

Constitution Making and Post Conflict Reconstruction

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Abstract

It is increasingly recognized in international law and policy that constitutional transformation plays a role in post conflict reconstruction. Yet the extent to which international law does or should impose a normative framework on post conflict constitutional processes remains contested. This chapter addresses this issue by exploring the ways in which international law intersects with constitutional processes in the post conflict environment. Ultimately the chapter highlights the need for closer dialogue between law and politics in this area in order to address some of the tensions inherent in trying to restore fractured sovereignty through constitutional transformation.

Key Words

Constitutions; peace and security; local ownership; peace agreements; Somalia

Introduction

It is increasingly recognized in international law and policy that constitutional transformation plays a role in post conflict reconstruction.¹ Over the course of the last twenty five years more than 30 constitutions have been either adopted or amended in a post conflict context.² Of these only a relatively small number have been drafted under the direct supervision of the United Nations (UN).³ However while the UN does have clear policy guidelines on the principles that

¹ Kirsti Samuels, 'Post Conflict Peacebuilding and Constitution Making' (2006) 6 *Chicago Journal of International Law* 663, 664

² For details of states who have benefited from United Nations assistance in constitutional processes see Vijayashri Sripati, 'UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989-2011' (2012) 19 *International Peacekeeping* 93

³ The Security Council has mandated peace operations to assist only 12 states with writing their constitutions. These are Burundi, Namibia, Rwanda, Somalia, Sudan, South Sudan, Afghanistan, Cambodia, East Timor, Nepal, Kosovo and Iraq. See Sripati (n 2) 93

should underpin post conflict constitutional processes,⁴ this is an area of post conflict reconstruction in which until recently there has been little direct engagement with international law. That is not to say that there has been no scholarly engagement with the question of post conflict constitutionalism. A number of disparate bodies of literature exist that address the function of the constitution in post conflict reconstruction or peacebuilding, many of which draw on international law in their analysis.⁵ Post conflict constitutionalisation has been addressed in the literature from the perspective of constitutional design⁶; as an aspect of transitional justice⁷; and most recently within the evolving international law framework of *jus post bellum*.⁸ While each of these bodies of literature addresses the role of the constitution in post conflict reconstruction policy, few address specifically the role played by international law in shaping either the process or the outcome of the constitutional process. Some highlight the influence of international actors,⁹ and the increased internationalisation of the process,¹⁰ but the extent to which international law does or should impose a normative framework on post conflict constitutional processes remains contested.¹¹ Indeed the disparate nature of this field makes it difficult to identify a single body of rules that could be said to represent an

⁴ United Nations Guidance Note of the Secretary General, 'United Nations Assistance to Constitution Making Processes' (April 2009)

⁵ See eg Samuels (n1); Philip Dann and Zaid Al-Ali, 'The Internationalised "Pouvoir Constituent": Constitution Making Under External Influence in Iraq, Sudan and East Timor' (2006) *Max Planck Yearbook of United Nations Law* 423; Hallie Ludsin, 'Peacemaking and Constitution Drafting: A Dysfunctional Marriage' (2011) *University of Pennsylvania Journal of International Law* 239; Emily Hay, 'International(ized) Constitutions and Peacebuilding' (2014) *Leiden Journal of International Law* 141

⁶ see eg Choudhury, Sujit, *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP, 2008); Harvey, C and A Schwartz (eds) *Rights in Divided Societies* (Hart, 2012); Lerner, H, *Making Constitutions in Deeply Divided Societies* (CUP, 2011)

⁷ Turner, C, 'Transitional Constitutionalism and the Case of the Arab Spring' (2015) *International and Comparative Law Quarterly* (forthcoming); McConnachie K and J Morrison, 'Constitution Making, Transition and the Reconstruction of Society' in K McEvoy and L McGregor (eds) *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (Hart, 2008); Aeyal M Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel' (2004) 40 *Stanford Journal of International Law* 47

⁸ Bhuta, N 'New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation' (2012) 60 *University of Toronto Law Journal* 799; Jennifer S Easterday, 'Peace Agreements as a Framework for Jus Post Bellum' in Carsten Stahn et al (eds) *Jus Post Bellum: Mapping the Normative Foundations* (OUP, 2014) 379

⁹ See Dan and Al-Ali (n 5)

¹⁰ See Hay (n 5)

¹¹ Bhuta (n 8); Easterday (n 8)

established normative framework for post conflict constitution making, leaving a regulatory gap for those involved in providing post conflict constitutional assistance.

This chapter aims to address this gap by exploring the ways in which international law intersects with constitutional processes in the post conflict environment. This is done with specific reference to the extent to which it could be said that international law exerts a normative pull on the process. The chapter begins by locating the role of constitution drafting within international law and policy. It identifies a shift away from constitution drafting as an aspect of development policy towards the incorporation of constitutional reform as an element of the peace and security agenda. The chapter then considers the increased international attention paid to post conflict constitutional processes by the international community, and charts the impact that the increased internationalization of these processes has on the eventual outcome. To do this the chapter explores the role of international law in providing a normative framework for constitutional reform, assessing both the potential and the shortfalls of international law as a normative regime in this area. It highlights the tension between international involvement and local ownership that punctuates debate in this area, and considers the way in which international law should engage with questions of sovereignty in these contexts. The chapter draws on the recent case study of the constitutional process in Somalia to illustrate the ways in which international law has intersected with constitutional reform in that context. As one of the most recent constitutional processes to be conducted with United Nations supervision, and spanning over 20 years, the case of Somalia is used to narrate shifting international priorities and illustrates the promises and pitfalls of international intervention. The chapter therefore uses this case study to draw conclusions of more general application for post conflict constitutional reform. Ultimately the chapter highlights the need for closer dialogue between law and politics in this area in order to address some of the tensions inherent in trying to restore fractured sovereignty through constitutional transformation.

Post Conflict Constitutional Assistance: Shifting Paradigms

As noted, international involvement in post conflict constitutional processes is not a new phenomenon. While often thought of as a post Cold War development, UN assistance in statebuilding has a much longer pedigree.¹² However on the specific question of constitutional assistance, current international policy is rooted in the experience of the UN of supporting constitutional processes in Cambodia, East Timor and more recently Afghanistan.¹³ It has been predominantly a practice led field, administered by the UN as a “long term conflict prevention strategy underlying development.”¹⁴ Until 2005 such assistance had been undertaken under the auspices of the UN Development Programme (UNDP) on an ad hoc basis, in the absence of an overarching doctrine to provide guiding principles.¹⁵ In 2005 it was recommended that the capacity of the UN to deliver effective assistance when requested depended on it developing doctrine and guidance in the area that would allow the provision of technical expertise.¹⁶ This has been done through documenting the experiences of the UN to date and reflecting on that practice, forming part of a broader institutional reflection on the UN’s role in assisting countries with the transition from war to peace initiated as a result of the Secretary General’s report ‘In Larger Freedom’.¹⁷

However constitution making processes have also in recent years been identified as a central aspect of democratic transitions and peacebuilding.¹⁸ The linking of constitutional processes with the establishment of peace and security introduced a second source of potential international involvement in constitutional processes- one much more closely linked with international law. In 2000,

¹² Ralph Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’ (2001) 95 *American Journal of International Law* 583

¹³ Michele Brandt, ‘Constitutional Assistance in Post Conflict Countries, The UN Experience: Cambodia, East Timor and Afghanistan’ (UNDP, June 2005)

¹⁴ Sripati (n 2) 93

¹⁵ Guidance Note (n 4) 3

¹⁶ Brandt (n 13)

¹⁷ United Nations Secretary General, ‘In Larger Freedom: Towards development, security and human rights for all’ (May 2005) UN Doc A/59/2005

¹⁸ Samuels (n 1) 664

following a series of high profile failures by the Security Council to prevent atrocities, the Secretary General commissioned a report on UN peacekeeping operations.¹⁹ Central to the recommendations made in this report was an explicit emphasis on the importance of the rule of law and the protection of human rights to the establishment of peace. This potentially extended the institutional scope of constitutional assistance beyond the narrow confines of UNDP and towards the much broader remit of the Security Council.²⁰ This report has been interpreted as signifying a shift towards greater engagement with ideas of democracy and constitutional settlement in international law,²¹ providing a rationale for international intervention in constitutional processes. With this shift has come a more explicit engagement with international law in the process of post conflict constitution drafting. With the identification of constitutional reform as key aspect of peace and security came a shift away from the ‘soft’ activity of development, which allows for a much more progressive approach to the realization of international law, towards the ‘hard’ business of peace and security where compliance with international norms is a matter of legal obligation and seen as central to delivering international security.

Locating the Role of International Law

Despite the increased attention paid to constitutional reform within the peace and security agenda, there is currently no extant body of international law that provides generally applicable rules on post conflict constitutional reform. As outlined, this is an area that has been largely practice driven, with policies formulated as a result of reflection on practice rather than in response to legally mandated requirements. In the post conflict context international law can be divided into two distinct categories; the ‘hard’ law that mandates international action; and the ‘soft’ law and policy that is used to add substance to international interventions.

¹⁹ Report of the Panel on United Nations Peace Operations (Brahimi) UN Doc A/55/305-S/2000/809 paras 10-13

²⁰ Brahimi (n 19)

²¹ White, Nigel, ‘Commentary on the Report of the Panel on United Nations Peace Operations (The Brahimi Report)’ (2001) 6 *Journal of Conflict and Security Law* 127

“Hard” Law – The Constitution, Peace and Security

The first key site of engagement of international law with constitutional reform is located in the intervention of the Security Council, acting pursuant to its chapter VII powers. The expansion of the definition of peacekeeping to include the much broader idea of ‘peacebuilding’ as outlined in the Brahimi report has allowed for more intensive intervention in the internal governance of states than would traditionally have been allowed under international law. Intervention typically now arises as a result of the Security Council authorizing transitional peacebuilding measures that include a constitutional process.²² The level of detail of these resolutions varies,²³ but the common thread is that ‘hard’ international law is being used to mandate internationally supervised constitutional reform as an integral element of re-establishing security.

Therefore international law, in the form of legally binding Security Council resolutions, introduces international law into post conflict constitutional processes. However to date, the use of Chapter VII powers has not led to claims of the existence of a consolidated or normative body of international law that addresses the requirements of post conflict constitution making. ‘Hard’ international law has not imposed substantive requirements on such constitutional processes. Security Council intervention remains limited to requiring that constitutional reform take place, and the holding of free and fair elections, linked to established principles of self-determination. Therefore while it may be argued that international law now requires some form of constitutional reform in post conflict societies, the nature and scope of this reform is not specifically addressed. This may be because the divergent contexts in which the Security Council votes to use these powers means that it would be difficult to distil principles of general application.²⁴ Because each example is bounded by the scope of the mandate provided by the resolution, they remain squarely in the

²² The most recent of these, and the one that will form the basis of the analysis presented in this chapter, is Resolution 1814 on Somalia. UN Doc S/Res/1814 (2008) para 5

²³ Some, for example Resolution 1272 (2002) established an interim administration for East Timor, while Resolution 1814 (2008) set specific timelines for transition in Somalia.

²⁴ Dieter Fleck, ‘*Jus Post Bellum* as a Partly Independent Legal Framework’ in Carsten Stahn et al (eds) *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014) 43

realm of practice rather than providing indicators of a general legal obligation.²⁵ It certainly could not yet be argued that a customary law of constitutional assistance exists. This is not to say, however, that international law does not exert any influence on the substance of post conflict constitutions.²⁶

Security Council resolutions illustrate the way in which the ‘peace and security’ paradigm facilitates the involvement of international actors and sets benchmarks, such as the adoption of a new constitution. It is this shift that provides the context in which the role of international law in constitutional processes can be assessed. Framing constitutional reform as an inherent part of the wider project of establishing security and the rule of law allows for much greater emphasis on compliance with fundamental principles of international law within the process. This raises three key issues; first, the way in which international law is used to legitimize the involvement of external actors in post conflict constitutional processes; second, the ways in which international involvement dictates the process and the outcome of constitutional reform; and finally the extent to which international law provides a normative framework that facilitates or constrains constitutional processes.

International law and external actors

The past thirty years have seen a number of high profile examples of international intervention in post conflict reconstruction. The practice of international territorial administration has been mandated by the Security Council in Cambodia,²⁷ East Timor,²⁸ and Kosovo.²⁹ These resolutions use the force of international law to authorize not only the establishment of an international administration, to govern the state in question, but also to provide a legal basis for the much broader range of policies adopted pursuant to that mandate. Therefore the role of international law is clearly visible – it legitimizes

²⁵ Fleck (n 25)

²⁶ see pages []

²⁷ UN Doc S/Res/745 (1992)

²⁸ UN Doc S/Res/1272 (1999)

²⁹ UN Doc S/Res/1244 (1999)

the intervention of external actors in the domestic affairs of otherwise sovereign states. This in turn is only possible in legal terms because of the expansion of the definition of peacekeeping to include rule of law reform as a means of achieving international peace and security, thereby falling within the law making power of the Security Council. This paradigm shift has therefore been central to the ability of international law to require constitutional processes be undertaken in post conflict states. Absent this link there would be no clear legal basis for the international community impose requirements relating to post conflict constitutional reform.

One of the most recent constitutional processes to be conducted under United Nations supervision took place in Somalia, culminating in the adoption of a provisional constitution in 2012. This marked the end of more than twenty years of UN involvement in state building in Somalia. International involvement in Somalia shifted from humanitarianism to state building in 1994 with Security Council resolution 897.³⁰ This resolution revised the mandate of the existing United Nations [peacekeeping] Mission in Somalia (UNOSOM I), shifting from a rationale of creating the conditions for the delivery of aid towards a more ambitious programme of political transition that would establish democracy and reconciliation in Somalia. With this resolution came a significant expansion in the scope of the powers authorized by the Security Council. UNOSOM II was authorized to use 'all means necessary' to achieve a secure environment throughout Somalia. To do this the mission was mandated to assist the Somali people with 'rebuilding their economic, political and social life, through achieving national reconciliation so as to recreate a democratic Somali State'.³¹ While constitutional reform was not undertaken until much later, the linking of governance with peace and security laid the foundation for international concern with post conflict constitutionalism.

The most recent process of constitutional reform began in 2006, following international peace talks that led to the establishment of the Transitional Federal

³⁰ UN Doc S/Res/897 (1994)

³¹ <http://www.un.org/Depts/DPKO/Missions/unosomi.htm>; UNOSOM II was established by Security Council resolution 814 (1993) and took over from UNITAF in May 1993.

Government³² and the adoption of the Transitional Federal Charter.³³ While an Independent Federal Constitutional Committee (IFCC) had been appointed in 2006 to work on drafting a new federal constitution, the Transitional Government was unable to establish effective authority,³⁴ and was itself implicated in significant abuses of human rights and humanitarian law. By 2007 the Security Council was still emphasizing the need for a representative process and the importance of democratic elections.³⁵ International pressure was maintained throughout this time. In 2008 the Security Council once again reiterated the importance of moving towards a constitutional democracy in Somalia. The preamble to Resolution 1814 welcomed an agreement to prepare a timetable for a constitutional process leading to a referendum that was to be held in 2009. The resolution further confirmed that UNPOS and the UN country team would support the Transitional Federal Institutions ‘with the aim of developing a constitution and holding constitutional referendum and free and democratic elections.’³⁶ Breakthrough came with the UN brokered Djibouti Peace Agreement, signed on 9 June 2008. This agreement resulted in a ceasefire that was to bring to an end 18 years of war and crisis in Somalia.³⁷ It also called for the international community to help provide adequate resources for the follow up from the agreement, and required the establishment of a high level committee, chaired by the UN, to be established within 15 days of the date of the Agreement. The role of this committee would be to follow up on issues relating to political co-operation between the parties and concerns over justice and reconciliation. Since 2011 the constitutional process has assumed central

³² The establishment of the Transitional Federal Government was achieved after a period of protracted mediation on the part of the international community rather than through local elections. See <http://www.cfr.org/somalias-transitional-government/p12475>

³³ This Transitional Federal Charter replaced the Transitional National Charter that had been adopted following peace talks in 2000 but had expired in 2003. This National Charter is interpreted by the UN as the first attempt to introduce constitutional governance in Somalia. *UN Guidebook on the Provisional Constitution of Somalia*. <http://unpos.unmissions.org/LinkClick.aspx?fileticket=ZGyV-8QAQxc%3D&tabid=9705&language=en-US>

³⁴ Matthew Saul, ‘From Haiti and Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law’ (2009) 11(1) *International Community Law* 119, 146

³⁵ UN Doc S/Res/1744 (2007) paras 1 & 2; UN Doc S/Res/1772 (2007) paras 1&5

³⁶ para 5

³⁷ <http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/080818%20%20Djibouti%20Agreement.pdf>

importance in the Somali transition.³⁸ The 'Roadmap' to transition agreed between Somali leaders and international organisations lays out strict deadlines for the drafting and adoption of a draft constitution.³⁹ It can therefore be seen how the international community is deeply embedded in the process in Somalia, not only through the exercise of international authority through Security Council resolutions, but also in the facilitation and ongoing support for implementation of the peace agreement.⁴⁰

This involvement demonstrates the ways in which international law, most significantly Chapter VII resolutions, are used to introduce external actors into post conflict constitutional processes and to legitimate their actions. Once the Security Council has authorized action under the heading of peace and security, deeper involvement by a broader range of external actors becomes possible. In this way international law can frame negotiations by setting parameters for debate and setting benchmarks against which the process can be judged.⁴¹ It is inevitable, therefore, that once such actors are involved in the process that it will begin to be shaped not only by domestic political concerns and priorities, but also by those of the external actors who are party to it. This applies equally whether the process is undertaken directly under the auspices of an international administration, such as was the case in Bosnia, East Timor, Cambodia or Kosovo, for example, or whether international actors are involved as mediators, and therefore in a position to shape the outcome of peace

³⁸ S/Res/2067 (2011) prioritizing the drafting of a constitution

³⁹ [http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/110906%20-%20Initialled%20Roadmap%20\(The%20Annex\).pdf](http://unpos.unmissions.org/Portals/UNPOS/Repository%20UNPOS/110906%20-%20Initialled%20Roadmap%20(The%20Annex).pdf)

⁴⁰ This assistance continues with the newly established United Nations Assistance Mission in Somalia, established in 2013 pursuant to Security Council Resolution 2102 (2013). The mission established to 'provide a framework for a holistic but more targeted UN engagement capable of directly supporting the fragile institutions of the new Somali state and facilitating the democratization process, including the adoption of Somalia's draft Constitution and free and fair national elections in four years time.' See <http://unpos.unmissions.org/LinkClick.aspx?fileticket=TUqISABGCOA%3D&tabid=9705&mid=12667&language=en-US>

⁴¹ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Cambridge University Press, 2008) 297

negotiations.⁴² The latter has become more significant in recent years with the rise of the negotiated peace agreement as a means of ending civil wars. Recent research suggests that 34% of peace agreements now contain some provision on constitutional reform,⁴³ reflecting the increasing tendency of the UN to explicitly require constitution drafting as a means of conflict resolution.⁴⁴ In Somalia, for example, Security Council Resolution 1814 specifically mandated constitutional reform.⁴⁵ Similarly peace agreements themselves are now often regarded as having constitutional form.⁴⁶ This means that provisions included as a result of international involvement at the negotiation stage will themselves achieve constitutional status, at least until such times as a longer, more participatory constitutional process is complete. This was also the case in Somalia, where the internationally brokered 2004 peace agreement, the Transitional Federal Charter, enjoyed the status of constitutional document, pending the outcome of a constitutional process, to be completed within two and a half years of the date of the Agreement.⁴⁷ The Charter, despite naming Islamic Sharia as the source of legislation within the state,⁴⁸ clearly reflects international law in terms of rule of law and fundamental rights.⁴⁹

That international involvement at the negotiation stage is reflected in the eventual terms of the peace agreement and then the constitution leads to the second key site of engagement with international law.

⁴² For a good example of the ways in which international actors can shape a peace process see Visar Morina et al, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' (2011) 9 *International Journal of Constitutional Law* 274

⁴³ Easterday (n 8) 388

⁴⁴ Easterday (n 8) 395

⁴⁵ UN Doc S/Res/1814 (2008)

⁴⁶ Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373, 392

⁴⁷ For an overview of this process see Kirsti Samuels, 'An Opportunity for Peacebuilding Dialogue? Somalia's constitution making process' (2010) 21 *Accord* 86

⁴⁸ Provisional Constitution of Somalia, adopted August 1 2012, Art 8, available at <http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=>

⁴⁹ See Title two of the provisional constitution which sets out a lengthy list of enumerated rights, including due process rights, civil liberties and social and economic rights.

Towards a substantive model of constitutional reform

Whereas Security Council resolutions can mandate that a constitutional process be undertaken, the implementation of these processes is undertaken by regulation.⁵⁰ It is therefore located more squarely in the realms of policy and practice than normative law. It is in this implementation phase that the second potential source of international law is located. There is now a trend in post conflict constitution making whereby constitutional processes, even if not directly supervised by the UN, are increasingly framed with reference to international law and international norms. This has been described by Hay as the 'normative embedding' of constitutions within international law,⁵¹ and it often begins implicitly rather than explicitly, with the involvement of international actors in the mediation of a peace agreement. This can establish very early in a process the parameters for negotiation and the international law framework within which post conflict reconstruction will take place.⁵² As a result of the UN's consolidation of its rule of law work in recent years, it has been suggested that there is now a 'rule of law menu',⁵³ a selection of institutions that are used in state building to create a legitimate state. This metaphorical 'menu' is explicitly rooted in international law, resting on the four normative pillars of international human rights law, international humanitarian law, international criminal law and international refugee law.⁵⁴ Where international organisations are authorized to oversee or facilitate a constitutional process, or even where they have been brokered a peace agreement that required constitutional reform, an increased emphasis on compliance with international law becomes clearly visible.⁵⁵

⁵⁰ For example in East Timor Security Council resolution 1272 (1999) mandated the establishment of an interim administration to oversee the transition to self government, but the legal framework for the conduct of the constitutional process was set out in the administrative regulation 2001/2, passed by the High Representative of the international community.

⁵¹ Hay (n 5) 145

⁵² Hay (n 5); Morina et al (n 42)

⁵³ Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post Conflict Societies: Beyond the Rule of Law Template' (2007) 12 *Journal of Conflict and Security Law* 65, 67

⁵⁴ Report of the Secretary General on Rule of Law and Transitional Justice in Conflict and Post Conflict Societies. UN Doc S/2004/616

⁵⁵ Morina et al (n 42)

It has been suggested that issues such as human rights, self-determination and democracy are all established matters of international concern.⁵⁶ While it could not yet be argued that a specific normative framework of post conflict constitutionalism has emerged from international law, it could be argued that it at least provides a values-based framework for the development of such a regime.⁵⁷ It has been suggested that international influence in post conflict constitutions is no longer simply technical, but that the United Nations ‘pushes for particular substantive norms to be included in the constitution.’⁵⁸ This suggestion appears to be borne out in the fact that international treaties are often incorporated directly into the constitution of post conflict states.⁵⁹ Where not directly incorporated, every post conflict constitution, whether drafted with international assistance or not, will contain some guarantee that the state will give effect to internationally recognized human rights.⁶⁰ As Bowden et al suggest, ‘international law can shape domestic developments [through] declarations that national laws must not violate international human rights norms and standards’, or requiring states to sign and ratify international treaties.⁶¹

In the case of Somalia this approach is visible in Article 3 of the Somali constitution which endorses international law by proclaiming human rights, rule of law and general standards of international law as founding principles.⁶² From 2008 more significant progress was made on the constitutional process in Somalia. In July 2010 a consultation was launched on a draft constitution. By 2012 the Federal Constitution was adopted, followed by Presidential elections that autumn. This marked the achievement of both procedural and substantive concerns of the international community in Somalia. Not only had a constitution

⁵⁶ Hay (n 5) 148

⁵⁷ Dan and Al-Ali suggest that international law is increasingly setting standards for and shaping domestic constitutional law, most prominently in the area of human rights, but to a growing degree also with respect to the domestic systems of government. (n 5) 428

⁵⁸ Easterday (n 8) 395

⁵⁹ See for example the constitutions of Bosnia, East Timor, and of Kosovo, all of which directly incorporate lists of international treaties into the constitutional structure of the state.

⁶⁰ Recent examples include the Provisional Constitution of Somalia, Art 3 and the Transitional Constitution of the Government of South Sudan, 2011, Art 9 (3)

⁶¹ Brett Bowden, Hilary Charlesworth and Jeremy Farrall, *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations* (Cambridge University Press, 2010) 10

⁶² Art 3

been adopted, but substantively it clearly embedded substantive provisions of international law, particularly international human rights law.

The way in which international law has shaped the constitution can be seen in the evolution of the constitutional document from the Transitional Federal Charter, adopted in 2004, to the Provisional Constitution, adopted in 2012. The Transitional Federal Charter was adopted in 2004 following the IGAD sponsored Somalia National Reconciliation Conference.⁶³ The Charter initially enjoyed constitutional status, and set out basic provisions on governance but contained provision for a constitutional process that was to culminate in the adoption of a new constitution within three years.⁶⁴ To assist this process, a consortium of NGOs, donors and international agencies was formed.⁶⁵ The process was facilitated by international organisations, drawing also on the advice of international constitutional experts,⁶⁶ all acting with the authority of the Security Council,⁶⁷ and this international influence is clearly visible in the substantive content of the Charter. The Charter itself declared Islamic Sharia as the primary source of legislation in Somalia.⁶⁸ However it also contained strong provisions on protection of the fundamental rights and freedoms of the people.⁶⁹ The 2012 Constitution, however, reflected a much broader range of rights, reflective of current international concerns and the evolving normative expectations of the international community.⁷⁰ Constitutional status is now afforded to rights such as environmental rights,⁷¹ economic and social rights,⁷² children's rights,⁷³ and legally enforceable rights in relation to language and culture.⁷⁴ The constitution

⁶³ See Sally Healy, 'Peacemaking in the Midst of War: An Assessment of IGAD's contribution to regional security in the Horn of Africa' (2009) Crisis States Research Centre, Working paper No 59, 10 for an overview of the involvement of international actors in this process.

⁶⁴ Art 71(2) TFC

⁶⁵ Samuels (n 47)

⁶⁶ Samuels (n 47)

⁶⁷ See for example S/Res/1801 (2008) para 9; S/Res/2010 (2011) para 20

⁶⁸ Transitional National Charter Art 8 available at <http://www.refworld.org/docid/4795c2d22.html>

⁶⁹ Transitional National Charter chapter 5

⁷⁰ Bowden et al (n 61) 14

⁷¹ Art 25

⁷² Art 27. Rights enumerated include a right to clean potable water, a right to healthcare, and a right to full social security.

⁷³ Art 29

⁷⁴ Art 31

also prohibits female genital mutilation,⁷⁵ and a human rights commission is established to oversee the domestic protection of rights.⁷⁶

When compared with earlier constitutions drafted under UN supervision, such as those for Cambodia in 1992, or East Timor in 2002, the nature of the rights included within the constitutional framework has significantly expanded, reflecting the increased expectation of the international community. The link between international concern and the final text of the Somali constitution is also strengthened by the fact that in 2011, under the auspices of the Universal Periodic Review Process, the UNHCHR had highlighted the need to address monitoring, capacity building and mainstreaming of human rights in Somalia. The report had specifically recommended the development of human rights compliant legislative and policy frameworks, including at the level of the constitution, and the ratification of international human rights treaties.⁷⁷ Therefore what we see is that although there is no set body of international law that dictates the shape of the constitution, existing bodies of international law, such as human rights law, have the capacity to exert a normative influence on these processes, at least on paper. The Provisional Constitution of Somalia, as adopted, demonstrates the extent to which international actors project a template onto failed or post conflict states. The federalized separation of powers, combined with the provision for independent commissions,⁷⁸ and a Bill of Rights,⁷⁹ reflect what is becoming a standard model of post conflict constitutionalism,⁸⁰ reflecting broader developments in international law in which the 'United Nations has been instrumental in negotiating peace agreements that include national human rights institutions.'⁸¹ This is also part of a broader move towards conditioning international legitimacy on the

⁷⁵ Art 15 (4)

⁷⁶ Art 41

⁷⁷ National Report submitted in accordance with para 15 (a) of the annex to Human Rights Council Resolution 5/1, Somalia, 11 April 2011. UN Doc A/HRC/WG.6/11/SOM/1

⁷⁸ Chapter 10

⁷⁹ Chapter 2

⁸⁰ Bell suggests that human rights commissions are part of a typical blueprint for peace agreements. Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000)

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⁸¹ Amanda Lee Wetzel, 'Post Conflict National Human Rights Institutions: Emerging Models from Northern Ireland and Bosnia and Herzegovina' (2006-2007) 13 *Columbia Journal of European Law* 427

establishment of constitutional democracy. Where the entrenchment of rights is seen as a model for creating rather than reflecting democracy,⁸² it will be necessary to ensure robust oversight procedures to assist with the embedding of these norms, particularly in cultures where they are not already established. The Somali Constitution itself provides for a series of commissions, including a Human Rights Commission,⁸³ and Anti-Corruption Commission,⁸⁴ and a national Independent Electoral Commission.⁸⁵

“Soft” Law – International Law as a Transformative Framework

Finally, whereas Security Council resolutions and binding international treaties are examples of the ways in which hard law can be used to exert a normative influence on the constitutional process, no less significant is the effect of soft law on such processes. As outlined, there is no clearly applicable hard law regime that dictates the shape of a post conflict constitution. However where hard law, particularly Security Council authorization, mandates international actors to play a role in constitution drafting, this provides a context within which a much broader engagement with international law can occur. Constitutional processes that are conducted with the involvement of international actors are much more likely to be rooted in a values-based framework of international law, irrespective of the status of the relevant law. In these contexts soft law can be used as a means of introducing issues onto the constitutional agenda even in the absence of international legal obligation.⁸⁶ For example the Paris Principles on National Human Rights Institutions have featured prominently in post conflict constitutions since their adoption in 1993 despite being only ‘soft’ law.⁸⁷ Therefore what is important is not the status of international law, but its ability to project a coherent set of values that can be used to frame the negotiating process.

⁸² For further discussion of this point see Turner (n 7)

⁸³ Art 111B

⁸⁴ Art 111C

⁸⁵ Art 111G

⁸⁶ For more detailed discussion of soft law and values based frameworks in international law see Catherine Turner ‘Human Rights and the Empire of (International) Law’ (2011) *Law and Inequality* 311

⁸⁷ UNGA ‘Principles Relating to the Status of National Institutions (The Paris Principles)’ 20 December 1993 UNGA Res 48/134

Therefore it can be seen that despite the absence of a clearly defined law of post conflict constitutional assistance, international law provides a potentially rich source of guidance. However the existence of international law that can influence the constitutional process is not the end of the story. With increased internationalization of the process comes significant challenges. These include the sequencing of the constitutional process, balancing priorities between domestic and international actors, and finally ensuring that international law is adhered to rather than being simply window dressing for an ineffective process.

Challenging Normativity- Difficulties in Practice

The Timing of the Constitution: The Chicken and the Egg

As noted, recent years have seen a shift in international approaches to constitutional assistance away from development and towards security. As yet, in the absence of any overarching international law framework for the drafting of post conflict constitutions, there are no formal or internationally agreed benchmarks for assessing the success or otherwise of the outcome of a constitutional process. This is an area where there are conflicting schools of thought on when a constitutional process should occur, and what it should achieve.

The case of Somalia illustrates an increasing trend whereby the adoption of a new constitution is regarded as the end point of a transition. This represents a dilemma for policy makers and practitioners along the lines of which comes first, peace or the constitution?⁸⁸ Central to this dilemma is disagreement over whether the constitution can itself create peace, or whether peace is required before an effective constitutional process can take place. Whereas development

⁸⁸ In the Somali context see for example the difference of opinion between Burgess who views peacebuilding as only starting after the adoption of the 2012 constitution, and Hosington, who suggests that discord between key participants in the process should have been addressed before the constitution was adopted. Stephen Burgess, 'A Lost Cause Recouped: peace enforcement and state building in Somalia' (2013) 34(2) *Contemporary Security Policy* 302, 307; Matthew Hosington, 'Devolutionary Politics in Somalia: prospects for peacekeeping, peacebuilding and development' (2012) *Journal of Public and International Affairs* 52, 62

policy views the constitutional process as a longer term activity to be undertaken once peace has been established, more recent Security Council resolutions suggest that the constitutional process is regarded as a means of ensuring transition. This introduces a tension into the practice of constitutional assistance in that the short terms goals of peacebuilding, including the cessation of violence and re-establishing the rule of law, do not necessarily sit easily with the longer-term priorities of development and social transformation.

In policy terms, UNDP advice advocated the separation of constitution drafting processes from the negotiation of a peace agreement.⁸⁹ It was suggested that if a constitution was negotiated while conflict is ongoing, or in its immediate aftermath, that constitutional principles may be compromised in the desire to reach a settlement.⁹⁰ Similarly the parties to such negotiation may not necessarily be representative of the population as a whole, meaning that further negotiation and deliberation on the constitution would be required, as seen in Somalia.⁹¹ Within the context of UNDP, policy on constitutional assistance emphasizes local partnership and capacity building. The commitment to nationally led, transparent, participatory and inclusive processes is clearly visible within policy documents in this area.⁹² These features are emphasized not simply to demarcate the relative roles and responsibilities of the UN vis a vis national actors, but because adherence to these principles can serve broader goals such as helping to ensure the legitimacy of the constitution, increasing the capacity of the parties to a conflict to engage in dialogue on difficult political issues, and ultimately laying the foundations for democratic process. For this reason, policy dictates that 'UN constitutional efforts should be guided by the principle of national leadership to every extent possible.'⁹³ In the case of Somalia, the aims of the constitutional process were stated to be 'to unite the republic; to lend legitimacy to future political leaderships; and to introduce institutions that

⁸⁹ Jamal Benomar, 'Constitution Making and Peace Building: Lessons Learned from the Constitution Making Processes of Post Conflict Countries' (UNDP, 2003).

⁹⁰ Benomar (n 89) cites the case of Bosnia-Herzegovina as an example of a constitution that enshrined division rather than contributed to conflict resolution because it was drafted as part of peace negotiations.

⁹¹ Samuels (n 47)

⁹² Guidance note (n 4)

⁹³ Brandt (n 13)

are representative, responsive and accountable to the people.⁹⁴ It is clear, therefore, that constitutional processes are intended to serve relatively broad goals, including the legitimation of the new government.⁹⁵ For this reason, it has been suggested that ‘the range of issues that need to be debated in a constitution are too vast for a peace negotiation’, and that ‘many of these issues are best debated at a slower pace in a more inclusive fashion.’⁹⁶ Introducing constitution making as a tool of peacemaking therefore introduces uncertainty surrounding the underlying purpose of the constitutional process, as well as on the timing of such process.

It increasingly appears that the necessity to end violence is what has driven moves towards a more sustained engagement with international law in post conflict constitutional processes, and that has created some tension between extended participatory processes and shorter term processes that use the constitution as a means of ending the conflict.⁹⁷ With this shift towards constitutionalism as a tool to deliver peace comes a trend towards viewing constitution making not as a long-term process, but rather as a static marker of transition to be achieved within a set timeframe.⁹⁸ In this context the constitution marks the re-establishment of sovereignty, the point at which international intervention ends and the state is reconstructed.⁹⁹

The peace process in Somalia was dominated by such timetables, deadlines and roadmaps towards a drafted and adopted constitution.¹⁰⁰ These timelines and deadlines that punctuate the transitional process are relatively short. For example, the Transitional Federal Charter stated that the constitution drafting process was to be completed within two and a half years. The roadmap written

⁹⁴ Abdihakim Ainte, ‘Somalia: Legitimacy of the Provisional Constitution’ (2014) 25 *Accord* 60, 61

⁹⁵ Samuels (n 47)

⁹⁶ Samuels (n 47)

⁹⁷ Hallie Ludsin, ‘Peacemaking and Constitution Drafting: A Dysfunctional Marriage’ (2011) 33 *University of Pennsylvania Journal of International Law* 239

⁹⁸ See Turner (n 7)

⁹⁹ See Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford Scholarship Online, 2007) 10 suggesting that the timetable for the drafting of the constitution in East Timor was driven by the need to present an exit strategy to the Security Council

¹⁰⁰ S/Res/1814 (2008) para 5

in 2011 also placed a tight deadline on transition. This Roadmap itself was controversial. Somali parliamentarians protested that its provisions had not been submitted to parliament for approval, and that the level of external oversight of the constitutional process undermined Somalia's sovereignty.¹⁰¹ Yet these timetables and deadlines continued to be dictated by the Security Council, which required the completion of 'transition' by the specified date of August 2012.¹⁰² Further, while the preamble to Resolution 2036 notes that the deadlines set by the roadmap were missed,¹⁰³ the international community continued to nudge the process forward.¹⁰⁴ This preoccupation with an objectively identifiable end point of the transition suggests that the adoption of a new constitution is viewed as providing that marker- as the moment at which peace and security is re-established.

This preoccupation with the constitutional moment as the point at which the transition is complete leads to insufficient emphasis being placed on the process leading up to the adoption of the constitution. In Somalia the imposition of external benchmarks for adoption of the constitution have potentially undermined the legitimacy of the provisional constitution. Ainte reports perceptions among the Somali population that the process was 'engineered to hit external benchmarks', and that the process was truncated under pressure from international partners to deliver a constitution by the date specified for the end of transition.¹⁰⁵ Paradoxically this rush to achieve the constitutional moment may diminish local trust and ownership of the process,¹⁰⁶ as well as undermining the longer-term possibilities of a more extended participatory constitutional process.¹⁰⁷ It has also been suggested that the priority afforded to establishing central government ignored potential ongoing threats to peace and security.¹⁰⁸

¹⁰¹ See Ainte (n 94) 60

¹⁰² S/Res/1814 (2008)

¹⁰³ S/Res/2036 (2012)

¹⁰⁴ See UN Welcomes Agreement on Somalia's Constitution Making Process, <http://www.un.org/apps/news/story.asp?NewsID=42308&#.U93XiKBCZSU>

¹⁰⁵ Ainte (n 94) 63

¹⁰⁶ Ainte (n 94) 63

¹⁰⁷ This is not only a risk in Somalia. Brandt (n 13) cites UN backed processes in Cambodia and East Timor or examples of opportunities to make the process more genuinely participatory having been missed because of tight international timelines.

¹⁰⁸ Hosington (n 88) 62

This drive towards a 'constitutional moment' is also problematic in that it suggests a linear approach towards peacebuilding in which the before and after of the transition is clear. This can obscure ongoing problems that arise as a result of a truncated constitutional process, such as weak local ownership of the process, conflict between international and local norms, and the ability of the state in question to effectively implement the constitutional provisions.

Competing Priorities – local vs international ownership

The tension between long and short terms goals of post conflict constitutional reform is of interest in that increasingly constitutional priorities are being set by external actors, who mandate not only the fact that constitutional reform must be undertaken, but also set prescriptive terms that dictate the content of the constitution and the time within which it must be adopted. Section two outlined the ways in which international law is becoming embedded into constitutional processes, notwithstanding the absence of a dedicated body of law on the subject. While the 'normative embedding' of international law may bring some advantages, such as providing an external framework for negotiation, there are also limitations to the capacity of international law to effectively regulate constitutional processes. The ways in which externally imposed timelines can undermine the constitutional process have been discussed. However overreliance on international law as providing normative frameworks for the substantive drafting of a constitution can also create problems of ownership. The move towards viewing constitutional reform as an element of peace and security has resulted in much greater emphasis being placed on the substance of the constitution.

The involvement of international actors in these processes means that not only must the constitution reflect the priorities of national constituencies, but increasingly it must also reflect those of the international actors too.¹⁰⁹ The constitution must reflect international standards of governance and human rights protection, attaining the 'standard of civilisation' set by the international

¹⁰⁹ Dan and Al-Ali (n 5)

community.¹¹⁰ The incorporation of international human rights conventions in to post conflict constitutional structures may appear to be simply a means of ensuring that the newly reconstructed state meets its international obligations. However in the post conflict context there is a symbolism to who makes and enforces the law,¹¹¹ and an overreliance on external standards, such as those provided by international law, or indeed those implemented as a matter of policy by international experts, can lead to tension between local and international priorities, particularly where insufficient effort is made to contextualize international law.¹¹² This can lead to a perception among the population that international law is being given priority over national law.¹¹³

It has been suggested in the Somali context that the legitimacy of the transitional institutions was fundamentally challenged as a result of their having been 'developed outside Somalia with too much foreign influence'.¹¹⁴ While much greater effort has been made to ensure that the constitutional process was locally driven in Somalia in comparison with earlier processes,¹¹⁵ the process and the resulting draft constitution have not been without controversy. Opinion in Somalia is divided in particular on the question of a federalized governance structure. The draft constitution provides for a federalized structure whereby power is divided between the state level federal government and regional member state governments. It has been suggested that this model does not take sufficient account of context.¹¹⁶ The president of Somalia, Hassan Sheikh Mohammed, elected in 2012, has emphasized the significance of local clan

¹¹⁰ See Zaum (n 99) on this dynamic in East Timor

¹¹¹ For further discussion see Catherine Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Transition: The Role of International Law' (2008) 2 *International Journal of Transitional Justice* 126

¹¹² See Zaum (n 99)

¹¹³ Mohamud Uluso, 'Provisional Constitution Heightens Tensions in Somalia' *International Policy Digest*, August 8 2012

¹¹⁴ Ainte (n 94); Sally Healy, 'Somalia: Ready to move on?' Conciliation Resources, February 2013

¹¹⁵ The Special Representative of the Secretary General described the roadmap as 'the most inclusive process of all the efforts to rebuild Somalia's governance', describing the role of the UN as merely to 'facilitate a Somali led process'. Cited in Ainte (n 94) 60

¹¹⁶ In particular it is also alleged that this model is being imposed notwithstanding the existence of a democratically ratified constitution adopted in 1961. Afyare Abdi Elmi, 'Revisiting the UN Controlled Constitution Making Process for Somalia' *E-International Relations*, September 2, 2012; This is consistent with a pattern noted by Bell, whereby constitutional reform is undertaken under the auspices of the international community contrary to existing rules on constitutional amendment. See Bell (n 46)

structures within Somalia. Highlighting the continued existence of the Somali state, despite decades of war, he suggests “There was nothing but the traditions, cultures and the customary law. These are what the people used in these decades and there is a great deal of relevance in Somali traditions even today.”¹¹⁷ This can be contrasted with the more westernized federal system being proposed in the draft constitution.

It is stated by the UN that the reason for this federalization is to address demands for self-governance arising from the regions in response to years of overly centralized government.¹¹⁸ Yet opinion in Somalia is divided not only on the question of whether federalism is an appropriate structure for Somalia at all,¹¹⁹ but also on how it should operate if it were to be introduced.¹²⁰ Ainte suggests that many Somalis ‘see federalism as overly complex, alien and potentially divisive, and a threat to the homogeneity of Somalia’s population.’¹²¹ The internationally devised formula for allocating power and representation was viewed as taking insufficient account of these local and informal clan based power structures, thereby diminishing the role of some groups.¹²² This is pertinent to the constitutional process for two reasons. The first is that representation in the constitution drafting process, through membership of the IFCC, was linked to this power sharing formula. Groups who were not recognized by the proposed federal structure would therefore also be excluded from the constitutional negotiations.¹²³ Second, the mandate of the IFCC itself was restricted to drafting a federal constitution. This was mandated from the outset, following the adoption of the 2004 Charter, and the result of this was that the IFCC ‘did not have the opportunity to debate the type of system that would be suitable for the context or advance the interests and aspirations of the Somali

¹¹⁷Cited in Healy (n 114)

¹¹⁸ UN Guidebook (n 33) 13; This assessment is also shared by the newly elected president of Somalia, Hassan Sheikh Mohammed, who suggests that all the rules in place in Somalia served only the highly centralized system, at the expense of any law to facilitate the devolution of power or regulate the relationship between the centre and the peripheries. Cited in Healy (n 114)

¹¹⁹ See eg Elmi (n 116)

¹²⁰ Ainte (n 94)

¹²¹ Ainte (n 94)

¹²² Laura Hammond, ‘Somalia Rising: things are starting to change for the world’s longest failed state’ (2013) 7 *Journal of Eastern African Studies* 183, 184

¹²³ Ainte (n 94) 62

people....'¹²⁴ Local ownership of the process was further diminished by the fact that the Constituent Assembly that adopted the constitution was not elected,¹²⁵ and had very little real power to make amendments to the draft constitution.¹²⁶ This lack of representation was further compounded by the fact that a referendum on the constitution that had been promised was never held, due to security concerns.

These accounts of the shortcomings of the process stand in stark contrast to the UN's own account, which celebrates its inclusivity. Following the adoption of the provisional constitution the UN boasted how "The Constituent Assembly embodied the diversity of Somali society around the traditional clan system, and ensured inclusiveness by bringing together elders, religious leaders, women, youth, business people, intellectuals and the Diaspora,"¹²⁷

There is a clear tension between the UN's assessment of the process and the assessment of some Somalis over the extent to which it was in fact locally owned. This highlights the potential gap between what is regarded by the international community as a model constitutional process, and the perceptions of Somalis on both the conduct and the outcome of that process. Constitutional processes, where mandated by international law, and conducted within that interpretive framework, must remain sensitive to context if they are to be successful.¹²⁸ Even where processes appear *prima facie* to be inclusive, political sensitivities will continue to influence how the processes is regarded. While it should be noted that there is currently no explicit international law that requires federal government, once internationally mandated constitutional processes are devolved to the regulatory or policy sphere they are, as noted in Section [] ,

¹²⁴ Elmi (n 116)

¹²⁵ See The Gawore Principles on the Finalisation and Adoption of the Constitution and the End of the Transition' 24 December 2011

¹²⁶ See Somali Roadmap Signatories, 'Protocol Establishing the Somali National Constituent Assembly' 22 June 2012

¹²⁷ 'UN Officials Welcome "historic" new Constitution for Somalia, <http://www.un.org/apps/news/story.asp?NewsID=42603#.U93Vx6BCbII>

¹²⁸ In the Somali context see Samuels (n 47); This is in contrast to the approach taken by the international community to those who dissented on the Somali constitution, branding them as 'spoilers'. See Ken Menkhaus, 'Governance without Government in Somalia: Spoilers, State building and the politics of coping' (2006-2007) 31 *International Security* 94

heavily influenced by the values that underpin international law.¹²⁹ The way in which international actors frame the debate means that international preferences in terms of models of governance, including political and economic structures, risk becoming enshrined into constitutional documents in post conflict states, regardless of whether these models reflect the preferences of the indigenous population or not.¹³⁰ It cannot therefore be assumed that international involvement or the application of international law can act as a legitimate arbiter of constitutional issues, or indeed will be accepted as such by the population.

The other key site of conflict over the constitution is the extent to which it enshrines international priorities in the realm of human rights and rule of law. The draft constitution clearly attempts to strike an appropriate balance between meeting international human rights law obligations, and reflecting the reality of Somali culture. There is much less overt criticism of the constitution on these grounds than on the question of federalism. However in this case, actions speak louder than words, leading to the final challenge for international law in the post conflict constitution drafting process.

Constitutional Guarantees as a fig leaf.

It has become common in post conflict constitutional reform to include long lists of international human rights treaties either within the substance of the constitution, or annexed to the document. On paper these newly reconstructed states appear to be model international subjects, providing guarantees at the highest level of domestic compliance with international law. However where the constitution marks the culmination of the transition, and the point at which the international community 'exits', the adoption of the constitution can mark the end rather than the beginning of the state's commitment to the implementation of international law.

¹²⁹ See also Easterday (n 8) 384-385 on international law as 'framing' debate in these areas.

¹³⁰ See for example Lisa Markadian in this volume.

In the Somali example, while the constitution does not specifically list international human rights conventions to which Somalia must give effect, it does contain a catch all provision stating that the Constitution should ‘ recognize and enforce all international human rights conventions’ that Somalia was a party to.¹³¹ This reflects the position whereby constitutions are no longer purely domestic instruments, but must take into account their global context.¹³²

Somalia also provides two good examples of the gap between law and practice in this area. The first relates to the representation of women. Despite the existence of Security Council resolution 1325, which has since 2000 required that women be properly represented in peace processes; and the re-iteration of this requirement in the Somali context through Security Council resolutions 1772¹³³ and 1814,¹³⁴ in 2014 Somalia had only two female cabinet members.¹³⁵ This simply reflects the persistent under representation of women throughout the process. Initially the Federal Constitutional Committee had not included any women. While this list was subsequently amended to include two women,¹³⁶ this could hardly be said to meet the requirements of Resolution 1325. Yet the Security Council have signaled, in resolution 2067 that the transition is complete, notwithstanding the ongoing underrepresentation of women.¹³⁷

On an even more fundamental level, basic security remains an issue for women in Somalia,¹³⁸ hinting at the alarming gap between the legal protection afforded

¹³¹ Art 3

¹³² Ulrich K Preuss, ‘Perspectives on Post Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalisation’ (2006-2007) 51 *New York Law School Law Review* 468, 481

¹³³ S/Res/1772 (2007) para 19

¹³⁴ S/Res/1814 (2008) para 17

¹³⁵ Report of the Secretary General on Somalia, 3 March 2014, UN Doc S/2014/140, paras 3-4; This is in spite of the existence of a quota of at least 12% women being set for the Transitional National Assembly. See Christine Bell and Catherine O’Rourke, ‘Peace Agreements or Pieces of Paper? The Impact of UNSC Resolution 1325 on Peace Processes and their Agreements’ (2010) 59 *International and Comparative Law Quarterly* 941, 949

¹³⁶ Samuels (n 46) 86

¹³⁷ S/Res/2067 (2014)

¹³⁸ Sally Healy (n 114). See also the damning Human Rights Watch report, ‘Here Rape is Normal: A Five Point Plan to Curtail Sexual Violence in Somalia’ (HRW, 2014) outlining the ongoing and persistent culture of violence against women in Somalia.

to women by the Somali constitution,¹³⁹ and the reality on the ground. This gap also illustrates the practical limits of international law as a transformative framework in post conflict constitutional processes. To date Somalia has not ratified the International Convention on the Elimination of Violence Against Women (CEDAW), nor have they produced a National Action Plan on the implementation of Resolution 1325.¹⁴⁰ Given the failure to implement 'hard' international law requirements in respect of gender equality, it is hardly surprising that other 'softer' requirements have also not been met.

The Somali constitution requires that a National Human Rights Institution should be established.¹⁴¹ This reflects the increasing trend to require that post conflict constitutions provide for national implementation and monitoring of human rights after the transition is complete. However to date no such institution has been created in Somalia, and this issue has come to represent the shortcomings of the constitutional process in terms of guaranteeing robust compliance with international law.¹⁴² This illustrates the disconnect between the international community's expectations of the constitutional undertakings in respect of human rights, and the internal domestic reality which is unable to fulfill such expectations.

Both of these examples represent attempts to use law to shape a political culture, either in terms of the representation of women, or a legal approach to the implementation of human rights. And yet these are both inherently political activities, which are unlikely to yield significant success in the absence of political agreement.¹⁴³ This demonstrates the limits of the normative pull of international law in the realm of post conflict constitutionalism. As the old saying goes, you can lead a horse to water, but you can't make it drink. Therefore the

¹³⁹ For example, Art 3 (4) guarantees the effective participation of women in public life; Art 15(2) prohibits any form of violence against women; Art 24(5) prohibits discrimination based on sex at work; Art 27 (5) ensures that women get the support they need to realize their socio-economic rights

¹⁴⁰ See Aisling Swaine in this volume for more detailed discussion of the role of action plans.

¹⁴¹ Art 111B

¹⁴² See OHCHR, 'Stand alone high level interactive dialogue on assistance to Somalia in the field of human rights' 8th January 2014, UN Doc A/HRC/25/45, para 23(g)

¹⁴³ See Lerner (n 6) 234 arguing that there are certain questions that have to be assigned to politics alone, where law should not intervene.

normative requirements of international law that favour constitutional reform as a means of ending transition need to be balanced against the need for a longer participatory process that fosters a political culture of dialogue and 'listening to the other voice'.¹⁴⁴

Conclusion

The shift that has occurred in recent years towards a normative vision of post conflict constitutionalism, encompassing not only the redrawing of political boundaries within the state, but also the place of the state within the international community, has created a tension between the ideals of democracy, concerned with allocating power by free and fair election, and constitutionalism, concerned with setting the limits within which power can be exercised. While the goal of constitutionalisation remains achieving political agreement on the exercise of power within the state, an increased emphasis on the legal requirements of international law in relation to governance and individual rights alters the dynamic of the constitutional process. It has been suggested that the current trend in international law represents 'much more than a mere migration of ideas or a borrowing of concepts.'¹⁴⁵ Rather what is happening is that over the past twenty years a particular model of constitutional governance has been recast as the only legitimate form of governance in international law, and as such forms the benchmark against which constitutional processes can be measured.¹⁴⁶ This means that constitutional legitimacy is driven not by domestic concerns, but by the needs of the peace and security agenda.

However, as has been discussed, while international law may mandate that a constitutional process must take place, and provide a normative framework within which negotiations take place, ultimately it cannot guarantee the legitimacy of the process or the resulting constitution. Nor can it ensure that provisions that are committed to paper will be implemented in any meaningful way once the constitution is adopted. For these reasons we should be cautious about advocating a strongly normative framework of international law to

¹⁴⁴ Hassan Sheikh Mohammed, interviewed by Healy (n 114).

¹⁴⁵ Dan and Al-Ali (n 5) 461

¹⁴⁶ Dan and Al-Ali (n 5) 461

regulate post conflict constitutional processes. While international law may help international actors to put pressure on domestic parties to keep a process moving forward, and ensure that a constitution is in fact agreed, we must also recognize that constitutional processes are inherently political and that space must be left for negotiation and for politics if they are ultimately to be successful.