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(UN)CONSTITUTIONAL CHANGE ROOTED IN PEACE AGREEMENTS

Asli Ozcelik* & Tarik Olcay†

Abstract

Peace agreements aiming to end intra-state armed conflicts have often provided for radical constitutional change, with more than 100 peace agreements concluded since 1989 containing provisions on constitutional reform. When such constitutional change is envisaged to take place within the framework of an existing constitution, as opposed to the making of a new constitution, hard-achieved deals between peace-making parties are exposed to ‘the unconstitutionality challenge’. Although there is ample literature on the making of a new constitution during transitions from conflict to peace, implementing a peace agreement within an existing constitutional framework and ‘the unconstitutionality challenge’ to peace reforms have not been fully examined to date. In this Article, we first identify the modalities in which ‘the unconstitutionality challenge’ is directed at constitutional change rooted in peace agreements. We do so through a comparative survey and by particular reference to peace processes in Colombia (with the FARC-EP) and the Philippines (regarding the Mindanao conflict). We then examine the promise and limitations of three legal strategies in addressing the unconstitutionality challenge: (i) recourse to international law in assessing unconstitutionality, (ii) transitionalism in judicial review, and (iii) attributing supra-constitutional or international legal status to peace agreements. We conclude that while each strategy has some merit, their effectiveness may be limited where they lack legal feasibility or political purchase. The resulting intractability of the unconstitutionality challenge, particularly in jurisdictions where there is a strong commitment to legalism, warrants a re-thinking of the link between peace-making and constitutional reform and the importance of taking existing constitutional frameworks in transitional countries seriously.

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INTRODUCTION—THE UNCONSTITUTIONALITY CHALLENGE TO PEACE

Constitutional change, understood broadly to cover the making of a new constitution or the reform of an existing constitution, has become a central aspect of the resolution of many intra-state armed conflicts. Peace agreements concluded to end intra-state armed conflicts often provided for radical constitutional change, with 118 peace agreements concluded in the post-1989 period containing constitutional reform provisions.¹ Constitutional change is also promoted in international peacebuilding policy as a requirement for durable peace.² When such constitutional change is envisaged to take place within the framework of an existing constitution, as opposed to the making of a new constitution, hard-achieved deals between peace-making parties become subject to public, parliamentary, or judicial approval processes as required by a particular constitution and thus exposed to the risk of a challenge of unconstitutionality. This risk arises particularly when peace-making parties attempt to circumvent the constitutional amendment procedures or promise changes that conflict with the substantive principles of the constitution.

Constitutional change proposals rooted in peace agreements have raised constitutionality concerns as such in several jurisdictions around the world—from Bangladesh to Mali, and Colombia to the Philippines. In Colombia, for example, the constitutionality of the constitutional amendments adopted by the Congress during the negotiation and implementation of the 2016 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace,³ concluded between the Colombian government and the *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (FARC–EP), was challenged before the Colombian Constitutional Court in a series of cases.⁴ Another

¹ See United Nations and University of Cambridge, Language of Peace, <https://www.languageofpeace.org>.

² The Secretary General, *Guidance Note of the Secretary-General on UN Assistance to Constitution-making Processes* 3 (2009), https://www.un.org/ruleoflaw/files/Guidance_Note_United_Nations_Assistance_to_Constitution-making_Processes_FINAL.pdf.

³ Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colombia – FARC-EP, Nov. 24, 2016, <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> [hereinafter *Final Peace Agreement*].

⁴ See, e.g., C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>; C.C., agosto 6, 2014, Sentencia C-577/14, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2014/C-577-14.htm>; C.C., agosto 24, 2016, Sentencia C-379/16, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2016/c-379-16.htm>; C.C. diciembre 13, 2016, Sentencia C-699/16, G.C.C. (Colom.), <https://www.corteconstitucional.gov.co/relatoria/2016/C-699-16.htm>; C.C., mayo 17, 2017, Sentencia C-332/17, <https://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm>.

prominent example is from the Philippines, where the Philippine Supreme Court found that the constitutional amendment promised in a Memorandum of Agreement on the Ancestral Domain (MOA-AD) negotiated by the Government of the Republic of the Philippines and the Moro Islamic Liberation Front (MILF) in 2008 would substantively and procedurally violate the Constitution.⁵ As the examples demonstrate, especially in jurisdictions where there is a strong commitment to legal constitutionalism, the oft-inflexible requirements of the constitutional status quo pose a *legal* obstacle in the way of implementing the constitutional change promises made in peace agreements.

Our aim in this Article is to identify and examine the unconstitutionality challenge to peace agreements, with a view to assessing whether it can be averted or overcome by parties to peace agreements or constitutional courts. We begin in Part I by identifying the modalities of constitutional change rooted in peace agreements and introducing the challenge of unconstitutionality that arises when such change is envisioned in the form of an amendment to an existing constitution. We then identify and examine three legal strategies that have been employed to address unconstitutionality challenges directed at constitutional reform proposals rooted in peace agreements in the following three Parts of the Article. The first two legal strategies, namely (i) having recourse to international law in assessing the constitutionality of peace-agreement-based constitutional change proposals (Part II) and (ii) adopting a doctrine of transitionalism in judicial review (Part III), aim to *overcome* an unconstitutionality challenge and can be employed by courts in the exercise of constitutionality review. The third legal strategy, namely (iii) the attachment of supra-constitutional or international legal status to peace agreements (Part IV), aims to *avert* unconstitutionality challenges and can be employed by peace-making parties. Each of these strategies may be effective, to varying degrees, at addressing unconstitutionality challenges directed at peace-agreement-based constitutional amendments. However, our analysis demonstrates their shortcomings and the resulting intractability of the unconstitutionality challenge, particularly where the conclusion or implementation of a peace agreement requires a radical departure from the existing constitution and there is a commitment to legal constitutionalism in a particular jurisdiction.

G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm>; C.C., octubre 11, 2017, Sentencia C-630/17, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2017/C-630-17.htm>.

⁵ Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), 568 S.C.R.A. 402 (2008) [hereinafter *North Cotabato*].

In our analysis, our broader aim is first to direct attention to the constitutional reform modality of constitution-making, which is commonly employed in peace agreements yet remains underexplored in international policy and literature. Although there is an abundance of scholarship and policy guidance on making a new constitution in conflict and post-conflict settings, the widespread practice of constitutional reform within an existing constitutional framework and the significance of taking existing constitutions seriously both for the legitimacy and practical success of constitutional reforms are underappreciated. Addressing this gap and bringing together constitutional and international legal analysis, we seek secondly to provide guidance to domestic and international actors engaged in constitutional reform and peace-making processes in conflict and post-conflict settings. While exploring the disruptive potential of the unconstitutionality challenge for transitions to peace and probing the viability of certain legal strategies in diverting that, we remain mindful of its role as a legal tool that allows political opposition groups that are excluded from peace negotiations to have a say in the resultant constitutional reform projects.

We carry out our analysis in this Article with particular reference to two jurisdictions, Colombia and the Philippines, for a number of reasons. Firstly, the question of the constitutionality of peace agreements or implementing laws has been judicialized in both countries and has led to intense political debates. The abundance of arguments put forward for and against the constitutionality of agreements and the review of their constitutionality allow us to consider the viability of various strategies of addressing such challenges. Secondly, both countries have seen several rounds of peace negotiations and of judicial review of resultant agreements. Therefore, it is possible to trace the impact of previous court decisions on peace negotiations and resultant agreements, and compare the traction gained by different strategies by parties to the agreements. Thirdly, both countries have aspired to liberal constitutionalism, at least during the period under study, especially in terms of their commitment to the procedural guarantees of constitutional change, and partially incorporate international law into their domestic legal system. Lastly, the apex courts in both countries have been identified as judicially activist courts, which frequently pronounce on policies and engage in non-formalist constitutional interpretation.⁶ This allows us to highlight the

⁶ See JULIO RÍOS FIGUEROA, CONSTITUTIONAL COURTS AS MEDIATORS: ARMED CONFLICT, CIVIL-MILITARY RELATIONS, AND THE RULE OF LAW IN LATIN AMERICA 37 (2016); Alejandro N. Jr. Ciencia, *From Judicialization*

significant role apex courts play in the negotiation and implementation of constitutional changes promised in peace agreements, as well as raising the question of whether and how judicially activist courts can develop a jurisprudence of transitionalism.

Before proceeding, three caveats regarding the scope of this Article are in order. Firstly, we do not engage in an extensive discussion of whether and when upholding a peace-agreement-based constitutional amendment is desirable from a normative perspective. We acknowledge that constitutional changes promised by warring parties may be based on self-interest, lack representative legitimacy, or prioritize short-term requirements of achieving a negotiated settlement at the expense of long-term requirements of constitutionalism, however understood, and may prevent the inclusion of other societal groups in the constitutional order.⁷ Secondly, we do not directly address the question of whether and under which conditions the making of a *new* constitution within the context of peace-making may be deemed unconstitutional. This question has partly been dealt with in the literature, particularly in relation to the issue of constituent power.⁸ In this Article, we focus on constitutional changes *within* a constitutional order brought about by peace agreements and the constitutionality challenge they may face. Lastly, we focus on agreements concluded to end intra-state armed conflicts in this Article, as these are much more commonly concluded than inter-state treaties, and the required constitutional change is often more extensive and thus more likely to raise unconstitutionality challenges. However, most of our legal analysis also applies to constitutional change required for the implementation of inter-state peace treaties, such as the constitutional amendment promise in the recently concluded agreement between Greece and North Macedonia for the settlement of the dispute regarding the latter's official name.⁹

to Politicization of the Judiciary: The Philippine Case, in THE JUDICIALIZATION OF POLITICS IN ASIA (Björn Dressel ed., 2012).

⁷ See Christine Bell & Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*, Policy Paper, 32, Hague, INTERNATIONAL IDEA, <https://www.idea.int/publications/catalogue/sequencing-peace-agreements-and-constitutions-political-settlement-process> (2016).

⁸ See, e.g., Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 423 (2006).

⁹ Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council Resolution 817 (1993) and 845 (1993), The Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership between the Parties, Greece – FYROM, art 4(d), June 12, 2018, <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/02/14-February-Letter-dated-14-February-2019.pdf>.

I. PEACE AGREEMENTS AND CONSTITUTIONAL CHANGE

A. Two modalities of constitutional change rooted in peace agreements

Resolution of intra-state armed conflicts between a government and an armed opposition group, whether over governance or territory, almost always requires fundamental changes to the constitutional order.¹⁰ In conflict and post-conflict states, armed opposition groups and public often have little confidence in the existing constitutional order and consider constitutional change as a potential means of entrenching the recognition of their grievances and political causes in the constitutional order.¹¹ The prevalence of constitutional change as a peace-making practice is not only driven by the demands of the conflict, negotiating parties, and the affected society, but also a consequence of the policies of international actors that provide technical assistance to parties in conflict and post-conflict settings. International peace facilitators consider constitutional change, particularly the making of new constitutions, as a condition for a new beginning and sustainable peace.¹² Consequently, regardless of whether constitutional change is explicitly promised, almost all peace agreements, as “constitutions in embryo”, include provisions on constitutional matters, ranging from political powersharing to changes in intra-state and state borders, and from national identity to human rights guarantees.¹³

Our survey of peace agreements compiled in the *Language of Peace* database¹⁴ showed that provision for constitutional change in peace agreements follows broadly two modalities: making of a new constitution or changes to the existing constitution. Within the first modality, there are mainly two sequencing patterns in which a peace agreement provides for a new constitution. Firstly, some peace agreements contain a new constitution or are concluded in the form of a constitution. For example, the Dayton Agreement, which put an end to the Bosnian War in 1995, contained as an annex the new Constitution of Bosnia and

¹⁰ For a definition of ‘intra-state conflict’, see The Uppsala Conflict Data Program, Definitions, <https://www.pcr.uu.se/research/ucdp/definitions/>.

¹¹ Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 U. PA. J. INT’L L. 239, 242 (2011).

¹² See, e.g., Lakhdar Brahimi, *State Building in Crisis and Post-Conflict Countries*, 7th Global Forum on Reinventing Government: Building Trust in Government (2007) <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN026305.pdf>; The Secretary General, *supra* note 2.

¹³ Sujit Choudhry, *Civil War, Ceasefire, Constitution: Some Preliminary Notes*, 33 CARDOZO L. REV. 1907, 1917 (2012).

¹⁴ See *supra* note 1.

Herzegovina.¹⁵ Furthermore, some negotiated settlements to intra-state armed conflicts are formally reflected in interim or final constitutions instead of a peace agreement. For example, the 1994 South African Interim Constitution and the 2005 Constitution of Iraq are considered as “constitutional peace agreements” or “peace-agreement constitutions”.¹⁶ Although these instruments are ‘constitutions’ in form and status, their direct role in the resolution of the respective armed conflicts brings them close to ‘peace agreements’ in nature and function.

Secondly, another group of agreements set the procedural and/or substantive framework for the making of a new constitution. These agreements often function as interim constitutions or transitional political arrangements, or provide for the adoption of such transitional instruments, until the new constitution comes into effect. For instance, the 2000 Arusha Peace and Reconciliation Agreement for Burundi, signed with a view to ending the Burundian Civil War that had started in 1993, led to the adoption of the 2005 Constitution of Burundi following a transitional period.¹⁷ A lengthy Chapter I in Protocol II to the Agreement lays out the “constitutional principles of the post-conflict constitution” pertaining to, inter alia, the fundamental values and general principles, fundamental rights, political parties, and the legislature, executive and judiciary, as well the procedural and temporal framework for the adoption of the new constitution. Similar arrangements are also found, among others, in the 1991 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict,¹⁸ the 2001 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions,¹⁹ the 2006 Comprehensive Peace Accord signed between the Government of Nepal and the Unified Communist Party of Nepal,²⁰ and the 2008 Agreement on National Dialogue and Reconciliation in Kenya.²¹

¹⁵ General Framework Agreement for Peace in Bosnia and Herzegovina, Bosnia and Herzegovina – Croatia – Yugoslavia, Nov. 21, 1995, <https://peacemaker.un.org/bosniadaytonagreement95>.

¹⁶ See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT’L L. 373, 391-94 (2006); Jennifer S. Easterday, *Peace Agreements as a Framework for Jus Post Bellum*, in *JUS POST BELLUM* (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014).

¹⁷ Arusha Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000, <https://peacemaker.un.org/node/1207>.

¹⁸ Framework for a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, <https://peacemaker.un.org/cambodiaparisagreement91>.

¹⁹ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), Nov. 14, 2001, <https://peacemaker.un.org/afghanistan-bonnagreement2001>.

²⁰ Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist), Nov. 21, 2006, <https://peacemaker.un.org/nepal-comprehensiveagreement2006>, art. 3(2).

²¹ Kenya National Dialogue and Reconciliation: Longer Term Issues and Solutions – Constitutional Review, Mar. 4, 2008, <https://peacemaker.un.org/kenya-constitutionalreview2008>.

The second modality of constitutional change, namely amendments to the existing constitution, relate to the peace agreements whereby, some parties *effect* or *promise* amendment to the existing constitution through a peace agreement, either explicitly or implicitly.²² Constitutional amendment rooted in peace agreements is a prevalent practice with 77 of the 118 peace agreements, which provide for some form of constitutional reform, containing a commitment to amend the respective existing constitution.²³ The Arusha Accords signed in 1993 between the government of Rwanda and the Rwandan Patriotic Front to end the Rwandan Civil War presents a striking example. Stipulating that “the Constitution of 10th June, 1991 and the Arusha Peace Agreement shall constitute indissolubly the Fundamental Law that shall govern the Country during the Transition period”, the Agreement enumerates the 45 provisions of the Constitution that are ipso facto replaced by the respective provisions of the Agreement and establishes the supremacy of the Agreement over the Constitution in case of norm conflicts.²⁴ The Fundamental Law of the transition period was replaced by the new constitution in 2003,²⁵ the making of whose procedural and substantive conditions were set by the Agreement.

In addition to the rare practice of *effecting* constitutional amendment as such, many peace agreements *promise* amendments. The Lomé Peace Agreement concluded in 1999 between the Government of Sierra Leone and the Revolutionary United Front, for example, tasks the Government with establishing a Constitutional Review Committee to recommend constitutional amendments to ensure the conformity of the Constitution with the Agreement.²⁶ The 2001 Bougainville Peace Agreement concluded between the Government of Papua New Guinea and the Bougainville leaders provides that it constitutes the basis for the enactment and interpretation of constitutional amendments and other laws, which must

²² See, e.g., Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF), July 7, 1999, <https://peacemaker.un.org/sierraleone-lome-agreement99> [hereinafter *Lomé Peace Agreement*]; Bougainville Peace Agreement (Papua New Guinea), Aug. 30, 2001, <https://peacemaker.un.org/png-bougainville-agreement2001> [hereinafter *Bougainville Peace Agreement*]; Northern Ireland Peace Agreement, Apr. 10, 1998, <https://peacemaker.un.org/uk-ireland-good-friday98> [hereinafter *The Good Friday Agreement*]; Framework Agreement (Ohrid Agreement), Republic of Macedonia – Ethnic Albanian Representatives, Aug. 13, 2001, <https://peacemaker.un.org/fyrom-ohridagreement2001>.

²³ United Nations and University of Cambridge, *supra* note 1.

²⁴ Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, art. 3, Aug. 4, 1993, <https://peacemaker.un.org/rwanda-peaceagreementtrpf93>.

²⁵ The Constitution of the Republic of Rwanda 2003 [CONSTITUTION] (Rwanda).

²⁶ Lomé Peace Agreement, *supra* note 22, art. X.

explicitly state that they are intended to give legal effect to the Agreement.²⁷ Another noteworthy example is the 1998 Northern Ireland peace agreement to end the conflict in Northern Ireland, popularly known as the Good Friday Agreement, as it required changes “in the Constitution of Ireland and in British legislation relating to the constitutional status of Northern Ireland”.²⁸ Lastly, constitutional change proposals that intend to give legal effect to a peace agreement, even in cases where the agreement does not promise, but its implementation implicitly requires, constitutional amendment, would also be included within this modality in terms of the unconstitutional challenges they may face.

In some instances, these modalities may be simultaneously adopted. A peace agreement may require changes to an existing constitution which is to remain in effect for an interim period, while providing the foundation for the making of a new constitution. The above-mentioned Arusha Accords of Rwanda is a case in point. Regardless of such differences in timing and sequencing, what matters in our classification, given the focus of this Article on unconstitutionality, is whether constitutional change takes the form of constitution-making or constitutional amendment. In the first modality, there is a new constitution that replaces an old constitution or becomes the first constitution of a new state. In the second modality, on the other hand, a constitutional amendment is either *effected* or *promised*, explicitly or implicitly, by a peace agreement. It is this modality that risks facing constitutionality challenges as it takes place within an existing constitutional order with no claim to replace it altogether.

B. The unconstitutionality challenge to constitutional amendments rooted in peace agreements

The question of the constitutionality of amendments rooted in peace agreements has been judicialized in a number of jurisdictions, such as Bangladesh, Colombia, France,²⁹ Mali, and the Philippines. In many other ongoing or stalled peace processes unconstitutionality challenges have been raised in the political realm against agreements reached by the conflict

²⁷ Bougainville Peace Agreement, *supra* note 22.

²⁸ The Good Friday Agreement, *supra* note 22.

²⁹ The example of France is not introduced in this section as it does not concern an unconstitutionality challenge before an apex court, but rather relates to an administrative case that came before the *Conseil d'Etat*. See CE Ass., Oct. 30, 1998, No. 200286, <http://www.conseil-etat.fr/fr/arianeweb/CE/decision/1998-10-30/200286>. See also U.N. Human Rights Office of the High Commissioner [OHCHR], Human Rights Committee, Annex, para. 2.9, U.N. Doc. CCPR/C/75/D/932/2000 (July 21, 2002) (*submitted by Marie-Hélène Gillot*). See also *infra* footnote 60 and the accompanying text.

parties or constitutional amendment proposals rooted in the agreements, as the example of Ukraine below demonstrates. These instances attest to the disruptive potential of the unconstitutionality challenge to peace and the significant role apex courts play in this regard. In this section, we identify and illustrate with examples the different types of unconstitutionality challenges that may be directed at peace agreements according to the nature of the limitation imposed on constitutional amendment: temporal, procedural, and substantive.

Firstly, the unconstitutionality challenge may stem from *temporal* limitations to constitutional amendment. Many constitutions prohibit amendments during a state of emergency, under martial law, and in times of war.³⁰ Constitutional amendment rooted in peace agreements may fall within the scope of this prohibition if an ongoing intra-state conflict is recognized by the state as such or if a state of emergency is declared due to the conflict. The unconstitutionality concerns raised in the fragile peace processes in Ukraine and Mali are cases in point. In Ukraine, in an effort to bring a negotiated end to the conflict in eastern Ukraine, the Government and the separatist groups in the Donetsk and Luhansk oblasts agreed to the Minsk Protocols, which included a commitment to the reform of the Ukrainian constitution towards decentralization and local self-government.³¹ In an effort to implement this commitment, the then President of Ukraine submitted to the *Verkhovna Rada* of Ukraine a draft law introducing amendments to the Constitution that guarantee a degree of autonomy to the Donetsk and Luhansk oblasts, along with a series of other reforms promised in response to the Maidan revolution.³² A petition calling on the President of Ukraine and the *Verkhovna Rada* to declare a moratorium on the amendment process until the foreign troops were withdrawn from Ukrainian territory and “illegal irregular armed formations” were disbanded was signed by a group of constitutional experts, members of the Constitutional Commission, former judges, politicians and public figures.³³ One of the arguments of this

³⁰ See Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 *REV. CONST. STUD.* 37, 41-42 (2016).

³¹ Protocol on the Results of Consultations of the Trilateral Contact Group (Minsk Agreement), Sept. 5, 2014, <https://peacemaker.un.org/UA-ceasefire-2014>; Package of Measures for the Implementation of the Minsk Agreements, Ukraine-Russia, Feb. 12, 2015, <https://peacemaker.un.org/ukraine-minsk-implementation15>.

³² See European Commission for Democracy Through Law (Venice Commission), *Draft Law on Amending the Constitution of Ukraine as to Decentralization of Power Introduced by the President of Ukraine to the Verkhovna Rada on 1 July 2015*, Opinion No. 803/2015, CDL-REF(2015)022 (July 7, 2015) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2015\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2015)022-e).

³³ *Ni zminam do Konstytutsii Ukraïny v umovakh boïennoho stanu!*, HYVLYA, Aug. 13, 2015, <https://hvylya.net/analytics/politics/ni-zminam-do-konstitutsiyi-ukrayini-v-umovah-voyennogo-stanu.html>.

opposition bloc, stemming from Article 157 of the Constitution that prohibits amendments “in conditions of martial law or a state of emergency”, is that the occupation of Crimea and the separatist violence in the eastern provinces of the country that satisfied the conditions of martial law rendered any amendment process unconstitutional.³⁴

Mali presents another example of potential temporal limitations on constitutional amendments rooted in peace agreements. A constitutional reform effort in 2017, aiming mainly to give effect to the 2015 Algiers Agreement for Peace and Reconciliation in Mali, led to demonstrations across the country and formation of the opposition coalition “Antè A bana: Don’t touch my Constitution”.³⁵ Under the 2015 Agreement, the Malian Government undertook to “take the necessary measures to adopt the regulatory, legislative and constitutional measures needed to implement the provisions of the present Agreement”.³⁶ Accordingly, in 2017 the Malian National Assembly passed a law to amend the Constitution, conditioned on approval in a referendum.³⁷ Arguing that holding a referendum while the territorial integrity of the country was jeopardized due to the partial territorial control of armed groups in the north of the country would be unconstitutional, some members of the Parliament filed an unconstitutionality petition before the Constitutional Court, with reference to Article 118(3) of the Constitution, which provides that “[n]o procedure of revision shall be attempted or followed when it touches the integrity of the State”.³⁸ Although the Court determined “material errors” in the proposed amendments and required a new vote and revisions at the National Assembly, it rejected the procedural claims of the applicants.³⁹ The Court held that the residual control of armed groups over certain parts of the territory was not severe enough to trigger the limitation in Article 118(3), comparing it to the graver situation in 2012.⁴⁰ The decision, however, indicates that it is theoretically possible that an

³⁴ *Id.*

³⁵ Sidi M. Diawara, *Mali: Peace Process, Constitutional Reform, and an Uncertain Political Future*, CONSTITUTIONNET, July 20, 2017, <http://constitutionnet.org/news/mali-peace-process-constitutional-reform-and-uncertain-political-future>.

³⁶ Accord Pour la Paix et la Reconciliation au Mali – Issu du Processus d’Alger, sec. 1, ch. 1, art. 3, June 20, 2015, <https://www.peaceagreements.org/masterdocument/1365>.

³⁷ La loi N° 2017-31/AN-RM du 02 juin 2017 portant révision de la Constitution du 25 février 1992.

³⁸ LA CONSTITUTION DU MALI DU 25 FEVRIER 1992 [CONSTITUTION], art. 118(3) (Mali).

³⁹ Cour Constitutionnelle de la République du Mali [Constitutional Court] Arrêt N° 2017-04/CCM/Réf. du 04 juillet 2017, July 4, 2017, pp. 250-66, http://www.courconstitutionnelle.ml/wp-content/uploads/2019/02/Recueil_Volume-6_2014-2017-1.pdf (Mali).

⁴⁰ *Id.*

amendment promised in a peace agreement may be deemed unconstitutional by the Court when a part of the state territory is under the effective control of an armed group.

Secondly, the very promise of constitutional amendment in a peace agreement may be deemed unconstitutional on *procedural* grounds, i.e. that it does not conform to the constitutionally stipulated amendment procedure. For instance, the Supreme Court of the Philippines struck down in 2008 the MOA-AD to be signed by the government and the MILF as unconstitutional because, inter alia, the agreement guaranteed an amendment of the Constitution without observing the existing procedural constitutional amendment rules on the initiation of constitutional change. The MOA-AD prescribed that “[a]ny provisions of the MOA-AD requiring amendments to the existing legal framework *shall come into force upon signing* of a Comprehensive Compact and upon effecting the necessary changes to the legal framework ...”.⁴¹ Considering that the term “legal framework” is inclusive of the constitution, the Court thus held that the provision is “inconsistent with the limits of the President’s authority to propose constitutional amendments, it being a virtual guarantee that the Constitution and the laws of the Republic of the Philippines will certainly be adjusted to conform to all the ‘consensus points’ found in the MOA-AD”.⁴²

Elsewhere too, peace-making parties have attempted to circumvent the procedural rules of amendment, which were deemed too cumbersome for the agility required in peace processes. In Colombia, the Constitutional Court found the so-called ‘fast-track’ legislative procedure, introduced through a constitutional amendment⁴³ to facilitate the implementation of the Final Peace Agreement between the Government and the FARC-EP, partly unconstitutional.⁴⁴ The procedure provided for an expedited enactment process for ordinary legislation and constitutional amendments implementing the Agreement. Accordingly, the deliberative role of the Congress in the process was significantly reduced while the Executive’s role was accentuated by making its approval mandatory for any amendment to be adopted. Upholding the “fast-track” legislative procedure only in part, the Court held that certain aspects of the amendment substantially altered the decision-making powers of the

⁴¹ Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001, Governance, para. 7, Aug. 5, 2008, <https://peacemaker.un.org/philippines-memorandum-ancestral-domains2008> [hereinafter *MOA-AD*] (emphasis added).

⁴² North Cotabato, *supra* note 5.

⁴³ Acto Legislativo 1 de 2016, Diario Oficial No. 49.927 de 7 de julio de 2016 (Colom.).

⁴⁴ C.C., mayo 17, 2017, Sentencia C-332/17, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm>.

Congress and that these changes to the guarantees for the separation of powers amounted to a substitution of the Constitution.⁴⁵ Consequently, despite allowing for flexibility and expedition in the legal implementation of the Final Peace Agreement, the judgment emphasized the irreplaceability of certain fundamental procedural guarantees of constitutional change.

Lastly, an unconstitutionality challenge to constitutional amendments rooted in peace agreements can stem from *substantive* grounds if the promised constitutional amendment is regarded to be in contravention of the unamendable principles of a constitution. In Colombia, the Constitutional Court ruled on the constitutionality of several aspects of the Final Peace Agreement, including its transitional justice component, which was introduced as Transitional Article 66 to the Constitution in 2017.⁴⁶ As we discuss further in Part III below, the Court considered, and rejected in most part, whether the amendment amounted to a substitution of the essential principles of the Constitution, including the principles of equality and the rule of law.⁴⁷

Although it is beyond the scope of our Article, it is worth mentioning that unconstitutionality challenges are directed not only at amendments but also at ordinary legislation implementing peace agreements. Two examples, from Bangladesh and the Philippines, are illustrative in this respect. In Bangladesh, the 1997 Chittagong Hill Tracts Peace Accord between the Bangladeshi Government and the United People's Party of the Chittagong Hill Tracts and the implementing law 'Chittagong Hill Tracts Regional Council Act' became the subject of a case before the Supreme Court. The negotiating parties explicitly stated that the Accord was reached "under the framework of the Constitution of Bangladesh"⁴⁸ yet two petitions to the Court submitted that the Regional Council established in pursuance of the Peace Accord and special political participation rights accorded to the indigenous hill people were unconstitutional as the Council was at odds with the state's unitary character, its establishment did not respect the constitutional procedure of

⁴⁵ *Id.* On the constitutional replacement doctrine (also referred to as the substitution doctrine), see Mario Alberto Cajas-Sarria, *Judicial review of constitutional amendments in Colombia: a political and historical perspective, 1955–2016*, 5 *THE THEORY AND PRACTICE OF LEGISLATION* 245 (2017).

⁴⁶ Acto Legislativo 1 de 2017, Diario Oficial No. 50.196 de 7 de abril de 2017 (Colom.).

⁴⁷ C.C., mayo 17, 2017, Sentencia C-332/17, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2017/C-332-17.htm>.

⁴⁸ Chittagong Hill Tracts Accord, Bangladesh- Parbatya Chattagram Jana Sanghati Samity, Dec. 2, 1997, <https://peacemaker.un.org/node/1449>.

establishing any local government, and special rights accorded to the hill people impinged upon the rights guaranteed by the Constitution to all citizens living in the region.⁴⁹ Therefore, the Court upheld the petition and found the implementing law unconstitutional.

In the Philippines, the Supreme Court ruled in 2008 that the grant of autonomy to the Bangsamoro people by the MOA-AD between the Philippine government and the MILF was “counter to the national sovereignty and territorial integrity of the Republic” and that any implementing legislation would be inconsistent with the Constitution.⁵⁰ As of July 2019, the case pending before the Supreme Court against the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao (BOL) also pertains to substantive unconstitutionality challenges relating to, inter alia, the autonomy granted to the Bangsamoro Autonomous Region in implementation of the 2014 Comprehensive Agreement on the Bangsamoro, signed by the same parties to the MOA-AD.⁵¹

Much of our analysis below applies to overcoming or averting the unconstitutionality challenges directed at such ordinary legislation too. However, there are differences between ordinary legislation and constitutional amendments in this context. Firstly, regarding a substantive constitutionality challenge, where political will exists, the unconstitutionality of ordinary legislation can be averted by amending the constitution in line with a peace agreement, i.e. by altering the content of the source of reference rather than the proposed amendment.⁵² However, the issue becomes harder to resolve when there is a clash between the unamendable core of a constitution and the amendment promised in a peace agreement. Secondly, in relation to the potential use of international law as a normative reference source in the assessment of the legality of the proposed reform, the strategy is less likely to be successful in the case of a constitutional amendment. As we further explain in Part II, even in

⁴⁹ Mohammad Badiuzzaman v. Bangladesh, Writ Petition No. 2669 of 2000, 7 L.G. (2010) H.C.D. (Bangl.).

⁵⁰ North Cotabato, *supra* note 5.

⁵¹ Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH), Petition, G.R. No. 24324, Dec. 11, 2018.

⁵² The Filipino Supreme Court flags this possibility in North Cotabato, *supra* note 5: “The MOA-AD not being a document that can bind the Philippines under international law notwithstanding, respondents’ almost consummated act of **guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion**. The grave abuse lies not in the fact that they considered, as a solution to the Moro Problem, the creation of a state within a state, but in their brazen **willingness to guarantee that Congress and the sovereign Filipino people would give their imprimatur to their solution**. ... The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, *for it can change the Constitution in any it wants*, so long as the change is not inconsistent with what, in international law, is known as *Jus Cogens*. Respondents, however, may not preempt it in that decision.” (italic added, bold and underlined in the original).

jurisdictions where international law is accorded precedence over ordinary legislation, this rarely extends to constitutional provisions, let alone to the unamendable core of a constitution. Therefore, unconstitutionality challenges directed at constitutional amendments appear to be more severe and more difficult to avert or overcome, and as such, is at the focus of our analysis.

C. Weighing constitution-making against constitutional amendment in light of the unconstitutionality challenge to peace

One obvious and straightforward strategy to overcome any unconstitutionality challenge to the promises of a peace process might seem to be the making of a new constitution. In contrast to the outlined unconstitutionality challenges arising from constitutional amendment, making a new (interim or final) constitution is often considered more immune to such challenges and thus a more desirable method of constitutional change in transitional societies.⁵³ Although the question of the limits of constituent power is far from settled,⁵⁴ it is generally accepted that a new constitutional order is established through constitution-making without the limitations imposed by the existing constitution.⁵⁵ In addition to legal considerations as such, making a new constitution is also considered, both by domestic and international actors, to present “moments of great opportunity to create a common vision of the future of a state” and to contribute to “post-conflict peace consolidation”.⁵⁶ However, constitution-making during an ongoing armed conflict or in its precarious aftermath has also raised various concerns ranging from the inherent tensions between some of the goals of peace-making and constitution-making to the political and practical difficulties of broadening participation in the constitution-making process.⁵⁷ Moreover, making a new constitution may not be essential depending on the context and extent of the required constitutional reform, i.e. if constitutional amendment appears as a sufficient and feasible alternative, given that constitution-making is a costly and cumbersome process.

⁵³ Cf. Brahimi, *supra* note 12.

⁵⁴ See, e.g., Mattias Kumm, *Constituent power, cosmopolitan constitutionalism, and post-positivist law*, 14 INT’L J. CONST. L. 697 (2016); Chris Thornhill, *Rights and constituent power in the global constitution*, 10 INT’L J. L. CONTEXT 357 (2014); Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218 (2014).

⁵⁵ Claude Klein & András Sajó, *Constitution-making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419 (Michel Rosenfeld & András Sajó eds., 2013).

⁵⁶ The Secretary General, *supra* note 2, at 3.

⁵⁷ See generally Ludsin, *supra* note 11 (focusing on the difficulties of concurrent constitution- and peace-making with several illustrative examples from Afghanistan, Iraq, Lebanon, India and others); David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013) (exploring the pitfalls of constitution-making in general with a specific focus on Egypt).

Peace-making within the framework of an existing constitution may on the other hand have certain advantages. Pursuing constitutional amendment in accordance with the established processes of a constitution may provide for some degree of deliberation by making the approval of the constitutionally determined institutions a requisite and may lower the risk of regressive constitutional change by establishing additional, external constraints on the incorporation of peace negotiation outcomes into law.⁵⁸ In general, it may be perceived as a sign that the peace-making reforms sought do not require a radical departure from the existing constitution.⁵⁹ As a result, seeking change within the existing constitutional order may increase the perceived legitimacy of peace-making reforms and the sense of legal certainty and continuity. As to the role of international facilitators in constitutional change processes, promoting respect to an existing constitution, where feasible, would reinforce the ideals they promote in post-conflict settings such as the rule of law.⁶⁰ Therefore, depending on the context, implementing the reforms required by a peace agreement within the framework of a constitution may be a worthwhile, if not necessary, policy. In the next three Parts, we explore the promise and limitations of three strategies that may be, and have been to some extent in Colombia and the Philippines, employed to overcome or avert the constitutionality challenges this policy may face.

II. RECOURSE TO INTERNATIONAL LAW IN ASSESSING UNCONSTITUTIONALITY

There is a growing body of international legal norms that pertains to constitutional issues, ranging from human rights to elections and political parties, and from the separation of powers and judicial independence to transparency and accountability. Therefore, international law may provide a reference framework for the negotiation of such issues during peace negotiations, even though it remains difficult to suggest that international legal norms govern the process or substance of constitutional change directly.⁶¹ Parties may take international

⁵⁸ Cheryl Saunders, *Constitutional Review in Peace Processes Securing Local Ownership*, ACCORD 56, 57 (2014); David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923 (2013); ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 80–84 (2009).

⁵⁹ Carlos Bernal-Pulido, *Transitional Justice within the Framework of a Permanent Constitution: The Case Study of The Legal Framework for Peace in Colombia*, 3 CAMBRIDGE J. INT'L & COMP. L. 1136, 1139 (2014).

⁶⁰ Cf. Bell & Zulueta-Fülscher, *supra* note 7, at 44 (stating that international actors undermine the principles they aim to foster by supporting unconstitutional exercises in some countries).

⁶¹ See David E. Landau, *Democratic Erosion and Constitution-Making Moments: The Role of International Law*, 2 UC IRVINE J. INT'L TRANS. & COMP. L. 87, 105 (2017).

legal considerations into account during negotiations both to ensure that the resultant agreements are in compliance with the international legal obligations of the state and to provide a starting point for negotiations. As such, the scholarship on transitional constitutionalism and post-conflict constitution-making suggests that international law provides for a continuous and neutral normative framework during a time of profound political and legal change in the shadow of violence, polarization, and distrust in the domestic political and legal system.⁶² It is within this context that the promise and limitations of recourse to international law in assessing the constitutionality of constitutional change proposals rooted in peace agreements need to be examined as a potential strategy for mitigating unconstitutionality challenges. Contingent upon whether international law deals with the issue in question and how peace-making parties have approached it, the role of international law vis-à-vis peace-agreement-based constitutional amendment can be categorized as *accommodative*, *silent or underspecified*, or *restrictive*.

Before elaborating on these roles of international law, it must be noted that whether recourse can be made to international law in assessing an unconstitutionality challenge will depend first and foremost on the hierarchy between international law and constitutional provisions in a particular jurisdiction. Domestic laws should be applied and interpreted in accordance with a state's international legal obligations, not only in order to avoid incurring state responsibility under international law, but also as a matter of compliance with domestic law, where international law is incorporated into and accorded supremacy over domestic law,⁶³ or even when not incorporated in some cases.⁶⁴ Although it has been suggested that international law places constraints on constitutional amendments,⁶⁵ it is doubtful that this would be the case in the absence of an express or implicit reference to this effect from within the domestic constitutional order, not least as the idea of an 'unconstitutional constitutional

⁶² See, e.g., RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 222 (2001); Catherine Turner, *Transitional Constitutionalism and the Case of the Arab Spring*, 64 *INT'L & COMP. L.Q.* 267, 271–74 (2015); Emily Hay, *International(ized) Constitutions and Peacebuilding*, 27 *LEIDEN J. INT'L L.* 141, 145 (2014).

⁶³ See, e.g., SYNTAGMA [SYN.] [CONSTITUTION] art. 28(1) (Greece); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 25 (Germany); TÜRKIYE CUMHURİYETİ ANAYASASI [CONSTITUTION], art. 90(5) (Turk.).

⁶⁴ Unincorporated treaty obligations may be given effect before UK courts in certain conditions. See Eirik Bjorge, *Can unincorporated treaty obligations be part of English law?*, *PUB. L.* 571-591 (2017).

⁶⁵ See, e.g., Lech Garlicki & Zofia A. Garlicka, *External Review of Constitutional Amendments? International Law As a Norm of Reference*, 44 *ISR. L. REV.* 343, 357–67 (2009); Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 *U. MIAMI L. REV.* 417 (2008); Silvia Suteu, *Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits*, 6 *GLOB. CONST.* 63, 85 (2017).

amendment' itself is a contentiously debated topic in constitutional law scholarship.⁶⁶ Nonetheless, international law is strongly anchored in the constitutional law of some countries, including Colombia and the Philippines, in a way that allows constitutional courts to engage with international law without legal or political backlash.⁶⁷ Consequently, in both jurisdictions, the constitutionality review of peace agreements or peace-agreement-based amendments included the use of international law and therefore allows us to discuss the threefold conceptualization of the role of international law in such cases.

Firstly, international law may provide a normative framework that is more *accommodative* of a peace-agreement-based constitutional reform, which would otherwise be considered unconstitutional within an existing constitutional framework. In Colombia, in its review of a constitutional amendment made in 2013 to add a transitional article to the Constitution, which provided for differential treatment of the perpetrators of conflict-related crimes and partially departed from the relevant criminal justice provisions, the Constitutional Court resorted to international law in upholding the constitutionality of the transitional justice system envisaged by the parties engaged in peace negotiations.⁶⁸ Thus, the Court allowed the accommodation of the peace-agreement-based constitutional amendment through recourse to international law. It must of course be noted that the Court is able to take Colombia's relevant international legal commitments into account, in addition to the fundamental values of the constitution, in judging whether a constitutional amendment amounts to a replacement of the constitution due to the constitutional block doctrine, whereby courts identify certain extra-constitutional norms as reference-norms in exercising judicial review. The Colombian

⁶⁶ See also YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 102 (2017); Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1875–76 (2003). For an example in a slightly different context, see CE Ass., Oct. 30, 1998, No. 200286, <http://www.conseil-etat.fr/fr/arianeweb/CE/decision/1998-10-30/200286> (where the French Council of State rejected a petition alleging that a constitutional amendment, which was passed to implement the Nouméa Accord between France and New Caledonia, violated the International Covenant on Civil and Political Rights on the grounds that international law is only accorded primacy over domestic legislation under Article 55 of the French Constitution and not to constitutional provisions and acts that are of constitutional status).

⁶⁷ 49 S.C.R.A. 105, 126 (1973) (Phil.), cited in Joaquin G. Bernas, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT—NOTES AND CASES: PART I 1224 (2005). See also Constitution fédérale de la Confédération suisse [Cst] [CONSTITUTION] April 18, 1999, SR 101, RO 101, art. 193, para. 4 (Switz.); S. Afr. (Interim) Const. 1993, art. 35 para. 1. For further examples, see Roznai, *supra* note 66, at 96–102.

⁶⁸ C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm> (The Court opined that a state can grant amnesty to crimes other than international crimes as per Article 6[5] of Additional Protocol II of the Geneva Conventions, that it can lawfully limit criminal prosecution only to international crimes and design non-judicial mechanisms for other crimes). See also C.C., agosto 6, 2014, Sentencia C-577/14 and Sentencia C-674/17, *supra* note 4.

Constitutional Court adopts this doctrine to incorporate international law into Colombian domestic constitutional law.⁶⁹ Coupled with the constitutional replacement doctrine—the Colombian Constitutional Court’s version of the unconstitutional constitutional amendment doctrine—this amounts to the judicially enforceable subjection of constitutional amendments to international law and has allowed the Court to have recourse to international law in its jurisprudence on peace-agreement-based constitutional amendments and ordinary laws in Colombia.

Secondly, international law may be *silent or underspecified* on the issue at question and thus may not be relevant to constitutionality review. In the Philippines, where the Constitution regards “the generally accepted principles of international law as part of the law of the land”,⁷⁰ international law has been referenced extensively during the peace negotiations between the Government and the MILF and in the resultant agreements. For instance, during the drafting of the MOA-AD, the parties included several international instruments within the “terms of reference”, including the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) and Universal Declaration of Human Rights, as normative support for the self-determination arrangement, which accorded greater powers to the Bangsamoro region than the existing constitution does to autonomous regions.⁷¹ Candelaria and Nonato contend that the parties pursued this strategy to overcome “problems pertaining to [the] existing constitutional framework” by referring to international law to accommodate the compromise reached by the parties.⁷² The Supreme Court agreed that international law had to be taken into account, as per Article II, §2 of the Constitution, in the assessment of constitutionality of the self-determination arrangement within the MOA-AD. Upon an analysis of the relevant international law, however, the Court held that the MOA-AD was irreconcilable with the legal system, including international law, as it went beyond what was required by the right to self-determination of peoples, including the specific category of indigenous peoples, under customary international law.⁷³ Neither the right to internal self-determination of peoples nor the specific right to autonomy of indigenous

⁶⁹ MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* 22–27 (2017).

⁷⁰ The Constitution of the Republic of the Philippines [CONSTITUTION], art. II, § 2 (Phil.).

⁷¹ MOA-AD, *supra* note 41.

⁷² Sedfrey M. Candelaria & Regina Ann L. Nonato, *An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, 53 *ATENEO L.J.* 263, 277 (2008).

⁷³ North Cotabato, *supra* note 5. It must be noted that the Court carried out its analysis assuming, but not holding, that the UN DRIP is part of customary international law.

peoples under Article 4 of UN DRIP, according to the Court, stipulates the granting of what the Court deemed “a near-independent status of an associated state”.⁷⁴ Therefore, international law was of limited guidance in assessing the legality of the MOA-AD due to its under-specified nature regarding the right to self-determination.⁷⁵ Although some scholarship suggests that there are emerging international legal norms regarding the process and substance of constitutional change, ranging from a right to participate in constitution-making or to the prohibition of unconstitutional constitutional amendments or to a right to democratic governance, as these norms remain *emerging* norms at best, international law will likely be silent on many issues that may be at the focus of peace-agreement-based constitutional amendments.⁷⁶

Lastly, beyond the potential risk of restrictive interpretation by courts, international law may in fact impose more *restrictive* standards on constitutional change than a particular constitution and therefore make it harder for a peace-agreement-based amendment to pass the constitutionality test. Depending on the international legal obligations of the state concerned, a constitutional amendment that foregoes any form of investigation of and accountability for international crimes and serious violations of human rights would not be considered constitutional to the extent that international law is accorded supremacy over constitutional provisions and even if it would have been constitutional in the absence of recourse to international law. Another example could be in relation to powersharing arrangements whereby the guarantees of group representation impinge on individual human rights. In *Sejdic and Finci v. Bosnia and Herzegovina*, the ECtHR held that a constitutional provision, which originates from the Dayton Peace Agreement and limits the right to be elected in parliamentary and presidential elections in Bosnia exclusively to Bosniaks, Croats, and Serbs (the ‘constituent peoples’ of Bosnia and Herzegovina), is discriminatory, and that the disqualification of Jewish and Roma-origin candidates constitutes a breach of the ECHR.⁷⁷ Although the decision does not concern the *adoption* of the electoral system when the peace agreement was concluded, but its *maintenance* 14 years afterwards and despite an improved security situation in the opinion of the Court,⁷⁸ within the jurisdictional zone of the ECHR,

⁷⁴ *Id.*

⁷⁵ See also Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 814 (2010).

⁷⁶ See Landau, *supra* note 61, at 105-08; Dann & Al-Ali, *supra* note 8, at 451.

⁷⁷ *Sejdic and Finci v. Bosnia and Herzegovina*, 2009-VI Eur. Ct. H.R. 273.

⁷⁸ *Id.*, at 311-12, paras. 45-47.

the Court's reasoning may still raise concerns at the moment of the conclusion of peace agreements and of constitutional amendments as to the continuance of their conventional—and if the ECHR is accorded supremacy over constitutional provisions, constitutional—validity.

To recapitulate, the role of international law in the constitutionality assessment of peace-agreement-based constitutional amendments depends on whether international law governs the issue at question, what requirements it stipulates, and whether international law is accorded supremacy over constitutional provisions in a particular jurisdiction. That said, even where international law is relevant and applicable, courts may avail themselves of 'avoidance doctrines' or channel their reluctance through narrow and conservative interpretation.⁷⁹ Therefore, in practice, the feasibility of the legal strategy of having recourse to international law for protecting a peace-agreement-based constitutional amendment from an unconstitutionality challenge may also be restrained by the disinclination of constitutional courts to engage with international law in general or to interfere with a sensitive political process, i.e. a peace-making process, in particular.⁸⁰ This brings us to the promise and pitfalls of the adoption of a transitionalist jurisprudence by courts, which is at the focus of the next Part.

III. TRANSITIONALISM IN JUDICIAL REVIEW

The incorporation of a peace agreement into domestic law may require judicial approval. In implementing the terms of a peace agreement, many transitional countries face the seemingly insurmountable challenge of the unconstitutionality of a peace agreement, especially if there is a constitutional court with constitutional review powers. When the terms of a peace agreement promise or require constitutional change, courts with such powers can review the constitutionality of these constitutional changes. One way to circumvent such

⁷⁹ See generally Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993).

⁸⁰ See, e.g., HCJ 4481/91 Bargil v. Israel [1993] IsrSC 47(4) 210, available at: <https://versa.cardozo.yu.edu/opinions/bargil-v-government-israel>, where Justice Goldberg said: "Should we refrain from considering this matter [of settlement policy of the Israeli government in Judea, Samaria and the Gaza Strip]? [...] I believe that we must answer this question in the affirmative. This is not because we lack the legal tools to give judgment, but because a judicial determination, which does not concern individual rights, should defer to a political process of great importance and great significance. Such is the issue before us: it stands *at the centre of the peace process*; it is of unrivalled importance; and any determination by the court is likely to be interpreted as a direct intervention therein." (Justice E. Goldberg) (emphasis added).

constitutionality challenges without sidestepping judicial review altogether is the adoption of a jurisprudence of transitional constitutionalism by courts.

Transitional constitutionalism may denote various things. Narrowly, it can refer to the idea of ‘transitional constitutions’, which is a specific *type* of constitution adopted to govern transitional periods,⁸¹ or it can denote the *study* of constitutions in transitional processes.⁸² More broadly, a new understanding of constitutionalism as transitional constitutionalism has been theorized, which emphasizes the incorporation of the principles of constitutionalism into transitions and the transformative uses of “the constitution as a tool to deliver peace”.⁸³ The constitution thus understood then pays heed to past experiences within the polity while executing its transformative project. In this way, transitional constitutionalism allows inserting constitutionalist elements into transition processes without imposing a strict constitutionalist agenda, i.e. provides relative flexibility in the requirements of constitutionalism to suit the needs of the transitional context, without losing sight of the transformative project.⁸⁴ The constitution, here, guides processes of negotiation rather than codifying a desired outcome,⁸⁵ and constitutionalism’s promise in this context is in its service to bringing about transformative change through legal means.⁸⁶ Relatedly, and in particular in relation to the role of courts, transitional constitutionalism denotes a legal strategy to have regard to the demands of transitional settings in their interpretation of the constitution, with a view to protecting the achievements of peace processes. In this vein, for example, Sapiano shows that some constitutional courts have adopted a more lenient approach to judicial review than under ordinary times by making use of purposive interpretation and proportionality tests that take into account the exigencies of a transition and the object of achieving peace.⁸⁷ The idea of transitional constitutionalism, therefore, is closely related to the role a constitution and constitutionalism play in transitional contexts. It is also largely depending on the court’s power and willingness to prioritize the achievement of peace in a

⁸¹ Gábor Halmai, *Transitional justice, transitional constitutionalism and constitutional culture*, in *COMPARATIVE CONSTITUTIONAL THEORY* 372, 377-79 (Gary Jacobsohn & Miguel Schor eds., 2018).

⁸² See e.g., Harald Eberhard, Konrad Lachmayer & Gerhard Thallinger, *Approaching Transitional Constitutionalism*, in *TRANSITIONAL CONSTITUTIONALISM* 9, 11 (Harald Eberhard, Konrad Lachmayer & Gerhard Thallinger eds., 2007).

⁸³ TEITEL, *supra* note 62, ch. 6.

⁸⁴ Turner, *supra* note 62, at 270-71.

⁸⁵ *Id.*, at 270.

⁸⁶ For an objection to the very idea of transitional constitutionalism on the grounds that it poses a danger to the rule of law, especially in the context of post-Communist transitions, see Wojciech Sadurski, *Transitional Constitutionalism Versus the Rule of Law?*, 8 *HAGUE J. RULE OF L.* 337 (2016).

⁸⁷ Jenna Sapiano, *Courting Peace: Judicial Review and Peace Jurisprudence*, 6 *GLOB. CONST.* 131 (2017).

way that usually results in a departure from its usual interpretation of constitutional principles. The legal strategies courts might employ vary from recognizing peace as an unamendable constitutional principle to resorting to proportionality analysis to balance peace and other constitutional principles, and/or employing purposive interpretation to read the value of achieving peace into the constitution.

While courts can step up and employ transitional constitutionalist interpretation, peace-making parties may as well expect or even expressly mandate this. For instance, the Bougainville Peace Agreement signed between the Bougainville Revolutionary Army and the government of Papua New Guinea in 2001 explicitly calls for liberal interpretation of its text by reference to its aim and stipulates its role as a guidance in constitutional interpretation by courts.⁸⁸ Another example is found in the Final Peace Agreement in Colombia, which provides that a transitional article requiring the peace agreement to be an “obligatory parameter for interpretation” shall be incorporated into the Constitution.⁸⁹

While such stipulations might have dubious authority in the constitutional-legal order, they might amount to more than mere political statements, especially when courts take them on board as part of their transitionalist judicial review. As discussed above in Part I, the Colombian Constitutional Court developed a transitionalist case-law while it reviewed several constitutional amendments adopted in the context of the peace process between the government and the FARC-EP.⁹⁰ Departing from its rigid application of the constitutional replacement doctrine, the Court applied the proportionality test and a novel balancing technique to accommodate the tensions between the amendments and the unamendable principles of the Constitution. Particularly the balancing technique has allowed the Court to balance the norms found in the constitutional block and the constitutional amendments’ underlying principle of the search for peace and reconciliation, and to uphold the conformity of the amendments with the Constitution.⁹¹ These amendments related to various issues that

⁸⁸ Bougainville Peace Agreement, *supra* note 22, art. 3.

⁸⁹ Final Peace Agreement (Colom.), *supra* note 3, Annex: Other Agreements and the Draft Law on Amnesty, Pardon and Special Criminal Treatment, Agreement of 7 November 2016, art. 1.

⁹⁰ See *supra* note 4.

⁹¹ Bernal-Pulido, *supra* note 59, at 1150–54; Gonzalo Andres Ramirez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy*, in DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 226 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016); Espinosa & Landau, *supra* note 69, at 370; David Landau, *Constitutional implications of Colombia’s*

the parties agreed on during the peace process, including the transitional justice system,⁹² political participation of former guerillas,⁹³ and the ‘fast-track’ procedure.⁹⁴

For instance, in the ‘fast-track’ decisions, although by inserting certain democratic guarantees, the Court upheld the ‘fast-track’ procedure introduced to facilitate the implementation of constitutional change by balancing the principles of constitutional supremacy and deliberative democracy with the principles of peace and reconciliation.⁹⁵ This brought considerable speed to the constitutional and legal implementation of the Agreement.⁹⁶ The partial modifications of the Court were driven by its finding that some of the provisions of the act nonetheless amounted to a replacement of the principles of constitutional supremacy and deliberative democracy, which the Court regards as unamendable principles of the Constitution.⁹⁷ Notably, demonstrating an even less strict application of the constitutional replacement doctrine, the judgment also included a forceful dissenting opinion by Justice Alberto Rojas Ríos, who argued that the principle of achieving peace and the temporary nature of transitional justice arrangements should justify departure from the established understanding of the principle of deliberative democracy, which would otherwise be unacceptable in normal times.⁹⁸

In a later decision, adding the caveat that the peace agreement must be interpreted in a way that is harmonized with the principles of the Constitution, the Court took note of the normative character of the Agreement in establishing “a parameter of interpretation” and “reference of development and validity for the norms and laws that will be implemented” during the transition.⁹⁹ The Colombian Constitutional Court has as such developed a jurisprudence of transitionalism, relating to both procedural and substantive aspects of constitutional change. It allowed the required flexibility to implement the Agreement while

judicialized peace process, July 29, 2016, available at <http://constitutionnet.org/news/constitutional-implications-colombias-judicialized-peace-process>.

⁹² Sentencia C-579/13 and Sentencia 674/17, *supra* note 4.

⁹³ Sentencia 577/14, *supra* note 4.

⁹⁴ Sentencia C-699/16 and Sentencia C-332/17, *supra* note 4.

⁹⁵ Sentencia C-699/16 and Sentencia C-332/17, *supra* note 4.

⁹⁶ Mateo Villamizar Chaparro, *Rushing Peace: The Fast-Track in Colombia*, THE JOURNAL OF INT’L POLICY SOLUTIONS, Nov. 15, 2017, available at <https://www.jipsblog.com/single-post/2017/11/15/Rushing-Peace-The-Fast-Track-in-Colombia>.

⁹⁷ Sentencia C-332/17, *supra* note 4.

⁹⁸ *Id.*

⁹⁹ Sentencia C-630/17, *supra* note 4. See also Gonzalo Ramírez-Cleves, *The Colombian Constitutional Court Rules That the Peace Agreement Is Mandatory for Three Presidential Terms*, Oct. 27, 2017, INT’L J. CONST. L. BLOG, available at <http://www.iconnectblog.com/2017/10/the-colombian-constitutional-court-rules-that-the-peace-agreement-is-mandatory-for-three-presidential-terms/>.

maintaining the overall supremacy of the Constitution. This jurisprudence has also functioned as a protection guarantee for the gains of the peace process in the face of the attempts by the new post-agreement government and President Duque to undo and modify some aspects of the agreement.¹⁰⁰

As in Colombia, the Philippine Supreme Court too was aware that it was “tasked to perform a delicate balancing act” between the requirements of the peace-making effort and of “adherence to the Constitution” when it had to review the constitutionality of the 2008 MOA-AD.¹⁰¹ However, in its exercise of balancing, the Court erred on the side of compliance with the pre-existing constitutional framework. The peace-making parties had not formally triggered the process of amending the Constitution after the 2008 MOA-AD. However, as the former stipulated that “any provisions of the MOA-AD requiring amendments to the existing legal framework *shall come into force* upon the signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework”,¹⁰² the Court found it to amount to a guarantee of constitutional amendment and held that guaranteeing constitutional change was beyond the constitutional powers of the executive.¹⁰³ On the other hand, in her Separate Opinion, Justice Chico-Nazario interpreted the agreement as a *consideration* of the necessary amendments to the Constitution for the purposes of peace-making rather than a *guarantee* thereof and argued that this search was not unconstitutional per se.¹⁰⁴ The majority, however, adopted an approach that reinforced the relevance of constitutionally established procedures, which led the parties to seek a more modest language in the 2014 Comprehensive Peace Agreement.¹⁰⁵

As to the review of the substantive constitutionality of the MOA-AD, press statements of the then Chief Justice Puno during the review process that the Court was taking into account the volatile situation, which was marked by deep opposition to the MOA-AD across

¹⁰⁰ On the new Government’s approach to the peace agreement, see International Crisis Group, *Risky Business: The Duque Government’s Approach to Peace in Colombia*, June 21, 2018, available at <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/67-risky-business-duque-governments-approach-peace-colombia>.

¹⁰¹ North Cotabato, *supra* note 5.

¹⁰² See *supra* note 41.

¹⁰³ This interpretation arguably also ruled out the political question doctrine as a relevant consideration in this case. See Candelaria and Nonato, *supra* note 72, at 286 (arguing, in relation to a different peace agreement concluded by the Philippine government and CPP/NPA/NDF, that the political question doctrine would be relevant to the review of the agreement or its implementation, which would remain within the realm of the Executive).

¹⁰⁴ North Cotabato, *supra* note 5.

¹⁰⁵ *Id.* See also *infra* note 140 and the accompanying text.

some sectors of the society and escalating MILF violence, have been interpreted by scholars as an indication that the Court was influenced by non-legal considerations in order to uphold state sovereignty.¹⁰⁶ It remains to be seen how the Court's review of the BOL, or any future constitutional amendment based on the 2014 Comprehensive Peace Agreement would result and whether the Court would engage in a more lenient constitutionality analysis. As a preliminary point, it can be said that any constitutional amendment required to ensure the constitutionality of the BOL may be interpreted by the Court as unconstitutional on procedural grounds if the Court finds that they are in fact a constitutional revision, i.e. more extensive than an amendment, which requires the holding of a constitutional convention.¹⁰⁷

Another manifestation of the transitionalist judicial review approach is to adjust the level of judicial intervention to constitutional amendment according to how participatory the amendment process is. It has been suggested that in judicial review of constitutional amendments, the threshold of unconstitutionality must be lower where participatory processes of constitutional change are in place. According to this line of thought, whenever the amendment procedure is more cumbersome as to be more inclusive, participatory and deliberative, the judiciary must show restraint in reviewing constitutional amendments. For instance, Yap argues that when the amendment process is particularly difficult, requires significant bipartisan support and endorsement of the general public, and once this constitutional rigidity is overcome politically, courts should refrain from striking down constitutional amendments.¹⁰⁸ Similarly, Roznai, a proponent of substantive judicial review of constitutional amendments, contends that there is a "spectrum of amendment powers" ranging from "governmental amendment powers" to "popular amendment powers" and argues that when an amendment power is closer in process to popular constitution-making and farther from extremely parliamentary amendment procedures, judicial review must be less intense.¹⁰⁹ Some peace agreements, as has been the case in Colombia and the Philippines, are subjected to referendums as a condition for their incorporation into law.¹¹⁰ Courts may take into account referendum outcomes, yet, it is difficult to see how they can decisively

¹⁰⁶ Sedfrey M. Candelaria & Maria Eloisa Imelda S. Singzon, *Testing Constitutional Waters II: Political and Social Legitimacy of Judicial Decisions*, 55 *ATENEO L.J.* 1, 38–46 (2010).

¹⁰⁷ See *The Constitution of the Republic of the Philippines* [CONSTITUTION], art. XVII (Phil.).

¹⁰⁸ Po Jen Yap, *The Conundrum of Unconstitutional Constitutional Amendments*, 4 *GLOB. CONST.* 114, 135 (2015).

¹⁰⁹ ROZNAI, *supra* note 66, at 219–20.

¹¹⁰ See generally Neophytos Loizides, *Negotiated Settlements and Peace Referendums*, 53 *EUR. J. POL. RES.* 240 (2014).

defer to a participatory process either to exercise judicial restraint or to uphold constitutional change or implementing laws unless there is provision for this under the constitution.

Overcoming constitutionality challenges through a transitionalist approach to judicial review has certain advantages. The engagement of courts in such purposive interpretation may help shield hard-achieved agreements between the parties of a conflict from procedural or substantive challenges based on the existing constitution. It can further provide another informed platform for a constructive dialogue between the constitution and the peace agreement, in which the fundamental requirements of each can be reconciled. Within the spirit of transitional settings, such reconciliations can have the potential of interpretative configuration of each instrument with the other instrument in mind. It is also argued that apex courts may in certain contexts be well-equipped as third-party mediators to reduce the uncertainty that is a fundamental aspect of conflicts and transitional settings.¹¹¹ It is notable in this regard that particularly the Colombian Constitutional Court has guided the negotiating parties by pronouncing on the constitutionality of negotiation outcomes.

Although courts' development of transitionalist judicial review can help alleviate the constitutionality challenges peace agreements face, this solution also has its own pitfalls and limitations. As Figueroa suggests, whether courts can effectively play this role depends on their independence, accessibility and the extent of their judicial powers, in order for them to be able to credibly collect, process and transmit information.¹¹² The success of such judicial behavior is also highly context-dependent. For instance, the so-called 'neo-constitutionalism' approach in certain Latin American countries, which marked a shift from the formerly dominant formalist constitutional interpretation in the last three decades,¹¹³ provides a ground for the courts in these jurisdictions to exercise transitionalist judicial review. As is the case in Colombia, the significant and powerful role the Constitutional Court has within the constitutional order and the success of its judicial activism, such as the established constitutional replacement doctrine, warrant the Court an institutional margin to engage in transitionalist reasoning.

¹¹¹ FIGUEROA, *supra* note 6, at 200.

¹¹² *Id.*, at 24.

¹¹³ *Id.*, at 37.

Moreover, adopting a transitionalist approach to interpretation relies on the legal competence and willingness of a court to avoid a norm conflict between the peace agreement and the constitution by interpreting them as compatible with each other. This is often not the case in transitional societies, where constitutional courts may be as polarized as other legal and political institutions. How realistic or desirable the judicial review of constitutional changes rooted in peace agreements is, therefore, an open question. Additionally, in many jurisdictions, courts would face constitutional obstacles in adjudicating constitutional amendments. As we noted above, the doctrine of unconstitutional constitutional amendment is controversial and is not accepted everywhere. Especially those courts that take a formalist approach in interpreting the constitution and defining their own authority would be reluctant to engage in the judicial review of constitutional change rooted in peace agreements.¹¹⁴

Another obstacle before effective judicial control over constitutional change rooted in peace agreements is the fact that many apex courts would be disinclined to adjudicate the issue due to a reluctance to take political risks in a transitional setting. Contending that constitutional interpretation in times of transition is a peculiar task, Bell writes that in adjudicating in such contexts, courts are simultaneously engaging in the politics of defining their own function in the constitutional order.¹¹⁵ Faced with a politically sensitive normativity clash, a court might likely avoid putting its institutional legitimacy at risk. Judiciaries may adopt a more proactive approach during the implementation process of a transition, for example under a new constitutional framework.¹¹⁶ Promises or provisions of constitutional amendment in peace agreements, however, relate to the problem of whether such constitutional change will even *register* in the constitutional order in the first place. The unconstitutionality challenge here, therefore, is for the establishment of a transition and may be more daunting or undesirable for a court to liberally engage with.

Lastly, options of an apex court would be limited where a peace agreement stipulates conditions that amount to an outright violation of the constitution, such as extensive changes to the fundamental principles or institutions of the constitutional order. Even in balancing the requirements of the transition and the constitutional principles, it is difficult for courts to

¹¹⁴ See Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 *HASTINGS L.J.* 639 (2019).

¹¹⁵ Bell, *supra* note 16, at 393.

¹¹⁶ See Tom Gerald Daly, *The Judiciary and Constitutional Transitions*, Workshop Report, 14-15 November 2014, Hague, INTERNATIONAL IDEA, <https://www.idea.int/sites/default/files/publications/the-judiciary-and-constitutional-transitions.pdf> (2016).

authorize or ignore such violations as eventually the courts themselves derive their authority from the constitution and operate within its boundaries, and are commonly referred to as the ‘guardians’ of the constitution.¹¹⁷

IV. ATTRIBUTING SUPRA-CONSTITUTIONAL OR INTERNATIONAL LEGAL STATUS TO PEACE AGREEMENTS

Parties to some peace agreements attribute supra-constitutional or international legal status to their agreement in an effort to elevate the agreement’s normative status above the constitution and shield it from domestic legal challenges, including constitutionality review. Therefore, claiming supra-constitutional or international legal status for peace agreements aims to *avert* any unconstitutionality challenge directed at the agreement or implementing laws without ameliorating the substantive unconstitutionality *per se*.

Peace agreements rarely claim supra-constitutional status explicitly. The 1993 Arusha Peace Agreement of Rwanda provides a radical example to this by enumerating the constitutional provisions automatically replaced by the Agreement and by stipulating that in case of norm conflicts between the other provisions of the Constitution and the Agreement, “the provisions of the Peace Agreement shall prevail”.¹¹⁸ Another example is the (failed) Transition Process Agreement concluded under the Gulf Cooperation Council Initiative in relation to Yemen, which provides that “[t]he GCC Initiative and the Mechanism shall supersede any current constitutional or legal arrangements. They may not be challenged before the institutions of the State”.¹¹⁹ A similar yet less drastic modality of the relationship between a constitution and peace agreement is the granting of supremacy to the latter in constitutional interpretation. The Bougainville Peace Agreement and the Final Peace Agreement (Colombia) cited in the previous section provide examples in this respect, as they stipulate that the implementing constitutional and other laws shall be interpreted in accordance with the agreements.¹²⁰

¹¹⁷ Hans Kelsen, *Who Ought to be the Guardian of the Constitution? Kelsen’s reply to Schmitt*, in *THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* 174-221 (Lars Vinx ed., 2015).

¹¹⁸ Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, art. 3(2), Aug. 4, 1993, <https://peacemaker.un.org/rwanda-peaceagreementtrpf93>.

¹¹⁹ Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council, National Coalition-National Council, pt. I, 4, Dec. 5, 2011, <https://peacemaker.un.org/yemen-transition-mechanism2011>.

¹²⁰ Bougainville Peace Agreement, *supra* note 22, sec. A, art. 3(b); Final Peace Agreement (Colom.), *supra* note 3. *See also* KUSHTETUTA E KOSOVËS [CONSTITUTION], art. 143 (Kosovo) (granting supremacy to an

In cases where there is no explicit claim as such, peace agreements have still been referenced in constitutional review or claimed to have supra-constitutional force. For instance, the Good Friday Agreement has been taken into account in the interpretation of the implementing 1998 Northern Ireland Act.¹²¹ This was elaborated on particularly in *Robinson*, where the issue was whether the election by the Northern Ireland Assembly of a First Minister and Deputy First Minister two days after the six-week period prescribed for the election under the 1998 Act, which was “in effect a constitution” for Northern Ireland,¹²² was legally valid. Upholding the appellant’s position that the election was invalid would have been to opt for the interpretation that “an immediate election becomes mandatory as soon as the six week period has passed” over the interpretation that “the Secretary of State retains a discretion, for the exercise of which he is politically answerable, to take advantage of developments in the Assembly which enable a First and Deputy First Minister to be elected and to carry on the government of Northern Ireland” despite the expiry of the six-week period.¹²³ In choosing the latter interpretation of the 1998 Act, Lord Hoffman suggested that it was necessary to have regard to the Belfast Agreement, whose aim was to create a constitutional arrangement that had the innate flexibility required to achieve cross-community government in the fragile and crisis-bound post-conflict environment of Northern Ireland. It must be noted that this was an exercise of “established principles of interpretation” rather than an attribution of supra-constitutional value to the Agreement.¹²⁴

Where recognized principles of interpretation allow, peace agreements can be given regard in constitutional interpretation also in other jurisdictions. However, this can be controversial where there is a clear clash between the provisions of a peace agreement and a constitution, which may arise even if the latter was adopted to implement the former. This was indeed the case in Burundi. In a case brought before the Constitutional Court of Burundi, the Court had to consider the applicants’ argument that the 2005 Arusha Peace Agreement had supra-constitutional force in order to decide whether the terms of the Agreement on

international peace proposal, Comprehensive Proposal for the Kosovo Status Settlement, dated Mar. 26, 2007, within the constitutional order).

¹²¹ See *Robinson v. Secretary of State for Northern Ireland*, [2002] U.K.H.L. 32; *R (Miller) v. Secretary of State for Exiting the European Union* [2017] U.K.S.C. 5, para. 128.

¹²² *Robinson v. Secretary of State for Northern Ireland*, [2002] U.K.H.L. 32, para. 11.

¹²³ *Id.*, para. 29.

¹²⁴ *Id.*, para. 33.

presidential terms prevails over the contradicting provisions of the Constitution.¹²⁵ Although the Court opined that the Agreement is “the Constitution’s bedrock particularly the sections relating to constitutional principles”, it nonetheless held that “the Arusha Peace and Reconciliation Agreement is not supra constitutional” and upheld the constitutional provisions that contradicted the Agreement.¹²⁶ Therefore, the Court took note of the terms of the peace agreement in its interpretation without according it supra-constitutional force. It is worth noting that the decision is widely reported to be given under political and military pressure, which downplays its precedential value. Overall, judicial pronouncements on this issue are rare and do not directly address an unconstitutionality challenge directed at a peace agreement, therefore any firm argument about the acceptance of supra-constitutionality of peace agreements by courts would be immature. Ascertaining whether a peace agreement has supra-constitutional force or can be a reference in constitutional interpretation remains a jurisdiction-specific question and can be a successful strategy in rare cases where the constitutional framework and jurisprudence are susceptible to the idea.

Another method of incorporating a peace agreement into the constitutional system pursued in the face of challenges to its legal entrenchment is the attribution of international legal status to the agreement. During the peace negotiations between the Colombian government and the FARC, the parties initially aimed to attach “international standing” to the peace agreement as “a Special Agreement pursuant to Article 3, common to the 1949 Geneva Conventions”.¹²⁷ Special agreements are concluded by states and armed opposition groups to bring into force international humanitarian law provisions in respect of the conflict between themselves, which is required as armed opposition groups are not parties to international humanitarian law treaties.¹²⁸ Rather than this particular objective, the strategy of the parties was driven by the aim to shield the Agreement and the implementing constitutional and other laws from international and domestic legal challenges, particularly from future legislative revocation, by incorporating the agreement into the Colombian constitutional block as an

¹²⁵ The Constitutional Court of the Republic of Burundi, Decision RCCB 303, May 4, 2015, <https://www.ihrda.org/wp-content/uploads/2015/05/Judgment-of-Burundi-Constitutional-Court-ENGLISH-Translation.pdf>.

¹²⁶ *Id.*

¹²⁷ Final Peace Agreement (Colom.), *supra* note 3, pmbl. and sec. 6.1.8.

¹²⁸ See generally Ezequiel Heffes & Marcos D. Kotlik, *Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime*, 96 INT’L REV. RED CROSS 1195 (2014).

international agreement and thereby granting it constitutional status. However, this strategy was prone to failure on several grounds and has failed.

Firstly, although the Final Peace Agreement contains clauses on issues of international humanitarian law, the parties' claim that the entire agreement qualified as a special agreement is overreaching as the provisions of the Agreement went far beyond the aim of rendering international humanitarian law applicable to the transition and extended to matters as wide-ranging as land reform and curbing illicit narcotics trade. Secondly, the international legal status of both special agreements and peace agreements, regardless of whether they qualify as special agreements, remain contested under international law.¹²⁹ Thirdly, the strategy was seen by the Colombian opposition and parts of the society as an attempt to subvert the established means of constitutional change, and judicial and democratic oversight, and as such has become one of the reasons behind the defeat of the Agreement at plebiscite.¹³⁰ Lastly, it did not meet the approval of the Constitutional Court. In upholding the law on submitting the agreement to a peace plebiscite, the Court added the proviso that the peace agreement would not be automatically included in the Constitution.¹³¹ Following this decision and the negative plebiscite outcome, the Agreement was then re-negotiated by the parties to stipulate, *inter alia*, that the agreement "shall be incorporated in accordance with constitutional requirements".¹³² The parties in Colombia accepted that the agreement would not be part of the Constitution or the constitutional block but only a parameter for the interpretation of the implementing laws.¹³³ The Constitutional Court upheld the new constitutional amendment based on the re-negotiated agreement.¹³⁴ The parties still refer to the re-negotiated Agreement as a special agreement, but having done away with the

¹²⁹ See Asli Ozcelik, *Entrenching Peace in Law: Do Peace Agreements Possess International Legal Status?*, 21 MELB. J. INT'L L. (forthcoming, 2020). See also *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Mar. 13, 2014 (Sierra Leone); North Cotabato, *supra* note 5; C.C., mayo 18, 1995, Sentencia C-225/95, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/1995/C-225-95.htm>, para. 17.

¹³⁰ Laura Betancur Restrepo, *The Legal Status of the Colombian Peace Agreement*, 110 AJIL UNBOUND 188, 188 (2016).

¹³¹ C.C., agosto 24, 2016, Sentencia C-379/16, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2016/c-379-16.htm>.

¹³² Final Peace Agreement (Colom.), *supra* note 3.

¹³³ Final Peace Agreement (Colom.), *supra* note 3, Annex: Other Agreements and the Draft Law on Amnesty, Pardon and Special Criminal Treatment, Agreement of 7 November 2016.

¹³⁴ C.C., octubre 11, 2017, Sentencia C-630/17, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2017/C-630-17.htm>.

claim of direct constitutional status, this reference remains largely symbolic to emphasize the humanitarian purposes of the Agreement and to ensure its implementation in good faith.¹³⁵

The issue of the international legal status of peace agreements also arose in the case concerning the 2008 MOA-AD in the Philippines. One of the unconstitutionality grounds put forward by the petitioners was that the Government's Peace Panel committed grave abuse of discretion by committing to amend the Constitution and existing laws to conform to the MOA-AD merely by signing it, i.e. without following the amendment procedure established by the Constitution. In this context, the Court also addressed the concern expressed by the petitioners that

“the MOA-AD would have given rise to a binding international law obligation on the part of the Philippines to change its Constitution in conformity thereto, on the ground that it may be considered either as a binding agreement under international law, or a unilateral declaration of the Philippine government to the international community that it would grant to the Bangsamoro people all the concessions therein stated”.¹³⁶

The Court held that the MOA-AD was not a source of binding obligations under international law either as an agreement or as a unilateral declaration.¹³⁷

As in Colombia, but to a stricter extent, the decision of the Supreme Court reinforced the need to observe the existing constitutional framework during peace negotiations. Irrespective of the international status of the MOA-AD, the Supreme Court found that “guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion”, as by doing so the Government usurped the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves by the Philippine Constitution.¹³⁸ Therefore, when the parties resumed negotiations, after the collapse of the process following the Supreme Court intervention in 2008, they aimed to ensure that the agreement and the draft implementing law would pass a future constitutionality review, so much so that a former Supreme Court judge was included in the Government's negotiation team to ensure that the Agreement would be negotiated within the parameters set by the

¹³⁵ Luisa Vierucci, *The Colombian Peace Agreement of 24 November 2016 and International Law: Some Preliminary Remarks*, PEACE PROCESSES AND HUMAN DIGNITY (2016) <https://www.peaceprocesses.it/images/pdf/luisa_vierucci_-_agreement_colombia-farc.pdf>.

¹³⁶ North Cotabato, *supra* note 5.

¹³⁷ *Id.*

¹³⁸ *Id.* See also The Constitution of the Republic of the Philippines [CONSTITUTION], art. XVII (Phil.).

existing Constitution.¹³⁹ A peace agreement signed in 2014 adopted a more careful wording: instead of “a guarantee to amend the Constitution”, the agreement now stipulated a “right to seek constitutional change by peaceful and legitimate means”.¹⁴⁰ In a 2016 decision, taking note of the constitution-respecting language of the Agreement, the Court dismissed unconstitutionality petitions as premature and inadmissible.¹⁴¹ The Agreement has since been passed into law through BOL and ratified in plebiscites held on January 21 and February 6, 2019.¹⁴²

Although peace agreements with armed opposition groups are not yet recognized as international agreements in international law, the obligations therein can be accorded international legal status indirectly: they can be incorporated into a binding Security Council Resolution or an inter-state treaty which has international legal force. A constitutional amendment promise in a peace agreement may thus be transformed into an international obligation binding the concerned state, which may incur responsibility in case of non-compliance with the obligation. However, undertaking such an obligation does not lead to a direct change in the constitutional order. Nor would it, or a peace agreement in general even if it were to be accepted as an international agreement, supersede constitutional provisions in case of a norm conflict, unless international legal obligations are granted supremacy over constitutional provisions in a jurisdiction, as explained above in Part II. Therefore, the strategy of attaching international legal status to a peace agreement, or the obligations therein, is unlikely to shield a peace agreement from unconstitutionality challenges as a matter of domestic law.

CONCLUSION

The aim of this paper has been to point out the challenge of unconstitutionality that peace agreements often face when peace-making reforms are sought within the framework of an existing constitution and to assess whether options pursued in transitional countries, namely

¹³⁹ Mikaela Francine D. Lagarde, *Clearing the Pathways to Peace: Law, Policy, and the Mindanao Conflict*, 59 ATENEO L.J. 1141, 1200 (2015).

¹⁴⁰ The Comprehensive Agreement on the Bangsamoro, Government of the Philippines (GPH) – Moro Islamic Liberation Front (MILF), Mar. 27, 2014, <https://peacemaker.un.org/philippines-comprehensiveagreement2014>.

¹⁴¹ Philippine Constitution Association (PHILCONSA) v. Philippine Government (GPH), G.R. No. 218406, Nov. 29, 2016.

¹⁴² The constitutionality of the BOL has been challenged in a pending case before the Supreme Court, *see supra note 51*. For an analysis on the compliance of the BOL with the Philippine Constitution, *see* Sedfrey M. Candelaria and Sang Mee A. Lee, *The Proposed Bangsamoro Basic Law and the Primacy of the Sovereign Power of the State*, 62 ATENEO L.J. 183 (2018).

recourse to international law in assessing constitutionality, adoption of a transitional constitutionalism approach by apex courts, and attribution of supra-constitutional or international legal status to a peace agreement, can deliver the parties' desired outcome of shielding the agreement or implementing laws from constitutionality challenges. We found that all three strategies have, to varying degrees, some merit, but display shortcomings in terms of their legal feasibility or political purchase. Where does then the potential intractability of the unconstitutionality challenge leave peacemakers? The requirement to comply with an existing constitution surely places limitations on peace-making parties where they attempt to circumvent a constitution to an 'illegitimate' extent (as we stated from the outset, addressing the question of what constitutes 'legitimate' constitutional change in a peace-making context is beyond the scope and purposes of our Article). However, there may well be instances where it is necessary, e.g. for the purposes of ending a conflict or of replacing a discriminatory constitutional order, to pursue in essence the change promised in a peace agreement.

Using constructive ambiguity in peace agreements or implementing agreement promises incrementally or informally, i.e. not through formal legal or constitutional change, may appear as a promising peace-making strategy in certain contexts. For instance, criticizing the Philippine government's insistence on peace-making within the framework of the existing constitution with a conservative approach to the interpretation of key constitutional principles, e.g. regarding territory, self-determination and autonomy, during the negotiations of the MOA-AD, Tupaz suggests that the reform of the Constitution in the Philippines in the peace-making context requires "a working misunderstanding" and "constitutional imagination" instead of "an idyllic consensus".¹⁴³ Interim constitutions and less formal means of incremental constitutional change, use of sunset clauses, constructive ambiguity, or deferral of agreement on sticking points have been explored in the literature as means of producing 'working misunderstandings' and exercising constitutional imagination.¹⁴⁴ Many transitional countries, such as South Africa and Northern Ireland, have notably moved towards constitutionalism through such means instead of formal constitutional amendments or the adoption of a final constitution from the outset.

¹⁴³ A. Edsel C. F. Tupaz, *The Mindanao Question: Constitutional Dialogue in Southern Philippines*, 54 *ATENELO L.J.* 1, 55–58 (2009).

¹⁴⁴ See generally Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming and Constitution-Making*, 49 *WM. & MARY L. REV.* 1249 (2008).

Whereas premature agreements on fundamental revision of a constitution may jeopardize precarious moments of peace-making,¹⁴⁵ crafting proto-legal roadmaps, instead of formal documents such as international agreements, interim or final constitutions, or constitutional amendment proposals, may enable the negotiating parties to move away from the necessity of strict legal clarity and precision towards constructive ambiguity and constitutional imagination. Regardless of the legal form it—eventually—takes, a peace agreement may nonetheless employ more accommodative, flexible language and arrangements. However, the processes of legal incorporation and constitutional review are not often conducive to sustaining such language and arrangements. Furthermore, both peace-making parties and broader public may be dissatisfied with proto-legal roadmaps setting out an incremental process. This is so, especially in countries like Colombia, where the legal culture is described as inclined to “legal fetishism”¹⁴⁶ and has over years and across peace processes led to “formal legalised documentation of each piece-meal peace process”.¹⁴⁷ For peace-making parties, an additional drawback of non-formalist agreements is that they do not guarantee the eventual achievement of the desired outcomes, whatever they may be, as they lack legal force. Such agreements may further be criticized for lacking legal and democratic legitimacy, governing the post-agreement period without being established in adherence to established processes, and for diminishing legal certainty and posing a risk to the rule of law.¹⁴⁸

In some transitions, incremental or informal constitutional change may be the adopted modality in peace-making. In others, formal constitutional change that is procedurally or substantively unconstitutional may nonetheless be effective, and even considered legitimate where locally no importance is attached to legal continuity.¹⁴⁹ However, in many jurisdictions

¹⁴⁵ Saunders, *supra* note 58, at 57–58.

¹⁴⁶ Maria Carrizosa, *Peace-ing Colombia Together*, PUBLIC SEMINAR, Nov. 21, 2016, <http://www.publicseminar.org/2016/11/peace-ing-colombia-together/>.

¹⁴⁷ Christine Bell, Catherine O’Rourke & Sissela Matzner, *A Chronology of Colombian Peace Processes and Peace Agreements*, Political Settlements Research Programme (2015), http://www.politicalsettlements.org/wp-content/uploads/2018/01/2015_BP_1_Bell_ORourke_Matzner_PA-X-Columbian-Chronology-2.pdf. See also Wen-Chen Chang, *Back into the political? Rethinking judicial, legal, and transnational constitutionalism*, 17 INT’L J. CONST. L. 453, 458-59 (2019) (stating that the post-1989 democratic constitutionalism is marked by legal constitutionalism and the abundance of formal constitution making or amendment, including through peace agreements).

¹⁴⁸ See also Sadurski, *supra* note 86, at 354-55.

¹⁴⁹ See Cheryl Saunders, *International Involvement in Constitution Making* 20 (University of Melbourne Legal Studies Research Paper, July 4, 2019), available at: <https://ssrn.com/abstract=3414698>.

where there is a negotiated transition from conflict to peace, formal constitutional change arises as an inevitable requirement to implement a peace agreement and is likely to face an unconstitutionality challenge. This then, if constitutional change and peace-making are desired to be effective, points to the need to take existing constitutions and constitutional practices seriously, not necessarily with a view to strictly complying with them, but to devising more viable strategies of amending them. The addressees of this warning are not only peace-making parties, but also international actors involved in peace-making and constitutional reform processes who may attach greater consideration to international policy blueprints or comparative practices than local constitutional context.