *Charter of Rights and Freedoms*:

[A] danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so

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<sup>471</sup> Raz, ‘On the Authority and Interpretations’ in *Between Authority and Interpretation*, edited by Raz (2009), 332.

<sup>472</sup> Barak, *Purposive Interpretation in Law* (2005).

<sup>473</sup> *Ibid*, 377.

<sup>474</sup> *Ibid*, 375.

<sup>475</sup> *Ibid*, 376.

doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing social needs ... If the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials...do not stunt its growth.<sup>476</sup>

The danger of a peace constitution being held in time may be greater than it is for constitutions written at other points in history. Peace agreements are compromise deals that, in many cases, have required concessions from both sides (and international actors) in order for agreement to be reached. However, when incorporated into the constitution, it is a risk that these tensions can freeze the social divisions of the conflict in time.

Barak lists six internal and external sources to determine objective purpose.<sup>477</sup> The most relevant being the fundamental values of the constitution, 'embodied in the words of the constitution ... as well as the objective purpose guiding the interpretation'.<sup>478</sup> Fundamental values can also be found in documents 'external to the constitution [which] encompass the constitution and form part of its objective purpose'.<sup>479</sup> For a peace constitution, peace is without doubt a fundamental value of the constitution, and the peace agreement is an example of a further source of fundamental values that are external to the constitution but which must be considered as part of its objective purpose. Peace has no clear meaning, and although the word 'peace' is included in the Colombian and Bosnian constitutions<sup>480</sup> there is no definition included. It is therefore at the discretion of the constitutional court, when referencing peace, to determine its meaning and scope, which in part explains the differences between domestic and international courts, as discussed below.

### *Proportionality*

Proportionality has become a common tool in constitutional interpretation<sup>481</sup> and again finds a different form in the peace constitution context. Broadly, there are four elements of

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<sup>476</sup> Supreme Court of Canada, *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 504. The Australian and German constitutional courts have made similar pronouncements. The United States Supreme Court has, on the other hand, engaged with original intent doctrine.

<sup>477</sup> Barak, *Purposive Interpretation in Law* (2005), 377–384.

<sup>478</sup> *Ibid*, 381.

<sup>479</sup> *Ibid*.

<sup>480</sup> See the preambles of the Bosnian and Colombian Constitutions; and Art 22 of the Colombian Constitution.

<sup>481</sup> Proportionality as a principle of constitutional law has its origins in post-World War II European jurisprudence. The principle of proportionality as a moral norm, can find expression in Jewish and Christian thought. As a legal concept, proportionality can be found in legal texts as early as the *Magna Carta* and finds expression in international law, the early writings of Thomas Aquinas and the doctrine of just war, see Barak, *Proportionality* (2012), 175-176, ch 7 broadly for the historical origins of proportionality; see also Poole, 'Proportionality in Perspective' (2010) who places the

proportionality: (1) proper purpose; (2) rational connection; (3) necessity; and (4) proportionality *stricto sensu*, or balancing.<sup>482</sup>

Limitation clauses, which provide a means for courts to access principles of proportionality, are sometimes included in constitutional texts. The German Constitutional Court and the Supreme Court of Canada have been influential in developing the principle of proportionality,<sup>483</sup> which has been ‘borrowed’ by other constitutional courts and adjusted in meaning to be contextual and contingent.<sup>484</sup> The principle, while having roots in the Middle Ages, is linked to ‘the Enlightenment of the eighteenth century and the notion of the social contract’<sup>485</sup> The principle of proportionality was originally used by German administrative courts in the late 19<sup>th</sup> century. It was only adopted into German constitutional law after 1950, when the Constitutional Court included it in its jurisprudence on the Basic Law; but, the Court did not articulate a test for its application until a series of cases from 1958.<sup>486</sup> The German Constitutional Court, however, has not expanded on the constitutional groundings of the principle.

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origins of proportionality, not in post-War Europe, but in the classical period, especially in the writings of Plato and Cicero.

<sup>482</sup> Barak, ‘Proportionality (2)’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012).

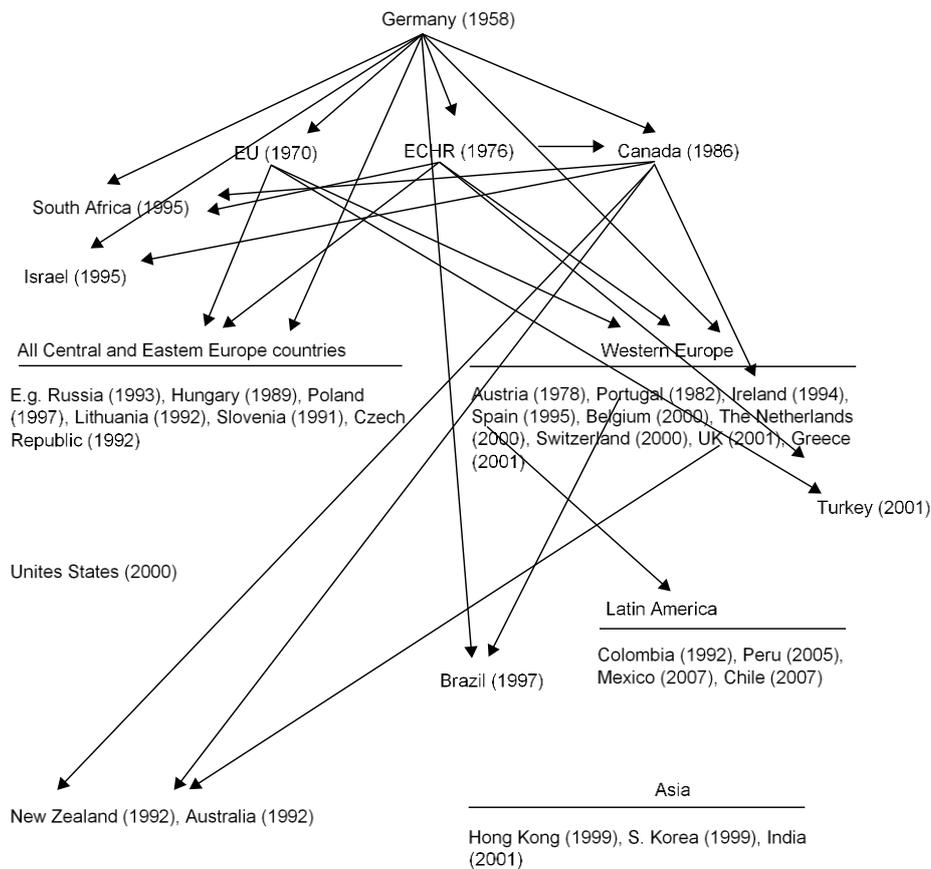
<sup>483</sup> See Grimm, ‘Proportionality in Canadian and German’ (2007).

<sup>484</sup> See Beatty, *The Ultimate Rule of Law* (2004).

<sup>485</sup> The history of the principle of proportionality, while interesting, is beyond the scope of this thesis, for a more detailed history, see Barak, *Proportionality* (2012) and Barak, ‘Proportionality (2)’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012). It is, however, notable and relevant to comment on the concurrent development of the principle of proportionality and the social contract. The social contract implied limitations on the ruler, the same is true of the principle of proportionality which is to limit the state from infringing the human rights of the individual. (see Cohen-Eliya and Porat, ‘American Balancing and German Proportionality’ (2010)). The same purpose of limitation is not present in the current discussion of proportionality, which is intended to protect the peace rather than to limit the power of the state. In the same way, the PAC is not simply intended to limit the authority of the state, but also to protect the peace, a notion not directly considered in early discussions of the social contract.

<sup>486</sup> BVerfGE 7, 377 (1958), BVerfGE 13, 97 at 104, 108 (1961), BVerfGE 16, 194 at 201 (1963), BVerfGE 19, 342 at 348 (1965) and BVerfGE 95, 48 at 58 (1996) – for an explanation of these cases see Grimm, ‘Proportionality in Canadian and German’ (2007), 385-386.

Figure: The Migration of Proportionality<sup>487</sup>



The Supreme Court of Canada, in one of the first cases brought under the *Charter of Rights and Freedoms*, established a clear doctrine for the application of proportionality. The case concerned the use of s. 1 of the *Charter*,<sup>488</sup> the so-called ‘limitations clause’. The Court reasoned that ‘[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance’. The Court held that s.1 had to be interpreted ‘contextually’ as a result of the qualification that the government could limit otherwise constitutionally protected rights if such limitations could be justified in a ‘free and democratic society’. In so doing, the Court relied on the phrase ‘free and democratic society’ contained in s.1 as evidencing both the justification for limiting a constitutional right and the purpose for which the Charter was

<sup>487</sup> Reproduced from Barak, *Proportionality* (2012), 182.

<sup>488</sup> The most notable example of a limitations clause is s. 1 of the Canadian Charter of Rights and Freedoms which reads as follows: ‘The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. South Africa (Art 36, of 1996 Constitution), Israel, New Zealand (Art 5, Bill of Rights) and Australia (s 28, 2004 Human Rights Act of the Australian Capital Territory and s 7, 2006 Charter of Human Rights and Responsibilities Act of the State of Victoria) have also included limitations clauses in their constitutional documents. The European Convention on Human Rights allows limitations that are ‘necessary in a democratic society’ (Arts 8(2), 9(2), 10(2), 11(2)).

enacted, such that ‘the underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit of a right or freedom must be shown...to be reasonable and justified’.<sup>489</sup> In coming to this decision, the Court articulated the grounds on which a limitation would be found reasonable and justified, namely, that the means chosen must (1) be rationally connected to the objective served by the limitation; (2) impair ‘as little as possible’ the right or freedom in question and, most importantly; (3) be ‘a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”’<sup>490</sup>

It has even been suggested, although not without criticism, that proportionality has ‘provided a common grammar for global constitutionalism’<sup>491</sup> and some have even gone so far as to argue that it is an expression of the ‘ultimate rule of law’.<sup>492</sup> I am cautious that the claim being made in this article of an emerging global ‘peace jurisprudence’ based on the principle of proportionality is not evidence of a ‘globalising’ legal trend, rather, it has been taken up by courts – in ways that address, in whole or in part, the four elements, without fully engaging in a proportionality test like *Oakes* – to allow for the demands of peace to be balanced gently against the activity of a continuously (re) negotiated political settlement.

A key assumption underlying the principle of proportionality in domestic legal analysis and in the global constitutionalism methodology is its application in a democracy, with Aharon Barak, in his book, declaring that democracy and the rule of law are values that are ‘central to the understanding of constitutional limitations’ and that proportionality ‘can be defined as the set of rules determining the necessary and sufficient conditions for a constitutionally protected right’.<sup>493</sup> The literature, with a few exceptions, limits the analysis of proportionality on certain ‘old world’ constitutional democracies.<sup>494</sup> This literature goes into detail on the rules and application of the principle, however, the strength of the arguments are circumscribed by the methodological limitations of the literature.<sup>495</sup>

For peace constitutions with judicial review, the court is given the authority that is re-negotiating the constitution. Grégoire Webber provides a particularly useful understanding of the constitution as not as articulating an end-state, but as an on-going activity. Webber reasons that limitation clauses are a ‘promising avenue’ to allow for democratic re-negotiating.<sup>496</sup> The principle of proportionality is one way for courts to navigate between

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<sup>489</sup> Supreme Court of Canada, *R. v. Oakes* [1986] 1 S.C.R. 103.

<sup>490</sup> *Ibid*, paras. 69-71.

<sup>491</sup> Cohen-Eliya and Porat, ‘American Balancing and German Proportionality’ (2010), 263.

<sup>492</sup> Beatty, *The Ultimate Rule of Law* (2004).

<sup>493</sup> Barak, *Proportionality* (2012), 3.

<sup>494</sup> These include: the UK, Europe, the US, Canada, Australia, New Zealand and Israel. This is evidence of a methodological bias that is present in comparative constitutional law, see Hirschl, *Comparative Matters* (2014).

<sup>495</sup> This is a consequence their selection of case studies, which necessarily limits the scope and generalisability of the theory.

<sup>496</sup> Webber, *The Negotiable Constitution* (2009), 13.

conflicting constitutional rights. Constitutional limitations clauses often refer to democracy as a justifiable means to limit other constitutionally protected rights. As with the political and legal constitutionalism discussion, democracy is used as the benchmark against which limitations are measured. In a post conflict transition, however, peace and democracy may have different requirements and require different sequencings. For this reason, democracy may not be the most suitable value against which to determine if the proportional limitation of a right is allowed under a peace constitution. Rather, it may be peace that is the more relevant and critical value, since peace is the prerequisite to democracy and not vice versa. Courts seeking grounds on which to limit constitutional rights recognize that putting an end to conflict is a proper and paramount purpose of any constitution. The constitutional courts in Bosnia-Herzegovina and Colombia, as the cases will make clear, upheld limitations on constitutionally recognised rights and, in doing so, accepted the need for certain rights to be understood as proportional to peace. Implicit in these decisions is a view that peace is an appropriate constitutional purpose. However, upholding a limitation using the principle of proportionality also allows space for the court to maintain discretion on which rights can be limited and the extent and time to which such limitations are valid. The use of the principle of proportionality is a mechanism for courts to continuously (re)negotiate the constitution to reflect the changing needs and customs of society. Nowhere are the needs and customs of society changing more suddenly and dramatically than in the transition from a state of conflict to a state of peace. In such cases, the principle of proportionality empowers the courts in such cases to reinterpret the political settlement between the elite driven compromise and the on-going transition.

### Cases

The cases considered in this chapter serve to illustrate what I suggest is an emerging global 'peace jurisprudence'. The conflict and peace process in Colombia is ongoing,<sup>497</sup> and while the direct conflicts in Bosnia-Herzegovina and Northern Ireland ended, both continue to be constrained by their pasts. The constitutions of Bosnia-Herzegovina and Colombia were both drafted as part of their peace processes, while the Northern Ireland Act (1998), that forms the basis for the Northern Irish judicial decision, operates as the implementing 'basic law' or 'devolved constitution' for that jurisdiction. In principle and fact the Belfast (or Good Friday) Agreement acts as a constitution for Northern Ireland, as the Judicial Committee of the House of Lords accepted in the case discussed below. It is this continued association to the peace process that make Bosnia-Herzegovina and Colombia interesting examples. The first case involving the Belfast Agreement and the case of Northern Ireland is also noteworthy case, as it involves a sub-state government and constitutional arrangement within a more settled national constitutional setting.

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<sup>497</sup> The Colombian government and FARC-EP signed an historic ceasefire agreement on 23 June 2016 intending to end a conflict that has lasted over 50 years, available at <[http://www.nytimes.com/2016/06/23/world/americas/colombia-farc-peace-deal-rebels-cease-fire-santos.html?\\_r=0](http://www.nytimes.com/2016/06/23/world/americas/colombia-farc-peace-deal-rebels-cease-fire-santos.html?_r=0)>, accessed 19 August 2016. The peace agreement failed to pass a referendum. The government has also agreed to a negotiation agenda with the National Liberation Army (ELN).

## *Northern Ireland*

The conflict in Northern Ireland has deep historical roots that cannot be covered in this thesis. However, it is necessary to give some background in order to contextualise the peace process and agreement. Although, the isle of Ireland was under British colonial rule from the mid-12<sup>th</sup> century, agitation of Irish nationalism in the late 19<sup>th</sup> century led to a policy of 'home rule'. A revolt against 'home rule' and for independence started with the 1916 Easter Rising and the election of nationalist party Sinn Féin in the 1918 general election. In response to raising communal tensions and ongoing War of Independence, the Government of Ireland Act 1920 was passed to partition the island and to enact a legislative parliament for Northern Ireland, modelled on the Westminster model, with judicial oversight.<sup>498</sup> The Act made similar provisions for the south, which gave rise to further violence. A compromise deal was reached in July 1921 between the representatives of the Irish Republic and the British Government (Articles of Agreement for a Treaty Between Great Britain and Ireland) to hold to the partition (although as a temporary measure with provision for voluntary reunification), with the six northern-eastern counties of Ulster to remain part of the United Kingdom, and the remaining counties to establish the new Irish Free State under dominion status. Resistance to the treaty led to the Irish Civil War, eventually won by the pro-treaty side. A new constitution was eventually drafted and passed in a referendum in July 1937, which recognised the whole of the island as its territory, but pending reunification, the laws of the Irish Parliament would apply only to the Irish Free State (Articles 2 and 3).<sup>499</sup> Ireland became a Republic in 1949 when it opted to leave the Commonwealth.

The new Northern Irish Parliament was dominated by the unionists, with sustained campaigns by the Irish Republican Army (IRA). The inequality and discord between unionists (Protestants) and nationalists (Catholics)<sup>500</sup> and the failure of the state to provide relief, led to rioting during the 1964 General Election campaign and to the establishment of the Northern Ireland Civil Rights Association in 1967 to push for civil rights reform. However, with sustained tension and violence, the British military was deployed in 1969, beginning the period of conflict known as 'The Troubles'. In 1971, the British government instituted a policy of internment (detention without trial). The Northern Irish government was suspended in March 1972 with executive and legislative authority moved to Westminster under 'direct rule'.<sup>501</sup> This followed Bloody Sunday in January when thirteen men were killed at a civil rights march by the Parachute Regiment. In response, the British embassy in Dublin was burned down and the Official IRA attacked the Regiment Headquarters in Aldershot.

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<sup>498</sup> The partition was based on demographics. The north was 66% Protestant (who largely supported continued union with Britain) and 34% Catholic (who mainly opposed partition).

<sup>499</sup> Articles 2 and 3 of the Irish Constitution were removed by the Nineteenth Amendment following a referendum in 1998, in accordance with the Belfast Agreement.

<sup>500</sup> The terminology used in this conflict is problematic. I have used the terms Unionists (Protestants) and Nationalists (Catholics). The dual terminology disguises the differences in positions inside both sides, however, in the context of this chapter, a more detailed account is not necessary. I also refer to the peace accord as the Belfast Agreement, although it is also called the 'Good Friday' Accord. This is not done with any intention of taking a position.

<sup>501</sup> The Northern Irish Parliament was abolished in the Northern Ireland Constitution Act 1973.

The nationalists and unionists, with the British and Irish governments, agreed to a power-sharing arrangement in the 1973 Sunningdale Agreement. The Agreement included the creation of a Council of Ireland and a North-South Consultative Assembly. The devolved Northern Ireland Assembly was established in 1974 which collapsed five-months later, resulting in a return to 'direct rule'. The next significant step in the conflict was the signing of the Anglo-Irish Agreement in 1985 between the governments of Ireland and Britain, granting the Republic a limited role in the governance of Northern Ireland. The constitutional status of the Northern Ireland was contested by the governments of Ireland and Britain, with both holding claim to the territory of the North. The Irish government making this claim in Articles 2 and 3 of the 1937 Constitution and Britain in the Northern Ireland Act 1920 and Northern Ireland Constitution Act 1973. The positions of the Irish and British governments underwrote those of the nationalists and unionists.<sup>502</sup> The Agreement reached between the two states, therefore, was a significant step towards the peace process that began in 1994.

Secret talks were held between the British government and the IRA from 1990. Further pre-negotiation talks were also held between the leaders of the two largest nationalist parties, the Social Democratic and Labour Party (SDLP) and Sinn Féin (the political wing of the IRA). By late 1992, secret talks were taking place between Sinn Féin and the Irish government. These talks led to the Irish and British government's signing the Downing Street Declaration, in which both parties agreed that it was for the people of Ireland as a whole, with the consent of the majority of the North, to determine the future status of Northern Ireland.<sup>503</sup>

The IRA declared a ceasefire in August 1994, which was followed by ceasefire declarations by loyalist paramilitary organisations.<sup>504</sup> Although the British and Irish governments published a framework for the negotiations, the ceasefire collapsed in February 1996 following the IRA bombing in London. Peace talks continued, although without Sinn Féin.

The final stages of the peace talks came about with the election of a new Labour government led by Tony Blair in May 1997. Blair invited Sinn Féin back into the talks, which resumed in September (the IRA having declared a ceasefire in July). An agreement was reached in April 1998. The Belfast Agreement, signed by the major political parties,<sup>505</sup> the British and the Irish governments, was a power-sharing agreement for Northern Ireland.<sup>506</sup> The Agreement was accepted by referendum in both the Republic of Ireland and Northern Ireland in May 1998. The British Parliament subsequently passed the Northern Ireland Act implementing the

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<sup>502</sup> See Bell, *Peace Agreements and Human Rights* (2000), 55.

<sup>503</sup> Joint Declaration on Peace' (The Downing Street Declaration), issued 15 December 1993 by John Major, then British Prime Minister, and Albert Reynolds, then Taoiseach (Irish Prime Minister), on behalf of the British and Irish Governments.

<sup>504</sup> 'Loyalist' is the term used for unionists who have a militant approach.

<sup>505</sup> The Democratic Unionist Party (DUP) was the only major party to oppose the Agreement. There were eight Northern Irish political parties involved in the talks, along with the British and Irish governments.

<sup>506</sup> For more on the Belfast Agreement see O'Leary, 'The Nature of the Agreement' (1999). For more on the power-sharing arrangement see O'Leary and McGarry, *The Northern Ireland Conflict* (2004).

power-sharing arrangement in a devolved assembly for Northern Ireland. The Act outlined the procedure by which the First Minister and the Deputy First Minister were to be elected, stipulating that: 'Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the Deputy First Minister'.<sup>507</sup> Section 16 left open what would happen if the six week deadline was overreached, only suggesting in Section 32(3) that: 'If the period mentioned in section 16 ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State shall propose a date for the poll for the election of the next Assembly.'<sup>508</sup>

The case being considered here involved a challenge to a failure by the Northern Irish Assembly to appoint a First Minister and Deputy First Minister by the deadline specified in the Northern Ireland Act. By the time of the facts in question in the case, the 1998-elected devolved government had been suspended and restored three times. When the devolved government was restored on 23 September 2001 the positions of First Minister and Deputy First Minister had become vacant. A vote was held on 2 November 2001, which was unable to gain the necessary agreement between the then main Unionist and Nationalist parties. Undesignated members of the Assembly re-designated as Unionists to get the required cross-party support needed to elect the First Minister and Deputy First Minister on 6 November, by which time the six-week deadline had expired.

Mr Peter Robinson, a Democratic Unionist Party (DUP) Assembly member, brought a case on the grounds the elections were unlawful and that new elections should be held in accordance with Section 32(3). The DUP, one of the then-potential 'spoilers' of the peace agreement which they opposed, were on the cusp of becoming the main Unionist party in Northern Ireland.<sup>509</sup> Having not been party to the Belfast Agreement, the DUP were at that time hopeful of dismantling it and who were making electoral gains vis-à-vis the then larger pro-agreement Ulster Unionist Party on the back of their opposition to the agreement. Their challenge therefore was more than technical – had elections had been called, the DUP stood a good chance of becoming the dominant Unionist party and of refusing to enter the power-sharing executive, effectively collapsing the central political mechanism and the Agreement.<sup>510</sup>

The question before the Judicial Committee of the House of Lords was whether the holding of a vote for the First Minister and Deputy First Minister after the deadline of 5 November 2001 violated the Northern Ireland Act. In what appeared to be an activist, highly purposive

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<sup>507</sup> Northern Ireland Act 1998, s 16 (1), reproduced in full in *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 3.

<sup>508</sup> Reproduced in full, alongside Section 31, in *Northern Ireland Act 1998*, s 16 (1), reproduced in full in *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 16.

<sup>509</sup> Unionists (loyalists) support the political union between Northern Ireland and the United Kingdom (and are mostly Protestant). Nationalists (republicans) favour union with the Republic of Ireland (and are mostly Catholic).

<sup>510</sup> Sinn Féin was also likely to become the dominant Nationalist party in the Assembly had a new election been called. There were concerns that the DUP and Sinn Féin would replace the more moderate Ulster Unionists and the Social Democratic and Labour Party (a nationalist party).

reading of a text that was arguably ambiguous, the House of Lords, in essence read the time limit and requirement to hold elections as not applicable.<sup>511</sup> They did so on the basis of the relationship of the Northern Ireland Act to the Belfast Agreement. Lord Bingham, giving the leading speech in the majority, held that:

[T]he 1998 Act ... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions ... If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. Mr Larkin [on behalf of the appellant] submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct ... [However, while] elections may produce solutions they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody...this constitution is also seeking to promote the values referred to in the preceding paragraph, [namely the values set out in the Belfast Agreement].<sup>512</sup>

It is also worth repeating here an extract from the opinion of Lord Hoffmann (in the majority): ‘According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States’.<sup>513</sup> The language in this decision reinforces the idea that the 1998 Act, implementing the Belfast Agreement, is in effect a constitution for Northern Ireland, and that as a constitutional document it embodies and protects the values and purposes of the peace agreement. The decision also makes note of the tensions between democratic values, such as

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<sup>511</sup> C Turpin and A Tomkins agree that the ‘majority of the House of Lords interpreted the legislation purposively, the purpose being to maintain devolved government in Northern Ireland’. And that ‘Robinson suggests that, when it comes to the interpretation of what the courts deem to be ‘constitutional statutes’ (whatever that may mean in our unwritten constitution), different rules may apply from those which govern the interpretation of ordinary (i.e. nonconstitutional) legislation.’ Turpin and Tompkins, *British Government and the Constitution* (2007), 70-71.

<sup>512</sup> *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 10-11.

<sup>513</sup> *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 33.

election and parliamentary procedure and strict compliance with the constitutional text (in this case the Northern Ireland Act), and values of peace and reconciliation can possibly be worsened by enforcing such democratic processes even when the effect would be to end the possibilities for democratic self-government. The House of Lords does not use the language of proportionality explicitly (which would not immediately have had the same connotation in British constitutional practice in any case), however, they rejected the petition of the appellant on the grounds that the provision of the Act requiring elections should a First Minister and Deputy First Minister not be elected was not intended to constrain the Assembly from acting, and that the provision ‘must be read in context’.<sup>514</sup> The House of Lords sought to preserve the arrangements in the original agreement in its spirit, even at the expense of the strict literal meaning of the implementing Northern Ireland Act. This case was brought shortly after the passing of the Act, making the decision in this case relevant to the success of the peace accord. The position taken in this case is an example in which the underlying political settlement was endorsed and protected by the judiciary, at the expense almost of the wording of the Northern Ireland Act, demonstrating the essential role of this ‘least dangerous branch’<sup>515</sup> of government in managing the ongoing political settlement process.

### *Bosnia-Herzegovina*

Again, while the complete history of Bosnia-Herzegovina and the conflict in the former Yugoslavia is beyond the scope of this thesis, a brief account is needed to provide some context to the peace process. The conflict in the former Yugoslavia began after the end of the Cold War and the death of Communist leader, Josip Broz Tito. The federal system of Yugoslavia held together the six republics of Serbia (which included the autonomous provinces of Kosovo and Vojvodina), Croatia, Slovenia, Bosnia Herzegovina, Macedonia and Montenegro. The preamble to the 1974 Constitution held that: ‘The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession on the basis of their will freely expressed ... have together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded on a socialist federal community of working people – the Socialist Federal Republic of Yugoslavia’<sup>516</sup> The republics of Slovenia and Croatia declared independence from Yugoslavia on 25 June 1991. This was followed by Bosnia’s declaration in March 1992. Conflict broke out in Croatia and Bosnia when their Serbian minority populations made bids to remain in Yugoslavia, and the Croat nationalists in Bosnia attempted to form their own sub-state. The conflict in Yugoslavia is in fact five conflicts: (1) the first was the brief war between the Yugoslav’s People’s Army (YPA) and the newly declared independent state of Slovenia; (2) the second was the conflict in Croatia, that like Slovenia, eventually successful but only after a protracted war; (3) the third war was between the Croatian army and the Serbian minority in Krajina which ended

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<sup>514</sup> *Robinson v Secretary of State for Northern Ireland & Ors* [2002] UKHL 32, para 17.

<sup>515</sup> Alexander Hamilton contended that the US Supreme Court would be the ‘least dangerous to the political rights of the Constitution’ (Hamilton, Federalist No. 78 ([1788] 2009)).

<sup>516</sup> Cited in Bell, *Peace Agreements and Human Rights* (2000), 92. The fact that the Constitution recognised the federal borders of the republics allowed the newly independent state to make a stronger claim of self-determination.

when the Croatian army pushed out most of the Serbs; (4) the fourth conflict is the one in Bosnia-Herzegovina that began following their bid for independence in 1992; (5) the fifth conflict was in Kosovo between Serbia and the ethnic Albanians who made claims on self-determination, and the war between NATO and the Serbian army that resulted.<sup>517</sup> The deadly and protracted conflict in Bosnia-Herzegovina lasted until 1995. The upper-hand that was held by Serbia was reversed in the summer of 1995 by NATO's military campaign, an American diplomatic push, and a coordinated Croat and Bosniak offensive.

The Constitution of Bosnia-Herzegovina was drafted as an annex to The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), the final peace agreement to resolve the war in the former Yugoslavia.<sup>518</sup> The Agreement was drafted in November 1995 under the supervision of the European Union special negotiator and delegates from France, Germany, Russia, the United Kingdom and the United States. The Agreement recognised the new state of Bosnia-Herzegovina as a decentralised federation composed of two entities, the Republic of Srpska and the Federation of Bosnia-Herzegovina. A power-sharing arrangement was agreed at the state federal level recognising Bosniacs, Croats and Serbs as 'constituent peoples', thereby, limiting election to the presidency and upper house to members of these groups.<sup>519</sup> The power-sharing arrangement was a necessary compromise needed to allow the Dayton Agreement and in particular its commitment to a central Bosnian state to go forward.<sup>520</sup> The Constitution also incorporated the European Convention on Human Rights (ECHR) to 'apply directly in Bosnia and Herzegovina.'<sup>521</sup>

Over time the foundation of the power-sharing arrangement, the provision that Serbs, Croats, and Bosniacs only were 'constituent peoples', was challenged. In a case concerning the constitutionality of the electoral law the Constitutional Court of Bosnia-Herzegovina - comprised of a careful balance of Bosniak, Croat, Serbian and international judges found that:

the provision of Article 8 of the Election Law of Bosnia and Herzegovina [on the election of the Presidency], including Article V of the Constitution of Bosnia and Herzegovina, should be viewed in the light of discretionary right

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<sup>517</sup> Ullman, 'Introduction', in *The World and Yugoslavia's Wars*, edited by Ullman (1996), 1-2; see also Bell, *Peace Agreements and Human Rights* (2000), 94, who also looked at the final Yugoslav conflict in Kosovo.

<sup>518</sup> For a complete history of the peace process and a more considered evaluation of the Dayton Agreement and the constitution see Szasz, 'The Quest for a Bosnian Constitution' (1995). See also O'Brien, 'The Dayton Constitution of Bosnia and Herzegovina', in *Framing the State*, edited by Miller (2010).

<sup>519</sup> The Constitution of Bosnia-Herzegovina sets out in the preamble that the constitution is 'dedicated to peace, justice, tolerance and reconciliation' and is determined by the 'Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina'.

<sup>520</sup> PW Galbraith, United State ambassador to Croatia between 1993 and 1998, in an interview with B O'Leary in August 2012, suggests that 'absent explicitly ethnic power-sharing assurances to the three main groups the negotiations would neither have begun or concluded' (McCrudden and O'Leary, *Courts and Consociations* (2013), 24).

<sup>521</sup> Constitution of Bosnia-Herzegovina, Art II (2).

of the State to impose certain restrictions when it comes to the exercise of individual rights. The said restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties ... [The articles] serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights are proportional to the objectives of general community in terms of preservation of the established peace.<sup>522</sup>

Justice Feldman, one of the three international judges on the Court, wrote, in his concurring opinion, that he regarded 'the justification as being temporary rather than permanent', concluding, however, that 'the time [had] not yet arrived when the State [had] completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.'<sup>523</sup> Justice Feldman's reasoning hints that the political process will eventually hit a stage at which time a justification on the grounds accepted in this case would not be constitutional.

In a second case on a similar matter, the Court found that:

The...restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties given that the said provision was intentionally incorporated into the Constitution... [and that such restrictions] are proportional to the objective of general community in terms of preservation of the established peace [and] continuation of dialogue.<sup>524</sup>

The decisions of the Bosnian Constitutional Court reflect the theories of Richard Pildes<sup>525</sup> and Samuel Issacharoff,<sup>526</sup> who agree that constitutional courts tend to be restrained when power-sharing arrangements are in tension with human rights provisions. This article goes further than the conclusions made by Pildes and Issacharoff, in suggesting that the Court is picking up the principal of proportionality to safeguard the power-sharing arrangement, although the Court did exercise caution in these cases. Further, as Justice Feldman holds the Court does not hold the constitutional authority to go beyond the constitution in determining legal and constitutional issues to bring the state law or constitution in line with Bosnia's

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<sup>522</sup> Constitutional Court of Bosnia-Herzegovina, *Admissibility & Merits*, Case No. AP-2678/06, 29 Sept 2006, para 21-22.

<sup>523</sup> Constitutional Court of Bosnia-Herzegovina, *Admissibility & Merits*, Case No. AP-2678/06, 29 Sept 2006, Separate Concurring Opinion of Judge David Feldman, para 3.

<sup>524</sup> Constitutional Court of Bosnia and Herzegovina, *Decision on Admissibility and Merits*, U-5/09, 25 Sept 2009 cited in McCrudden and O'Leary (n 507) 89.

<sup>525</sup> Pildes, 'Forward: The Constitutionalization of Democratic Politics' (2004).

<sup>526</sup> Issacharoff, *Fragile Democracies* (2015).

international obligations under the Convention.<sup>527</sup> However, as I discuss below, the European Court of Human Rights (ECtHR) came to the opposite decision in its judgment on the power-sharing arrangement, raising the question of whether and how regional or international courts apply a 'peace jurisprudence'. The ECtHR rejected the reasoning of the Constitutional Court, upholding the individual rights of the applicants over the power-sharing arrangement, in effect, finding the Constitution to be in violation of the Convention and Protocol.

### *Colombia*

The situation in Colombia is unlike that in Bosnia-Herzegovina or Northern Ireland as the civil war is not yet resolved despite several peace agreements having been signed over the fifty-year duration of the conflict. The conflict in Colombia has its roots in the political, and sometimes violent, battle between the Liberal and Conservative parties. The 1886 Constitution<sup>528</sup>, the one in effect until the enactment of the new 1991 Constitution, was adopted by the Conservative government, and replaced the 1863 Constitution of the previous Liberal Government. The 1886 Constitution was highly centralised and authoritarian, concentrating power in the president, who frequently used the emergency powers of the constitution to suspend the constitution.

The two most relevant groups are the FARC and the ELN. The ELN was formed in 1964, inspired by the Cuban revolution. The FARC, established in 1966, as a revolutionary Marxist group. The other guerrilla groups that have significantly impacted on Colombian politics are the Ejército Popular de Liberación (Popular Liberation Army, EPL), founded in 1968, and the Movimiento 19 de Abril (April 19 Movement, M-19), founded in 1973. These groups were urban-based groups. The government negotiated the successful demobilisation and disbandment of the M-19 in a process that culminated in the enactment of the 1991 Constitution. The EPL also demobilised in the 1990s.

Paramilitary groups formed in the 1960s as state sponsored militias<sup>529</sup> in reaction to the rise of the guerrilla groups, and in the 1970s and 1980s as private military for landowners and drug traffickers. Official state support of these groups was removed in the late 1980s after the La Rochela massacre in January 1989 in which paramilitaries murdered members of a judicial commission. However, continued collaboration between the security forces and paramilitary groups has been documented by the Inter-American Court of Human Rights.<sup>530</sup> These groups organised together in 1997 under the Autodefensas Unidas de Colombia (United Self Defense Units of Colombia, AUC).

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<sup>527</sup> Constitutional Court of Bosnia-Herzegovina, *Decision on Admissibility*, Case No. U13/05, Separate Concurring Opinion of Judge David Feldman, 26 May 2006, para 4.

<sup>528</sup> Amended in 1910, 1936 and 1945.

<sup>529</sup> Inter-Am. C.H.R., *Report on the Demobilization Process in Colombia*, OEA/Ser.L/V/II.120, doc. 60 para. 36 (Dec. 13, 2004).

<sup>530</sup> *Merchants v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004); *Mapiripán Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *Pueblo Bello Massacre v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); *Ituango Massacres v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

The 1991 Constitution of Colombia replaced the 1886 Constitution. The new constitution of Colombia created the Constitutional Court, which, in accordance with Article 24, is entrusted to '[safeguard] the integrity and supremacy of the Constitution'.<sup>531</sup> The institution of constitutional review, however, was not unique to the 1991 Constitution. Under the previous 1886 Constitution, the Supreme Court of Justice (CSJ) was called on to rule on the constitutionality of a national law when there was a disagreement concerning its constitutionality between the President and Congress. The judicial review function of the Court was extended in the 1910 amendment. The Supreme Court of Justice was a court of cassation and a constitutional court, with four chambers, including a constitutional chamber. The Constitutional Chamber would consider the claim before it would be decided on by the full court of twenty-four judges. The Supreme Court of Justice was also an active court, but limited its activism to structural questions. David Landau puts the approach of the pre-1991 Supreme Court of Justice in his first category, arguing that the Court made little distinction between ordinary legislation and the constitution, taking a strongly Kelsenian view, expect in decisions concerning the separation of powers doctrine, which the Court considered to be a principle pillar of the Constitution.<sup>532</sup> In line with this approach, the Court made a series of judgments limiting the executive's capacity in a constitutional emergency or state of siege.<sup>533</sup>

In an early decision, the Court listed some of the constitutional values and principles that inform the constitution and constitutional interpretation, including peace as 'captured in the preamble to the constitution'.<sup>534</sup> The Court has been judicially active and progressive,<sup>535</sup> rulings on laws that have bearing on the continuing peace process and in a way that supports the idea of an emerging 'peace jurisprudence'.

In an initiative of the Uribe government from 2003 onwards, the government passed the Justice and Peace Law in 2005 (Law 975)<sup>536</sup> as part of a 'peace process' with the United Self-Defense Forces of Colombia (AUC). These were right wing paramilitary groups who sought to uphold a 'pro-state' agenda and were often alleged to be acting in collusion with elements of the government meaning that the concept of a 'peace process' between these groups and the government was contentious. However, both the AUC and the government signed the Santa Fe de Ralito Agreement in July 2003, setting out the terms for the demobilisation and reintegration of AUC members. The Agreement included provisions limiting the prosecution of demobilised members. As a part of this process, in the period between November 2003 and

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<sup>531</sup> There are four courts under the Constitution of Colombia: the Supreme Court of Justice (highest court of ordinary jurisdiction and court of cassation); the Constitutional Court; the Council of State of Colombia (administrative court); and the Superior Council of the Judiciary (highest court of appeal on administration of justice). There is also the Office of Attorney General of the Nation (see Art 116).

<sup>532</sup> No. 43, 2418 G.J. 383, 387 (1984).

<sup>533</sup> No. 126, 2430 G.J. 141, 146-47 (1987); No. 45, 2413 G.J. 32, 40 (1983).

<sup>534</sup> See Landau, 'The Two Discourses in Colombian Constitutional Jurisprudence' (2005), 727

<sup>535</sup> Landau suggests that the Colombian Constitutional Court has adopted a 'new constitutionalism' approach to constitutional review which considers constitutions as extraordinary documents 'that should be read broadly and with the document's hierarchy of ideals in mind' (*ibid*, 709).

<sup>536</sup> Enacted by Congress on 22 June 2005, signed into law by President Uribe on 22 July 2005. This was followed by Decree No. 4760, 30 December 2005, which regulated aspects of the law.

April 2006, more than 30,000 members from 35 armed groups under the AUC, participated in the demobilisation process.<sup>537</sup> The law established a ‘transitional justice’ mechanism for paramilitaries to demobilise and confess in exchange for reduced penal sentences of five to eight years.<sup>538</sup>

A coalition of human rights organisations brought the case before the Constitutional Court under Article 241(4) of the Constitution,<sup>539</sup> challenging the content of thirty-three of the seventy-two articles of the Law on the grounds that there were irregularities in the legislative process in some of the rules; that the bill allowed for judicial pardons to members of illegal armed groups without procedural requirements; and that the measures were inadequate to the protections of victim’s rights. In its ruling, the Court:

named the pursuit of peace as a complex legal entity, as a collective right, an essential purpose of the Colombian state and a constitutional value. Therefore, the State had the authority to provide reasonable transitional instruments, justified and proportionate, even limiting other constitutional guarantees, in order to achieve peace. However, such limitations could not be based on the understanding of peace as an “absolute value”. Instead, the peace achievement should be compatible with the main aspects of the Rule of Law, in particular the rights of victims.<sup>540</sup>

The Court determined that the alternative punishment mechanism was aimed at achieving peace, and so, found the law to be constitutional in general. However, the Court issued guidelines on victims’ participation<sup>541</sup> and access to reparations,<sup>542</sup> the meaning of ‘paramilitarism’ as a crime under the law, and introduced legal consequences to those participating in the mechanism who concealed information<sup>543</sup> removing some of the more contentious aspects of the law. The Court ‘found that the settlement of the claim depended on the balance between the pursuit of peace and the rights of victims.’<sup>544</sup> The law remains controversial both in its passing and its implementation.

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<sup>537</sup> This is according to official data, cited by the Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, OEA/Ser/LV/II.125, Doc 15, 1 Aug 2006, para 7.

<sup>538</sup> For a fuller account of the Justice and Peace Law, see Laplante and Theidon, ‘Transitional Justice in Times of Conflict (2006).

<sup>539</sup> Under Art 214(4), the Court may ‘[d]ecide on the petitions of unconstitutionality brought by citizens against statutes, both for their substantive content as well as for errors of procedure in their formation’.

<sup>540</sup> *Gustavo Gallón Giraldo y Otros v. Colombia*, Judgement, C-370/2006 (Dossier D-6032), 18 May 2006.

<sup>541</sup> *Ibid*, para 6.2.3.2.2.1 – 6.2.3.2.2.10.

<sup>542</sup> *Ibid*, para. 6.2.4.1 – 6.2.4.1.24.

<sup>543</sup> *Ibid*, para 6.2.2.1.1 – 6.2.2.1.7.30.

<sup>544</sup> Constitutional Court, Press Release on the legal challenge to the Justice and Peace Law, Law 975 of 2005, Dossier D-6032 - Decision C-370/06, 18 May 2006.

In keeping with a strict reading of the Constitution, the Court may review the procedural constitutionality of an amendment, not the content.<sup>545</sup> However, in a series of decisions from 2003,<sup>546</sup> the Court has introduced the constitutional replacement doctrine as a doctrine on ‘unconstitutional constitutional amendments’, like the Indian Supreme Court’s basic structures doctrine. The doctrine sanctions the Court to review the content of amendments because it modifies or replaces the essential element of the Constitution.<sup>547</sup>

The Santos government, elected in 2010, pushed forward the peace process with the FARC and the ELN. As part of these efforts, the ‘Legal Framework for Peace’<sup>548</sup> was passed as a constitutional amendment, introducing Transitional Articles 66 and 67 as an ‘exceptional’ transitional justice framework to facilitate the peace negotiations and achieve ‘a stable and lasting peace’.<sup>549</sup> The amendment has been criticised for contravening certain human rights provisions of the 1991 Constitution and international human rights law.<sup>550</sup> However, the Court, exercising the constitutional replacement doctrine, ruled on the content of the Legal Framework for Peace amendment, accepting its constitutionality on the grounds that the essential principles of the constitution were not undermined by the amendment so long as it was proportional to the intended objective of facilitating peace.<sup>551</sup> Again, as in all the cases reviewed in this section, the Court was able to find a way to both honour the agreement so as to shield the political settlement and future peace negotiations, while tweaking it to better protect human rights, so as not to back track too far on the constitution’s protection of human rights and international law.

All three jurisdictions therefore, illustrate how courts often balance the requirements of the letter of the constitution, with its purpose as being to bring about peace. They show the ways in which courts will adopt flexible approaches to ensuring the constitution is not used to defeat the underlying political agreement that enabled it.

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<sup>545</sup> See Arts 241 and 379.

<sup>546</sup> C-551/2003, C-1200/2003, C-970/2004, C-153/2007, C-588/2009, C-141/2010, C-1056/2012 and C-10/2013. See Bernal, ‘Unconstitutional Constitutional Amendments’ (2013).

<sup>547</sup> Bernal, ‘Unconstitutional Constitutional Amendments’ (2013).

<sup>548</sup> Legislative Act 1/2012.

<sup>549</sup> Although the transitional justice mechanisms established under this amendment are to be ‘exceptional’, no clear timeline was given.

<sup>550</sup> For more on the tensions between (temporary) transitional justice mechanisms and (more permanent) constitutions, see Méndez, ‘Constitutionalism and Transitional Justice’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012) and Bernal, ‘Transitional Justice’ (2014).

<sup>551</sup> Judgment C-579/2013 (in which the Court accepted that prosecutions of members of illegal armed groups could be selected and prioritised as part of the transitional justice mechanism) and Judgment C-577/2014 (in which the Court ruled that former members of illegal groups could participate in politics after serving their sentence for ‘political crimes’). The details of these cases go beyond the scope of this article. For a fuller account of the cases see Bernal, ‘Transitional Justice’ (2014).

## International Courts

While so far I have focused on domestic jurisprudence, often these same cases and fact patterns are subject to subsequent international human rights court rulings. These have the capacity to take quite different decisions, posing the question of whether international or regional human rights courts understand the relationships of rights to peace differently than domestic courts.

### *European Court of Human Rights*

A claim was brought before the ECtHR concerning a challenge by two applicants, both citizens of Bosnia-Herzegovina, because their Jewish and Roma origins made them ineligible to stand for election to the House of Peoples and the Presidency, both governed by the power-sharing arrangement. The applicants, Dervo Sejdić and Jakob Finci, did not have a declared affiliation with the three ‘constituent peoples’ barring them from standing for election, which, they argued, amounted to racial discrimination under the Convention and Protocols.<sup>552</sup>

The ECtHR came to the opposite view from the Constitutional Court, finding, by fourteen votes to three, a violation of Article 14 (prohibition of discrimination) of the ECHR, together with Article 3 of Protocol No. 1 (right to free elections) and Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention.<sup>553</sup> The Court concluded that Bosnia-Herzegovina had moved on sufficiently from the conflict settled by the Dayton Agreement, and, therefore the objective of peace articulated by the Bosnian Constitutional Court was not a sufficient reason for overriding the individual equality rights of the challengers. In spite of accepting that ‘[t]he nature of the conflict was such that the approval of the “constituent peoples” ... was necessary to ensure peace .... [there have been] significant positive developments in Bosna and Herzegovina since the Dayton Agreement.’<sup>554</sup> The Court, quite dramatically found that the Constitution which comprised part of the Peace Agreement violated the ECHR. The contradictory decisions from the Constitutional Court and the ECtHR on similar facts illustrate the quite different balancing acts possible when applying the doctrine of proportionality and the ways in which differently positioned courts will evaluate the imperatives of peace differently.

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<sup>552</sup> The claim was based on Art 14 of the Convention, Art of Protocol No. 1 and Art 1 of Protocol No. 12.

<sup>553</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, European Court of Human Rights (ECtHR), 27996/06 and 34836/06, 22 Dec 2009. Two separate applications were submitted to the Court in summer 2006, which were joined and heard before the Grand Chamber in 2009, three years after the Constitutional Court decision. The decision has not yet been fully implemented.

<sup>554</sup> *Ibid*, para 45 and 47. On the issue of proportionality, as the Court was competent *ratione temporis* to consider the period after the ratification and the Protocol No. 1, it did ‘not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a “legitimate aim” since ... the maintenance of the system in any event does not satisfy the requirement of proportionality’ (para 46).

The decision of the ECtHR has been criticised by Christopher McCrudden and Brendan O’Leary,<sup>555</sup> who are concerned that the approach adopted by the Court in this case may reveal a new precedent of court’s being sceptical to consociational (power-sharing) arrangements. I agree with McCrudden and O’Leary’s argument that ‘the historical and political contexts in which the provisions of constitutions and peace agreements are drafted – especially peace agreements that are constitutional texts – need to be properly understood, especially by courts’ and that ‘[a]pparently repugnant provision may have defensible political origins’.<sup>556</sup> I also agree with their assessment of the ECtHR decision as being problematic, although it is necessary to note that there were strong dissenting opinions.<sup>557</sup>

This case of *Sejdić and Finci* reveals how the international court came to its decision in contrast to the Bosnia Constitutional Court’s approach of proportionality. The imperative of peace had passed for the ECtHR, which called ‘time’ on the transition during which a peace jurisprudence could apply. In his dissenting opinion, Justice Bonello is critical of the Court for ignoring the realities of the peace in Bosnia and is sceptical that the Court should ‘behave as the uninvited guest in peacekeeping multilateral exercises and treaties that have already been signed, ratified and executed.’<sup>558</sup> He also questions the Court’s reasoning that the situation in Bosnia had changed sufficiently making the power-sharing arrangement no longer necessary. The case may seem a clear violation of human rights, as Justice Bonello concedes, however, the reasoning of the majority opinion can also be criticised for going too far in preserving the electoral rights of the two applicants over the imperatives for the peace agreement in the first place. In the case before the Constitutional Court, Justice Feldman (cited above) had signalled that time will move the political settlement on so that compromises such as that in Dayton may no longer be necessary, but that time had not yet arrived. There is also a serious question, as Justice Bonello indicates, as to whether the ECtHR (or any international court) is the appropriate institution to determine when that time has come and peace has been achieved sufficiently to enable the dismantling of the power-sharing arrangements.

### *Inter-American Court of Human Rights*

A more flexible approach to a peace jurisprudence seems to be operating in the Inter-American Court of Human Rights. In a case before the Court concerning Colombia’s response to the murder of judicial officials, the Court held that the punishment for serious violations of the law must be proportionate to the crime and that ‘[e]very element which determines the severity of the punishment should correspond to a clearly identifiable objective and be

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<sup>555</sup> McCrudden and O’Leary, *Courts and Consociations* (2013).

<sup>556</sup> *Ibid*, xv.

<sup>557</sup> Partly concurring and partly dissenting opinion of Judge Mijovic, joined by Judge Hajiyev, and Dissenting opinion of Judge Bonello in *Sejdić and Finci v. Bosnia and Herzegovina*, European Court of Human Rights (ECtHR), 27996/06 and 34836/06, 22 Dec 2009.

<sup>558</sup> Dissenting opinion of Judge Bonello in *Sejdić and Finci v. Bosnia and Herzegovina*, European Court of Human Rights (ECtHR), 27996/06 and 34836/06, 22 Dec 2009.

compatible with the [American Convention on Human Rights].<sup>559</sup> The Court interpreted the Justice and Peace Law (Law 975), and in so doing, signalled, *obiter dicta*, that it accepted the Colombian Constitutional Court's reasoning on the principle of proportionality:<sup>560</sup> 'the punishment which the State assigns to the perpetrator of illicit conduct should be proportional to the rights recognized by law and the culpability with which the perpetrated acted, which in turn should be established as a function of the nature and gravity of the events.'<sup>561</sup> However, the Court stopped short of declaring the act of reducing sentences in consideration for demilitarization and confessions as being consistent with the Convention:

Given that uncertainty exists with regard to the content and scope of Law 975, and the fact that the initial special criminal proceedings are underway which could provide juridical benefits to individuals who have been identified as having some relationship to the events of the Rochela Massacre, and taking into account that no judicial decisions have yet been issued in these proceedings ... the Court deems it important to indicate, based on its jurisprudence, some aspects of the principles, guarantees and duties that must accompany the application of the juridical framework of the demobilization process.<sup>562</sup>

In this case, the Court appeared sympathetic to the need for a contextual application of human rights law that was understanding of the imperatives for peace and appeared to view its role as one of sketching out the parameters that the law should stay within, in terms of 'principles, guarantees and duties,' rather than give a black and white answer to the question of compliance with human rights law.

A second Inter-American Court judgement on the issue of amnesties after non-international armed conflict is worth mentioning briefly because it signals a reinforcing of this approach perhaps with a forward glance to Colombia's peace process to the FARC, although this case concerns the situation in El Salvador. The Court again considered the human rights implications of El Salvador's transitional justice mechanisms.

The Inter-American Commission of Human Rights found that '[i]n approving and enforcing the [General Amnesty for the Consolidation of Peace Law (1993)], the Salvadoran State violated the right to judicial guarantees [Art 8(1)] ... and the right to judicial protection

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<sup>559</sup> *La Rochela Massacre v. Colombia*, Inter-American Court of Human Rights, 11 May 2007, para 192.

<sup>560</sup> Proportionality is also a principle in international law, under which full amnesties are prohibited, however, while '[i]nternational law may require that punishment be proportionate to the seriousness of the crimes committed ... neither international law nor judicial practice has yet determined with any certainty what quantum of penalty is proportionate' (see Méndez, 'Constitutionalism and Transitional Justice', in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 1278).

<sup>561</sup> *La Rochela Massacre v. Colombia*, Inter-American Court of Human Rights, 11 May 2007, para 196.

<sup>562</sup> *Ibid*, para 192.

[Art 25]'.<sup>563</sup> Having failed to comply with the recommendations of the Commission Report on Merits No. 177/10 concerning the application of the Amnesty Law to the investigation of the alleged massacre of approximately 1,000 civilians between 11 and 13 December 1981 by the Salvadoran army, the Commission submitted the case to the jurisdiction of the Court. Justice Garcia-Sayán, in his concurring opinion, held that:

States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.

Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately.<sup>564</sup>

The opinion of Justice Garcia-Sayán gives perhaps the best articulation of the concept of balancing of rights, which cannot be achieved all at once, and the principle of proportionality. Unlike the ECtHR, which went quite far in pushing for constitutional re-working in *Sejdić*,<sup>565</sup> the Inter-American Court, in *La Rochela* and *The Massacres of El Mozote*, has been more sympathetic to the fragile balance that is demanded for peace.

### Legitimacy of Courts

However, on a note of caution, not all courts are equally trusted or legitimate. The mechanisms by which judges are appointed have bearing on the perceived (and actual) legitimacy of the court.<sup>566</sup> Still, courts may be the only institution that is trusted, especially following long, and violent conflict, where the executive and legislature are run by former parties to the war, who many may fear or disdain. The level of trust placed in the court is

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<sup>563</sup> Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez and Carlos Antonio Martínez, Inter-American Commission of Human Rights, Report N° 1/99, Case 10.480, El Salvador, January 27, 1999, para 123, 129.

<sup>564</sup> Concurring opinion of Judge Diego Garcia-Sayán, Judgment of *The Massacres of El Mozote and Nearby Places v. El Salvador*, The Inter-American Court of Human Rights, 25 October 2012, para 37-38.

<sup>565</sup> See Bell, 'What We Talk about When We Talk about International Constitutional Law' (2014), 273-274 on the 'mutually referencing' positions of European institutions.

<sup>566</sup> See Irving, *Gender and the Constitution* (2008), ch 6, who lists how judges are appointed in Australia, Canada, the US, South Africa, and India as examples of different models.

contextual, however, the increased faith in the judiciary and judicial review may have an impact, yet this can be both positive and negative.<sup>567</sup>

The interpretation of ‘peace constitutions’ demands that constitutional courts navigate between an elite pact and a more open constitutional way of doing business, where both remain important to any emerging constitutionalism. In the cases considered, the courts were asked to mediate between the tensions inside the political settlement, and in all examples, the courts interpreted peace to be the most important constitutional value, or the primary purpose of the constitution. As these examples make clear, judicial institutions are as important as political institutions in guaranteeing an enduring political settlement. The judiciary has, in some ways, limited the pace at which development of that political settlement has taken place, maintaining the constitutional link to the peace agreement, while acknowledging that the link should not preserve elite pacts against challenge permanently or without limits. The constitutional courts in all cases used similar reasoning that has impact on the meaning of post-conflict peace and the future of the *post bellum* state. In so doing, the courts have understood the constitution as an activity rather than an end-state, preventing the constitution from being frozen in time.

The legitimacy of courts to hold a position of such authority over the legislature and executive is what concerns the debate between political and legal constitutionalist.<sup>568</sup> In the case of peace constitutions, the court, as has happened in Bosnia-Herzegovina and Colombia, has authority over the political settlement. Although courts have been given increasing amounts of authority domestically, as the American model of strong-form judicial review has been adopted more widely, and internationally, as the number and jurisdiction of international and regional court has grown, the legitimacy of such courts to make decisions that are profoundly political is not clear. In the cases in this chapter, the courts were given extraordinary authority to interpret and therefore determine the implementation of the peace constitution. In the cases cited from Bosnia-Herzegovina and Colombia, each court also decided on the very meaning of peace, and put itself into a position to decide when peace has been achieved.

There are those who defend the role of courts in protecting human rights under a liberal consociational constitution. Taking from the example of Canada, Stefan Wolff and Karl Cordell argue that,

the rights of communities – minorities and majorities alike – are best protected in a liberal consociation system if its key provisions are enshrined in the constitution and if the interpretation and upholding of the constitution is left

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<sup>567</sup> For example, Kwasi Prempeh, ‘Marbury in Africa’ (2006), is cautious of the rise of juridical constitutionalism across Africa. While he sees the rise of new constitutions to underwrite the democratic trend, the reliance on the judiciary to secure and protect the constitution is limited and unable to adequately address deeper structural and institutional defects, including the distribution of power, in the post-colonial state.

<sup>568</sup> See Landau, ‘A Dynamic Theory of Judicial Review’ (2014) for a critical evaluation of the appropriateness of a democracy-improving model of judicial review, considering the cases of Colombia, South Africa and India.

to an independent constitutional court whose decisions are binding on the executive and legislature.<sup>569</sup>

Christopher McCrudden and Brendan O'Leary argue that courts play an even more instrumental role under consociational arrangements. They argue that,

[g]iven the potential conflict between the consociational and human rights aspects of the same peace agreement or political settlement, courts are likely to be called on to perform an even more delicate role than adjudicating disputes arising within long-established consociational arrangements.<sup>570</sup>

### Conclusion

David Landau suggests that it would be a 'significant mistake for scholars seeking to understand Latin American judicial behavior [sic] to fail to take account of judicial role conceptions'.<sup>571</sup> Landau argues that, broadly speaking, Latin American judges approach constitutional interpretation through two, very different, worldviews. The first, and classic approach, is the traditionalism-positivism model that assumes judges interpret the constitution without distinction from ordinary statutes. The second, which he calls, 'new constitutionalism' considers constitutions as extraordinary documents 'that should be read broadly and with the document's hierarchy of ideals in mind'.<sup>572</sup> Using Colombia as his case study, Landau argues that the new Constitutional Court of Colombia has adopted the second approach. His empirical analysis of the jurisprudence of the Supreme Court, in the 1980s, and the new 1991 Constitutional Court, led him to conclude that,

The post-1991 Constitutional Court thus abandoned the notion of the flat constitution where only specific legal rules had enforceable content for a complex, hierarchical constitutional structure that general principles and values dominated. They believed that they were doing something that was both quite new and fairly international in outlook. They even selected a new hero: In place of the old worship of Kelsen, the new court cited Dworkin's theories.

<sup>573</sup>

In support of his argument, Landau cites a former justice of the Constitutional Court, who argues that the 'Constitution has a hierarchy in its interior, or one might say, there exist some constitutional norms with greater weight than others'.<sup>574</sup> The Court has, in an early decision, listed some of the constitutional values and principles that inform the constitution and

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<sup>569</sup> Wolff and Cordell, 'Consociationalism, in *Routledge Handbook of Ethnic Conflict*, edited by Wolff and Cordell (2016), 295.

<sup>570</sup> McCrudden and O'Leary, *Courts and Consociations* (2013), 42.

<sup>571</sup> Landau, 'The Two Discourses in Colombian Constitutional Jurisprudence' (2005), 703.

<sup>572</sup> *Ibid*, 709

<sup>573</sup> *Ibid*, 728.

<sup>574</sup> RA Rivadeneira, El Valor de los Principios Fundamentales en la Interpretación Constitucional, (1994) *Revista de Derecho Público*, 58 quoted in *ibid*, fn 149.

constitutional interpretation, these are, ‘coexistence, work, justice, equality, knowledge, liberty, and peace captured in the preamble to the constitution ... service to the community, general prosperity ... [and] participation’<sup>575</sup>

Landau is making his case for Colombia, specifically, and Latin America, more broadly, however, with the extraordinary rise of constitutional courts with strong-form judicial review, courts are relevant and significant actors. Courts are interpreting constitutions that underpin the foundation of the political settlement and which underwrite the aspirations and values of the state, including those values and aspirations that are part of the peace process and agreement.

International courts are perhaps less well placed to make balanced judgements as to how the demands of justice should be weighed against the demands of peace as they may be less alive to the local requirements of the compromise and, in any case, may not be seen as the legitimate authority to navigate between these tensions. In such circumstances, it is perhaps best to follow the reasoning of the Inter-American Court in *La Rochela*, which set out broad parameters for what makes the compromise more acceptable in human rights terms. International courts that do not adopt a peace jurisprudence risk intervening directly to ‘destroy’ the political settlement, with little capacity to assist in the reconstruction of a new alternative one. This was the risk taken by the ECtHR in *Sejdić* which, by prioritising individual rights over groups’ rights and failing to sufficiently understand the difficulty of constitutional change, put in jeopardy the foundations of the political settlement without providing an alternative solution. The Court failed to understand that ‘the philosophy and practice of contemporary constitutionalism offers a mediated peace’ and while in ‘theory and practice this is seen as second best to a just peace,’<sup>576</sup> it is overreaching to make a determination on what that ideal peace should look like if it is at the expense of undoing the compromise arrangement that was necessary for a state of peace in the first place.

In concluding, I wish to caution that the argument made here that constitutional courts can be influential actors in the peace process, should not be mistaken for an endorsement on the activity of all constitutional courts. Recent examples have made it obvious that courts (both domestic and international) are not necessarily ‘good’ actors, and that they may be willing (or coerced) participants in eroding constitutional and democratic norms and laws.<sup>577</sup>

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<sup>575</sup> Constitutional Court of Colombia, T-406, G.C.C. (1992) (2), 198 quoted in *ibid*, 727.

<sup>576</sup> Tully, *Strange Multiplicity* (2005) 211 cited in Hart, ‘Constitution-Making’ (2001), 168.

<sup>577</sup> The European Commission has recently extended a Recommendation to Warsaw under the Rule of Law Framework, in follow-up to its opinion of 1 June 2016 concerning the ongoing constitutional crisis in Poland (see [http://europa.eu/rapid/press-release\\_SPEECH-16-2657\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-2657_en.htm)). Russia’s Constitutional Court recently issued a decision which elevates the Russian Constitution above the European Convention of Human Rights., giving rise to some concern (see Smirnova, ‘Russian Constitutional Court’ (2015)).

## Conclusion

FAITH IN THE liberal peace-making project has come under increasing scrutiny, however, increased attention is being directed towards constitution-making as a mechanism of state-building and reconciliation. The current scholarship and theory of public law, however, is not able to sufficiently comprehend the implications of what is being required of these new peace constitutions. The intention of this thesis was to go some way to considering the value of constitutions in transitions from violence to peace. Christine Bell has made a compelling case for questioning the turn to constitution-making as a mechanism of state and peace building, which has occurred in line with a failure of the international community to manage transitions from conflict. As she points out the move towards constitutionalism as a strategy is a consequence of ‘international actors question[ing] the effectiveness of their development, peacebuilding and international legal interventions and increasingly turning to politics for explanations [while] paradoxically appear[ing] to place renewed faith in constitutions as capable of remedying the deficits of past state- building approaches.’<sup>578</sup> The underlying aims of this thesis were, first, to question the type of constitution that emerged as part of a political settlement, including its status as a legal text, and the implications of its theoretical grounding on constitutional theory, and second, to better understand how courts, both domestic and international, are responding to the competing demands made of peace constitutions, that are being impacted by international law, while satisfying elite-demands and requirements of public participation in the peace and constitution-making process.

A peace constitution captures and protects the political settlement. It is distinct to local power politics and to the outcome of the violent conflict. A peace constitution breaks with the understanding that a constitution is a ‘moment’, that is enduring, and that sits outside of ordinary politics. Rather, a peace constitution is a ‘process, a continuing conversation, or a forum for negotiation amid conflict and division.’<sup>579</sup> Peace constitutions are limited by the dilemmas inherent in the process of negotiating the political settlement. The tension between elite buy-in and public participation, the balance between the time needed to establish trust and the immediacy of the situation, and the contradiction between local ownership of the process and constitution and the influence and involvement of the international community and law, makes each case distinct.

Constitutional theory can provide some boundaries and language to better understand the peace constitution, although only in so far as it allows for a place to make the distinctiveness of peace constitutions clearer, as ‘the practical considerations of this new context are very different from those which generated the theoretical accounts which ground established

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<sup>578</sup> Bell, ‘Introduction: Bargaining on Constitutions’ (2017)

<sup>579</sup> Hart, ‘Constitution-Making’ (2001), 154.

constitutions'.<sup>580</sup> The distinctive authority and constituent power of the peace constitution is held in the purpose of peace and the requirement of the constitution to move the state out of violence. It is this purpose which makes the peace constitution distinct, but, paradoxically, it is the very thing that a constitution may be too limited to deliver. The turn to constitution-making as a policy of statebuilding in post-conflict states is a reaction to the disenchantment of the liberal democratic peace building projects that have failed. Nonetheless, 'we know relatively little about ... the precise roles that constitution design and constitutional courts play in this process of 'statecraft'.<sup>581</sup>

In answer to the second question, looking at Northern Ireland, Bosnia-Herzegovina and Colombia where courts have addressed the validity of the underlying elite pact at the heart of the constitutional order, I suggest that the constitutional court found peace to be foundational to the constitution – noting the relationship of the constitution to the political settlement. In the cases from Bosnia-Herzegovina and Colombia, peace, as a basic value of the constitution, was used to measure proportional limitations of other constitutional rights. However, in none of these cases did the court find that the peace agreement was beyond question. In different ways, the courts in all three cases accepted that the peace settlement needed to stay open to other possibilities and re-evaluation. I also looked to the jurisprudence of international human rights courts, suggesting that international courts are less well placed to make balanced judgements as to how the demands of justice should be balanced with the demands of peace.

### Definition

A peace constitution is distinctive in its foundation. It is central to the political settlement and holds peace at its foundation. While a peace constitution has many similarities to a constitution written as part of democratic transition, the concerns of peace are distinct from democracy, as peace is the central concern of the political settlement. A peace constitution is attached to the peace agreement, a document that was drafted separately from the constitution, and which has as its overriding objective to settle the war, making it a compromised political solution. The peace agreement may also rest on international law as its source of legal authority, bringing a heavy influence of international law into the domestic constitution. Vivien Hart proposes that constitutions are a part of a canon that, 'borrowing from its literary counterpart, becomes a whole set of definitive sources rather than just one'.<sup>582</sup> The peace process and agreement are part of the canon of a peace constitution, and together form a part of a constitutional discourse that 'emphasizes process'.<sup>583</sup>

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<sup>580</sup> Bell, 'Introduction: Bargaining on Constitutions' (2017), 20

<sup>581</sup> *Ibid.*

<sup>582</sup> V Hart, 'Constitution-Making' (2001), 158: 'The map metaphor serves to introduce two of the features of constitutions: a map is both schematic and drawn from a particular perspective. However ingenious the cartographer in representing dimensions on the page, an act of imagination is required to comprehend the reality of the terrain from the signs and symbols of the map. Constitutional documents share these features'.

<sup>583</sup> Hart, 'Constitution-Making' (2001), 157.

Peace is the foundation of the constitution and the grounding of its authority. Constitutional theory has a long tradition of measuring constitutions against democracy and as the outcomes of revolutions, but constitutional theory does not engage sufficiently with the concerns of peace or violence. It was therefore the intention of this thesis to develop a theory of peace as the source of authority and as the common desire that binds together the constituent power. As a corollary to peace as the authority of constitutions, the place of violence in constitutions needs to be further understood as constitutional theory considers authority and legitimacy, but not violence.

### Authority

Traditional constitutional theory finds authority in the constitutional drafters, who were granted some form of authority and legitimacy from an outside source, from a previous constitutional order, or in the activity of the people acting in union. New constitutions, however, often emerge from unconstitutional processes or revolutions that replace the old constitutional order, only to find authority after their enactment. Likewise, peace constitutions may be granted authority from the peace agreement that constituted their enactment, or from international law that has influence in the constitution-making process. Authority from a peace constitution may also arise from the narrative of peace, as the narrative of freedom and liberty in the American Declaration of Independence held authority for the US Constitution.

Peace is a promissory act. The act of signing a peace agreement is symbolic, as well as a legal and political act. Transferring the narrative of peace from a peace agreement to a constitution is also a political act, that holds symbolic and actual authority. Peace as a term and political reality holds many conceptions (but it is exactly in both its collective and individual expression that it holds such power as a narrative). However, all people will understand peace to mean something different, which can be conditional of their experience of violence. The strength of the peace constitution rests on this fable of peace.

### Constituent Power

At the heart of constitutional authority is constituent power. The notion of constituent power was originally conceived as a validation for the revolutionary constitution. The strength of the narrative, that all people acting in concert transferred consent to the constitution as a replacement to the monarch, held authority that was replicated in the words 'we the people'. The power of this narrative was persuasive, and sufficient, to grant authority to the constitution. However, the true activity of the people was a myth. On the American Constitution, Robert Dahl asks:

Why should we feel bound today by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine, a fair number of whom were slaveowners, and adopted in only thirteen

states by the voices of fewer than two thousand men, all of whom are long since dead and many forgotten.<sup>584</sup>

The beginning of the American constitution was the preserve of the elite, however, the attached notion of political freedom to the constitution grounded it in the circle of legitimacy between the constituent power and constituted power. The ideal of the constituent power was as constructed in the American revolution as it was in the French. The reason that the first succeeded but the second failed, was according to Arendt that the founders in Pennsylvania could pull on the pre-existing constitutional authority of the states. That the 'legitimacy of the constituent power [was] derived from its capacity to give play to existing constituent practices'.<sup>585</sup> Arendt also located authority in the 'revolutionary spirit', which gave voice to the constituent power. However, in the 'self-evident truth' of the words of the Declaration of Independence, was the beginning of something 'permanent and enduring' which diminished the authority of the constituent power, at the same time as creating it.<sup>586</sup>

Like constitutional authority, however, constituent power has a distinctive understanding in peace constitutions, that is grounded in the common desire for peace, rather than an existing common identity based in national or political status, that is present and can give voice to the constitution in 'we the people'. The understanding of a peace constitution as a process, removes the appeal of endurance, correcting for the permanence of the constitution having a limiting effect on the constituent power. Again, the traditional notions of constituent power are limiting as they have no place for the international, which is now heavily involved, practically and normatively, in domestic constitution-making. As the international community becomes more involved in the domestic constitution-making process, constituent power is become diffused between several constituent powers and an international constituent power. The legitimacy of the international constituent power, which is acting with a similar narrative to the revolutionary constituent power holding to a normative agenda of human rights, minority rights and democracy, is suspect. The international, however, unlike the people, holds an authority from above that can act as a watch on the constitution. So, in the way that Schmitt understands the people to always exist above the constitution, the international, in the process of the internationalisation of constitutional law, sits above the domestic constitution.

### Constitutional Interpretation

Courts are instrumental actors in the peace process, and continue to facilitate the constant and on-going (re)negotiation that endures after the implementation of a new, or revised, constitutional arrangement. Every constitution is burdened with dilemmas; either inherent in the document itself, or introduced with the passage of time. In either case, many of these dilemmas are resolved in the courts. In the same way, peace constitutions, although likely burdened with more and tougher inconsistencies or dilemmas, are also subject to

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<sup>584</sup> Dahl, *How Democratic is the American Constitution?* (2002), 2.

<sup>585</sup> Bernal, 'A Revolution in Law's Republic' (2009).

<sup>586</sup> *Ibid.*

constitutional review. Constitutional interpretation of peace constitutions, is therefore, distinctive. Interpretation is grounded on more teleological reasoning with the purpose of peace at stake. In the decisions considered from Northern Ireland, Colombia and Bosnia-Herzegovina, the courts were willing to sacrifice certain human rights requirements or international legal precedent in the interest of the overarching purpose of peace. This approach was, however, done through balancing with proportionality analysis, with the effect of gently shifting the peace constitution towards a more normative constitutionalism, while holding in place the 'dirty' elite-brokered deal at the centre of the political settlement. These limitations on the normative constitution were not understood to be without constraint. In all cases, the courts recognised that time would need to be called on the balancing of peace - although when such a time would be reached not made clear.

International courts have also decided on the merits of cases with implications on the domestic peace constitution. While the reasoning behind the decisions considered in the cases of the international human rights courts is reasoned, domestic courts are more alive to the requirement of the peace constitution and, therefore, hold more legitimacy to make such determinations on the purpose and balancing of the peace constitution. The Inter-American Court, perhaps being more exposed to cases concerning conflict, demonstrates a higher level of awareness on issues of peace. The Court, in its judgement concerning the situation in El Salvador, pointed out the tension present between peace and existing international commitments and human rights, and the delay in their implementation that may be necessary to achieve peace, which the Court understood as a right in itself.

The jurisprudence of the courts, in all the cases considered, suggest a new way of interpreting constitution that is in line with the requirements of peace but which are not necessarily compatible with current constitutional theory. Peace as the overarching pressure on the constitution has allowed for courts to act creatively in holding peace as the purpose of the constitution against which other constitutional and human rights are balanced. This common set of judicial practices suggests that there is an emerging global 'peace jurisprudence' that is mirroring the increased influence of international constitutional law on domestic processes.

### The Hope for the Peace Constitution

Vivien Hart, writing years before other had started to consider the distinctiveness of constitution drafted in response to conflict, suggest that such constitutions are expected to

drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict and/or shape the governance framework will regulate access to power and resources – all key reasons for conflict. [As well as also putting] in place mechanisms and institutions through which future conflict in the society can be managed without a return to violence.<sup>587</sup>

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<sup>587</sup> Hart, 'Constitution-Making' (2001), 156.

Peace constitutions may simply be words on pieces of paper, or, as this thesis argues, they can be promises of a better future. Still, it is but a promise. As constitutions are being looked at as a device to transition out of conflict, it is as several states linger in a state of war, or return to conflict after years of stability. Constitutions, it is hoped, will bring stability and peace; however, this is requiring a lot of a document. Nonetheless, the new confidence in the peace constitution as a mechanism of conflict resolution and state-building, has the implication that the role of domestic constitutional courts, and regional human rights courts, has become significant in the potential success in the political settlement.

There is a tendency for constitutional courts in new democracies to be more activist than courts of established democracies.<sup>588</sup> Alec Stone Sweet argues that ‘[s]ince the Second World War, rights and review have been crucial to nearly all successful transitions from authoritarian regimes to constitutional democracy ... Indeed, it appears that the more successful any transition has been, the more likely one is to find an effective constitutional or supreme court at the heart of it’.<sup>589</sup> The processes of democratisation from post-authoritarian regimes overlaps with those processes of state and institution building (which includes democratisation) in a post-conflict state, albeit in differing contexts. However, it reasons that newly institutionalised courts authorised by peace constitutions may also display similar characteristics as constitutional courts in newly democratising states. The faith that courts may in some way protect the state from a return to violence in upholding the foundation of the peace constitution may be placing too high a burden on the judiciary.

This hope that a constitution may be able to repair and then hold together a state experiencing high-level violence is placing a great deal of reliance on what is a political and legal document. However, in helping to shape a constitutional identity and providing the language of a peaceful state, a constitution may be a tool in guiding a people and a country from war to peace.

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<sup>588</sup> ‘All the new democracies have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of the constitution. What is striking, and perhaps distinct, about the Third Wave of democratization is the central role assumed by these apex courts in sculpting democratic politics’ (Issacharoff, *Fragile Democracies* (2015), 9.)

<sup>589</sup> Stone Sweet, ‘Constitutional Courts’, in *The Oxford Handbook of Comparative Constitutional Law*, edited by Rosenfeld and Sajó (2012), 827.

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