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Melbourne Law School

Constitutional Implementation for Sustainable Peace Addendum: Update on the Bougainville case study

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The Constitution Transformation Network at Melbourne Law School supports the development and implementation of inclusive constitutions globally, with a particular focus on Asia and the Pacific. The ConTransNet team brings together subject matter and country experts in multiple constitutional fields and has supported constitution-building processes in Asia, the Pacific and in conflict-affected countries globally. ConTransNet organises (with International IDEA) an annual *Melbourne Forum on Constitution-Building in Asia and the Pacific* which brings together regional constitutional experts to exchange good practice and lessons learned, for the practical benefit of ongoing constitution-building processes. ConTransNet team members also regularly run courses at MLS on constitution-making, state-building and comparative constitutional law.

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Constitutional Implementation for Sustainable Peace

A project funded by the Folke Bernadotte Academy

Addendum: Update on the Bougainville Case Study

Constitution Transformation Network, Melbourne Law School

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Introduction

Post-conflict constitutions have a role in sustaining peace. This is most obviously the case where a peace agreement includes commitments that require changes to an existing constitution to deal with problems that are deemed to have contributed to the conflict in the first place.

This project, entitled ‘Constitutional Implementation for Sustainable Peace’, explores the significance of the *implementation* of constitutional commitments made as part of a peace agreement to sustaining peace. It asks whether, and if so how, constitutional implementation contributes to sustainable peace, and conversely, whether and how failures in constitutional implementation destabilise peace.

Implementation is understood broadly, to extend from formal constitutional change to the operation of changes in practice, including their interpretation by domestic courts. This phase of the project uses the constitutional changes required under the Bougainville Peace Agreement (BPA) as a case study. It is funded by the Folke Bernadotte Academy (FBA) to whom we express our thanks.

A first report on this phase of the project was published in June 2019.¹ It developed an analytical framework to understand and test the connections between constitutional implementation and sustainable peace. One part of this framework offered a way to assess constitutional implementation, by dividing it between textual implementation (in which the commitments of the peace agreement are reflected in the constitution) and substantive implementation of the constitutional changes in practice (including technical implementation, constitutional interpretation and cultural adaptation). A second part of the framework identified the potential connections between constitutional implementation and sustainable peace. It posited that the outcomes, as well as the process, of constitutional implementation could help to support sustainable peace.

The Bougainville Peace Agreement of 2001 was a particularly useful case to test this newly developed framework. From 1988, the Bougainville region of Papua Guinea (PNG) experienced a decade of civil conflict, within the region and between the region and PNG. The terms of the BPA provided for a high degree of autonomy for an Autonomous Region of Bougainville, to be implemented incrementally as powers and functions were transferred from the central PNG government to an Autonomous Bougainville Government. The BPA also guaranteed a referendum, to be held within a stipulated timeframe, on the question of Bougainville's independence from PNG. The referendum was to be followed by 'consultations' between the two governments about Bougainville's future status, with results that would be submitted to the PNG Parliament. The BPA required these commitments to be included in the PNG Constitution and in a new Constitution for Bougainville, in highly prescriptive terms, which also anticipated the need for judicial interpretation of the new constitutional arrangements to be guided by the BPA.

The first report showed that textual implementation – the incorporation of the provisions of the Peace Agreement into the constitutional laws of Papua New Guinea and Bougainville – was readily achieved. The record of substantive implementation, however, was more mixed. By mid-2019, nearly two decades after the peace agreement had been made, the Bougainville government still did not autonomously exercise all powers available to it, the PNG Government had not provided the financial support to Bougainville as promised under the peace agreement, and the referendum had been slightly delayed. On the other hand, most constitutional commitments had been at least partially implemented and, importantly, the peace had held.

The first report concluded that, while constitutional implementation can contribute to sustainable peace, not all problems of constitutional implementation present the same degree of risk. In the case of Bougainville, the problems arose from the challenges of transition and lack of capacity and have had no direct impact on the prospects for peace. Collectively, nevertheless, problems of this kind could exacerbate mistrust between the parties to the former conflict, and have delayed recognition and acceptance of what an autonomous status for Bougainville might mean for the relationship between PNG

¹ Anna Dziedzic and Cheryl Saunders, 'Constitutional Implementation for Sustainable Peace' (Constitution Transformation Network with support of the Folke Bernadotte Academy, June 2019).

and Bougainville. Because the process of giving effect to the BPA is not yet complete, it is too early to tell whether such problems will prove to be significant.

Two critical aspects of the BPA had not yet been put into effect when the first report was submitted in July 2019. The first was the referendum on the future status of Bougainville. The second was the consultations between the two governments on the results of the referendum and the ratification of the outcome by the Parliament of PNG. To enable these developments to be taken into account as far as possible, the FBA agreed that an addendum to the report might be submitted by the end of 2020. As it transpires, the referendum has now been held but the consultations have not yet begun. This addendum therefore covers events to the extent that they have occurred by December 2020 and foreshadows developments to come, to the extent to which they can be predicted at this stage.

The referendum was held over late November and early December 2019. The result was decisive, with a large majority of Bougainvilleans voting in favour of independence. The referendum result is not binding, however, under the BPA. Both the Peace Agreement and the Constitution require the governments of PNG and Bougainville to ‘consult over the results of the referendum’.² Consultations were due to begin in 2020, but were postponed until the pending Bougainville elections had been held. The elections in turn were delayed by the coronavirus pandemic and constitutional litigation to determine the then President’s eligibility to stand for re-election.

The structure of this addendum is as follows. Part I revisits the conceptual problem of the relationship between peace agreements and constitutions that was the impetus for this project in the first place. It enables the segments that follow to be placed in context and allows some recent literature to be taken into account. Parts II and III focus respectively on the two aspects of constitutional implementation that were still outstanding when the first Report was submitted. Part II canvasses the process and outcome of the referendum and shows that both represented substantive implementation of the commitments of the BPA as reflected in the Constitutions of PNG and Bougainville. Part III explains the challenges of the consultation process and some of the issues to which it may give rise. Unlike other aspects of the peace agreement, the process to be followed in the wake of the referendum was dealt with only lightly in the BPA and the constitutional laws that gave it effect, apparently leaving a final substantive decision about the status of Bougainville to agreement between the parties, as given effect by the Parliament of PNG. The ambiguity thus is left to be resolved through the process of implementation, with potentially significant implications for sustaining peace in Bougainville.

A final Part IV examines the role of the judiciary in interpreting and applying the constitutional provisions that can be traced to the BPA. The focus here is the court case brought by President Momis and the Executive Council of Bougainville, after the referendum but before the Bougainville elections, concerning President Momis’ eligibility to stand for re-election. At stake was the leadership of the Bougainville side in the consultations over the future status of Bougainville. This litigation required the Supreme Court of PNG to consider the relationship between the PNG and Bougainville constitutions.

Part I. The relationship between peace agreements and constitutions

The conceptual problem that stimulated this project is the nature of the relationship between peace agreements and constitutions. While they share some similarities in a post-conflict context, they are

² *Bougainville Peace Agreement* art 311(b); *Constitution of Papua New Guinea 1975* s 342(1).

distinct in a range of ways including the processes by which they are made, the participants in those processes, the sources of legitimacy on which they draw, the range of matters for which they typically provide, and legal status.

Peace agreements and constitutions are necessarily linked, however, where the former includes commitments of a constitutional kind, as increasingly is the case.³ This relationship presents significant challenges, stemming immediately from differences in legal status between peace agreements and constitutions, but reflecting other points of distinction between the two as well. The first challenge is to ensure that the agreed constitutional changes take place at all, given the status of a constitution as fundamental law that typically is made or changed by a more inclusive process than ordinary law, the outcome of which often cannot be guaranteed. The second challenge is to ensure that whatever constitutional changes are made are implemented in a way that supports the commitments in the peace agreement, including through judicial interpretation and notwithstanding the dynamics of ordinary politics.⁴

In the face of these challenges, there is a diversity of views in the literature about how to understand the relationship between peace agreements and post-conflict constitutions. Towards one end of the spectrum are those who point to the distinction between peace agreements and constitutions and argue that it should be maintained. Thus, for example, Halle Ludsin observes that peacemaking and constitution making have different, if overlapping, goals, which in turn require different procedures and considerations. On one hand, peace agreements have as their immediate priority ending violence between combatants and resolving crisis. Constitutions, on the other hand, establish long term arrangements for the governance of the whole society, requiring a more inclusive and participatory process over a longer timeframe.⁵ She acknowledges that the two processes cannot be wholly separate, especially where peace agreements require some constitutional change, but argues they should remain conceptually and practically distinct.⁶

At the other end of the spectrum is scholarship that conflates peacemaking and constitution making, to the point of characterizing a post-conflict constitution as a type of peace agreement. Thus, for example, in a recent piece using Bougainville as a case study Laurie Nathan argues that peace agreements and post-conflict constitutions share the same goal of securing peace, including by addressing the causes and drivers of conflict.⁷ He suggests that a post-conflict constitution, by virtue of its status as supreme law,

³ For examples see Dziedzic and Saunders, 'Constitutional Implementation for Sustainable Peace' (n 1) 4; Asli Ozcelik and Tarik Olcay, '(Un)Constitutional Change Rooted in Peace Agreements' (2020) 18 *International Journal of Constitutional Law* forthcoming, Part IA. The most recent example is the *Juba Agreement for Peace in Sudan* (3 October 2020) which sets out a process for constitutional change to establish a federal state.

⁴ Through this second challenge, the project also connects with the more generalised problem of implementation of new constitutions, irrespective of a connection with a peace agreement or even with a post-conflict context. See, for example, Guiding Principle and Strategy 6, 'Promote effective implementation' in United Nations, *Guidance Note of the Secretary-General on United Nations Constitutional Assistance* (September 2020).

⁵ Halle Ludsin, 'Peacemaking and Constitution Drafting: A Dysfunctional Marriage' (2011) 33 *University of Pennsylvania Journal of International Law* 239. See also Jennifer S Easterday, 'Peace Agreements as a Framework for Jus Post Bellum' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014).

⁶ Ludsin (n 5) 286.

⁷ Laurie Nathan, 'The Real Deal? The Post-Conflict Constitution as a Peace Agreement' (2020) 41 *Third World Quarterly* 556.

supersedes a preceding peace agreement to become the 'definitive peace agreement', with its own independent effect on the maintenance of peace.

Our position in this project falls between these two extremes. We regard the two sets of instruments as distinct, but accept the need to resolve the challenges that arise when the resolution of conflict requires constitutional change. One way of doing so is to anticipate the challenges of implementation when a peace agreement is made, tailoring the agreement accordingly. Bougainville illustrates how this might be done, in an unusually straightforward way. An opening section of the BPA set out the role and status of the Peace Agreement. It identified the BPA as the basis for drafting the constitutional amendments, required the amendments to make explicit reference to the BPA and specified the BPA as a guide to judicial interpretation. The provisions of the BPA on the procedures for autonomy and the referendum were highly detailed, in terms that later were reflected in the text of the PNG Constitution and the Bougainville Constitution. The BPA struck a nice balance between identifying the issues with which the new Bougainville Constitution must deal, while leaving significant substance to an appropriately inclusive constitution-making process in Bougainville, which the BPA also prescribed. The BPA specified the manner in which the constitutional provisions arising from these changes could themselves be altered, so as to ensure Bougainville had a voice.

In all these ways, the relationship between the Peace Agreement and the Constitution was expressly recognized and issues of application and interpretation anticipated. The success of these arrangements lay in managing the links between the Peace Agreement and the Constitutions at the points of peace making and constitution making, rather than fully insulating one from the other. In Bougainville's case, textual implementation of the BPA also was assisted by the process for the alteration of the PNG Constitution, which requires super-majorities in the legislature but does not involve a referendum, thus avoiding the additional uncertainties that a referendum requirement brings.⁸

The Bougainville case also demonstrates the case against resolving the challenges of implementing a peace agreement by treating the constitution itself as a peace agreement.

First, not every aspect of the BPA was 'constitutionalised'. Some constitutional provisions were expressed to be dependent on fulfillment of the weapons disposal plan set out in the Peace Agreement, but the plan itself did not need to be included in either the PNG or Bougainville constitutions.⁹ The limitations on PNG's defence powers in relation to Bougainville set out in the Peace Agreement were regarded as too sensitive to be reflected in law.¹⁰ The fact that commitments of this kind were not included in the

⁸ Where a referendum is required, there is an additional risk that constitutional change to implement a peace agreement will not be approved by the people at referendum, as occurred, for example, in Guatemala in 1999. A referendum to ratify a peace agreement in Colombia also failed in 2016.

⁹ For example, the first elections for the Autonomous Government of Bougainville were contingent compliance with the weapons disposal plan set out in the Agreement (*Constitution of Papua New Guinea 1975 s 279*). The date for the referendum was to be set only after considering whether weapons had been disposed of in accordance with the Agreement (*Constitution of Papua New Guinea 1975 s 338*).

¹⁰ Anthony J Regan, 'Autonomy and Conflict Resolution in Bougainville, Papua New Guinea' in Ghai, Yash and Sophia Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press 2013) 420.

constitution, however, does not mean these commitments were superseded or have lost all force. They were taken seriously as political commitments and subject to international monitoring.¹¹

Second, as the Bougainville case again shows, not every constitutional provision has a match or even a link to the Peace Agreement or the peace process. The amendments required to the PNG Constitution by the BPA were set out in a single new chapter of the Constitution, making clear its *sui generis* nature and limiting its application to Bougainville. Similarly not all the provisions in the new Bougainville Constitution followed from requirements of the BPA. Sustaining peace may be one goal of post-conflict constitutional arrangements, but it is not the only goal, even in the short term. The fact that a constitution implements a peace agreement should be significant for the application and interpretation of peace-related provisions. Over time, however, the application and interpretation of the constitution as a whole will be shaped by other contextual factors.

Once it comes into effect, any constitution is tested by politics, affected by bureaucratic practice and subject to judicial interpretation and the practice of officials. For present purposes, an example was the need to interpret the Constitutions of Bougainville and PNG when President Momis claimed a right to stand for election for a third term. This development is described in Part IV of this addendum. Another relevant example is the general instability of PNG politics, which challenged Prime Minister Marape's hold on office in 2020, incidentally delaying the high-level consultations over the result of the referendum.

The capacity of constitutions to respond to unanticipated challenges of this kind is critical to their effectiveness. Constitutions need to adapt to changing conditions over time, whether through interpretation, practice or formal change. A peace agreement, on the other hand, typically is subject to none of these processes. One risk of conflating a constitution with a peace agreement is to freeze it in time. The Constitution of Bosnia Herzegovina, which was formally part of the Dayton Peace Accords and so, unusually, doubles as both a peace agreement and a constitution, makes the point. The Constitution has maintained the peace but has not evolved to meet emerging needs and has proved impervious to formal change, despite a relatively easy alteration process. Thus, for example, the Constitution has been unable to accommodate equal rights for all ethnicities within the state, despite several rulings of the European Court of Human Rights that point to its inconsistency with the European Convention on Human Rights.¹²

Finally, the example of the BPA shows that a peace agreement may derive important endurance and rhetorical force from its very character as a *peace agreement*. As shown in Part III below, neither the Peace Agreement nor the PNG Constitution contain much guidance on how the consultations between the two

¹¹ The BPA and preceding ceasefire agreements were endorsed by the United Nations Security Council. The United Nations Observer Mission on Bougainville and later the United Nations Political Office in Bougainville was mandated to supervise weapons disposal. See United Nations Security Council, 'Security Council told Peace Agreement between Papua New Guinea and Bougainville can be fully implemented by year's end, despite serious obstacles' Press Release SC/7709, 28 March 2003.

¹² Ajla Škrbić, 'Constitutional Reform in Bosnia and Herzegovina: Can We Expect It in The Near Future?' (*IACL-AIDC Democracy 2020 Global Roundtable*, 25 November 2020) <https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-xx9lz-p6k2z-y8y6h-cplw4-4bcr5-t2hdf-pt4np-nzc2g-f64jl-c53x4-d693x-ycry5-xahmf-kbwxz-8fk4t-m3r34-5mehc-dxmzw>.

governments, following the referendum, should occur. To fill this gap, leaders in Bougainville and PNG have expressly invoked the BPA, along with Melanesian values of trust and respect, to guide the process.¹³

The Bougainville case study is distinctive, both because the challenges of the relationship between the Peace Agreement and constitutional arrangements were anticipated and because the Constitution of PNG was relatively easily changed. Other cases are less straightforward, each in its own way, leading to a greater shortfall in substantive or even textual implementation. Examples include the Comprehensive Peace Agreement on the Bangsamoro, the Indo-Sri Lanka Accord and the Comprehensive Peace Agreement in Nepal. These and other cases will be examined in later stages of the project, to understand the relationship between sustainable peace and constitutional implementation in more complex cases. These later studies will also provide opportunities to test the hypothesis that more could be done to manage the relationship between peace agreements and constitutions, without equating the two as a matter of law.

Part II. Implementation of the referendum

The first of the outstanding aspects of the BPA not covered by our earlier report was the requirement for a referendum on the future status of Bougainville. This was a core pillar of the BPA and one of the most contentious issues during the peace negotiations.¹⁴ As between the parties to the conflict within Bougainville, a referendum on independence was the agreed mechanism for balancing the demands of secessionists and those who wanted to remain part of PNG.¹⁵ However, the referendum was resisted by the PNG negotiators as a threat to the unity of the PNG state. Deadlock on the issue was reportedly broken by the then Foreign Minister of Australia, who suggested deferring the referendum for 10 to 15 years and expressly stating that the referendum result would be subject to the approval of the PNG Parliament. This latter requirement, separating the outcome of the referendum from a final decision about Bougainville's status, is the second outstanding aspect of the BPA. It still is incomplete, but is covered up to the end of 2020 in Part III of this addendum. At the time of signing the BPA, the Bougainville parties were persuaded that the international community would pressure PNG to honour the referendum result, as it had done in Timor Leste.¹⁶

Against that background, it can be seen that implementation of the referendum was critical to securing and maintaining peace. As the principal point of contention between Bougainville and PNG, implementation might have been expected to encounter opposition from PNG; hence its inclusion in the PNG Constitution, with an apparently mandatory time frame. Merely holding a referendum was not enough, moreover. To play its role in securing peace, the referendum needed to be accepted as free and

¹³ See eg, Hon President John Momis, 'Address to the National Parliament by the President of the Autonomous Region of Bougainville' (29 August 2019) 11-12; Sir Puka Temu Minister for Bougainville Affairs, Statement to Parliament, *Hansard*, 11 February 2020, 20: 'The Agreement has been the foundation for ongoing efforts to keep building and sustaining peace... The Bougainville Peace Agreement provides the foundation for what is to follow'.

¹⁴ Kearnneth Nanei, 'Special Autonomy and Bougainville', *Constitution-Building in States with Territorially based Societal Conflict* (International IDEA and Constitution Transformation Network 2017) 34.

¹⁵ John Braithwaite and others, *Reconciliation and Architectures of Commitment: Sequencing Peace in Bougainville* (ANU Press 2010) 57.

¹⁶ Anthony J Regan, 'Resolving Two Dimensions of Conflict: The Dynamics of Consent, Consensus and Compromise' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources 2002) 39-41; Edward Wolfers, "'Joint Creation": The Bougainville Peace Agreement - and Beyond' in Andy Carl and Lorraine Garasu (eds), *Accord: Weaving Consensus - The Papua New Guinea-Bougainville Peace Process* (Conciliation Resources 2002).

fair, both to meet internal tensions within Bougainville and to inform the Parliament of PNG in its final act of ratification. Implementation was further complicated by the built-in delay between the agreement in the BPA and the likely referendum date. While this was deemed necessary to reach agreement between the parties it was inevitable that, during that 10-15 year period, some circumstances would change, new political leaders would assume power and memories of what had been agreed in 2001 would fade.

Textual implementation

The BPA did not set out the requirements for the referendum in great detail. It required the PNG Government to 'move amendments to the National Constitution to guarantee a referendum'.¹⁷ It stated that the choices put to Bougainvilleans at referendum would include 'separate independence' but gave no guidance as to other options. It required the referendum to be held in the window between 10 and 15 years after the election of the first autonomous Bougainville government, with the actual date to be set after taking account of the standards of good governance and the implementation of the weapons disposal plan. The two governments were to consult over the results of the referendum, but the outcome was 'subject to ratification (final decision-making authority) of the National Parliament'.¹⁸ An Organic law to implement the agreed referendum arrangements was to be introduced into the PNG Parliament and take effect at the same time.¹⁹

As with the other provisions of the BPA, the textual response to these commitments was quick and successful. A section governing the referendum was included in the new Part XIV of the PNG Constitution, enacted by the PNG parliament on 27 March 2002.²⁰ The *Organic Law on Peace-Building in Bougainville – Autonomous Bougainville Government and Bougainville Referendum 2002* was passed on the same day, putting in place a range of requirements for the conduct of the referendum.

Nevertheless these measures did not finally determine all issues relating to the referendum, some of which were expressly deferred. For example, the governments were to consult and agree on criteria for determining a non-resident Bougainvillean's link to Bougainville for the purposes of eligibility to vote.²¹ Governments were also to consult and agree on the agency to be responsible for the administration of the poll, choosing from existing institutions or the creation of a new independent agency.²²

Recognising that the Organic Law was to govern a poll that would be conducted many years later, the Organic Law provided that the relevant agency, courts or governments could resolve inconsistencies or gaps by making determinations based on analogy to other sources and laws.²³ In order to 'avoid any doubt about the capacity of legislation to make provision for matters that cannot be anticipated at the time of making this law', new laws not inconsistent with the Organic Law could be enacted regarding the conduct of the referendum.²⁴ Finally, the Head of State was empowered to make constitutional regulations to give

¹⁷ *Bougainville Peace Agreement* art 309.

¹⁸ *Bougainville Peace Agreement* arts 2, 309-324.

¹⁹ *Bougainville Peace Agreement* arts 309, 314(b).

²⁰ For analysis see Dziedzic and Saunders, 'Constitutional Implementation for Sustainable Peace' (n 1) 15.

²¹ *Bougainville Peace Agreement* art 315; *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) s 55.

²² *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) ss 56, 58.

²³ *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) s 62.

²⁴ *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) s 63.

effect to the Organic Law.²⁵ The Bougainville Referendum Commission later took advantage of these provisions, gazetting five determinations in 2019 relating to the conduct of the referendum.²⁶

Substantive implementation

Despite early textual implementation of the referendum pillar of the BPA, substantial implementation was not really underway until 2017. By that point, there was considerable confusion about the legal requirements and conditions for the referendum amongst both officials and people in Bougainville. The Joint Autonomy Review of 2013 identified many points of misunderstanding amongst Bougainvilleans about the timing and conditions for holding the poll, the potential options to be put, and the eligibility of non-resident Bougainvilleans to vote. It also identified critical unresolved issues that the governments had failed to address, including financial support for the referendum and the body responsible for conducting the referendum.²⁷ These issues, if unresolved, had potentially destabilising consequences. In Bougainville some leaders expressed the view that the referendum was a matter for Bougainville alone.²⁸ In PNG then Prime Minister O'Neill hinted that the referendum may not proceed because key conditions for the vote – namely good governance and weapons disposal – had not been met.²⁹ In the end, however, no one seriously challenged the right to proceed with the referendum on these grounds, an indication of the positive approach to substantive implementation.

While substantial preparations for the referendum began slowly, once begun they went reasonably smoothly. An independent agency to conduct the referendum, called the Bougainville Referendum Commission (BRC) was established early in 2017, but not fully formed until 2018 with the appointment of its Chair, former Prime Minister of Ireland Bertie Ahern, and six Commissioners. There was equal representation of both governments, with the Electoral Commissioners of Bougainville and PNG serving as *ex officio* members alongside two Commissioners appointed by each government. The Joint Supervisory Body, a joint government body established under the BPA to oversee the implementation of the Peace Agreement, agreed on the eligibility requirements for non-resident Bougainvilleans in June 2018. In October 2018 it agreed that the question to be put to voters at the referendum would be 'do you agree for Bougainville to have (i) Greater Autonomy or (ii) Independence?' What each of these concepts actually meant was set out in a 'key messages and frequently asked questions' document approved by the two government in mid 2019 and circulated to voters.³⁰

The poll was conducted over three weeks from 23 November to 7 December 2019. The turnout rate was high, with 87,5% of eligible voters casting a vote. The result was decisively in favour of independence 176,928 (97.71%) of those who voted chose 'independence', while 3,043 (1.68%) chose greater autonomy. The poll was held to be peaceful, free, fair and credible by domestic and international observers.³¹

²⁵ *Organic Law on Peace-Building in Bougainville, Autonomous Bougainville Government and Bougainville Referendum 2002* (PNG) s 66.

²⁶ Bougainville Referendum Commission, 'Final Report' (2020) 5, 44.

²⁷ Government of Papua New Guinea and Autonomous Government of Bougainville, *Joint Review of Bougainville's Autonomy Arrangements* (2013) part 10.

²⁸ *ibid* 89.

²⁹ Eric Tlozek, 'Bougainville Independence Referendum "May Not Be Possible": PNG PM' (*ABC News*, 27 September 2017) <https://www.abc.net.au/news/2017-09-27/png-pm-casts-doubt-over-bougainville-independence-referendum/8990692>.

³⁰ *Bougainville Peace Agreement and Referendum: Key Messages and Frequently Asked Questions* (2019).

³¹ Bougainville Referendum Commission (n 26); Kerry Baker and Thiago Oppermann, 'The Bougainville Referendum: Lessons for the Future' (In Brief 2020/16, Department of Pacific Affairs, Australian National University).

It can readily be concluded, therefore, that the referendum requirement in the BPA was satisfactorily implemented, textually through the Constitution and the Organic Law and substantively through the actions taken by relevant parties. Implementation was given additional force by the constitutional guarantee but was enhanced through voluntary co-operation and fair dealing. Factors that contributed to the successful implementation of the referendum include the following.

The first was an **appropriate mix of local ownership and international support**. Local ownership was paramount, but international support was important on specific matters. The nature and degree of local ownership, which fed into the substantive implementation of the referendum requirement in the BPA, benefitted from the long process of reconciliation that had been conducted at individual, community and governmental levels. This was acknowledged by the Chair of the BRC, who wrote

It is a tribute to the people of Bougainville, to the people of Papua New Guinea, and to their respective governments and leaders that the referendum was widely seen as a successful national event. ... I acknowledge here the countless peace and reconciliation activities, both big and small, that have been undertaken leading up to the referendum.³²

Consistently with expectations of local ownership, there was a high degree of community involvement and ownership in the conduct of the poll. Concerted efforts were made to inform the people of Bougainville about the process of the referendum, the options on the ballot, and the place of the referendum in the wider peace process. While a variety of mechanisms was used, the BRC reported that the personal involvement of the Commissioners and a bi-partisan 'roadshow' with political leaders in face to face meetings were critical in establishing the credibility and independence of the Commission as well as political commitment to the referendum.³³

The official face of the referendum also was local. An 'overwhelming' majority of the 2500 staff who conducted the poll were Bougainvillean.³⁴ Polls were staffed by people from local wards, which built confidence, increased community involvement, and minimised transport costs.³⁵ These measures had positive effects on peace, both in the security of the poll itself, and in voters' trust in the outcome.³⁶

The involvement of international actors took place within a framework managed by the PNG and Bougainville governments and took a variety of forms. The Chair of the BRC was a foreign citizen – the former Prime Minister of Ireland – and performed the role of impartial mediator. The Bougainville and PNG governments jointly decided which international agencies were to be invited to observe the referendum, drawing on organisations with a historical role in the peace process thus far.³⁷ International donors played an important role in providing funds to the BRC, alleviating tensions over funding between PNG and Bougainville.³⁸ International interest in the referendum also had an effect. The BRC noted that Bougainvilleans were 'justifiably proud that the "eyes of the world were watching them"; that their aspirations were being taken seriously through a democratic, internationally recognised process'.³⁹

³² Bougainville Referendum Commission (n 26) 1.

³³ *ibid* 13, 27.

³⁴ *ibid* 2.

³⁵ *ibid* 8, 18.

³⁶ Baker and Oppermann (n 31).

³⁷ Bougainville Referendum Commission (n 26) 24.

³⁸ *ibid* 11.

³⁹ *ibid* 26.

Independent statehood would require Bougainville to be recognised as such not only by PNG, but by the international community, making international interest of this kind encouraging.

A second factor in the successful implementation of the referendum as free and fair was an approach that sought to **build on existing electoral infrastructure** and to learn from Bougainville's experiences of previous elections. Examples include the decision to update the 2015 Bougainville electoral roll rather than create a new referendum roll from scratch;⁴⁰ the introduction of a provisional ballot process so that voters were not unduly turned away from the poll as in past elections; and adhering to the Bougainville government's request for polls at the ward level to make them more accessible. These decisions not only utilised existing knowledge and procedures, but built on them for future Bougainville elections.

A third factor was the **efforts taken to ensure that the referendum was peaceful**. In addition to the wider efforts to build peace across Bougainville, Commissioners directly engaged with unreconciled groups, including some who opposed the referendum. The BRC reports that these personal interventions helped to ensure that such groups did not 'self-appoint' themselves as security, leaving this task to the Bougainville Police and community auxiliary police.⁴¹ The BRC also took a decision to mix the ballot papers before they were counted at a single central location.⁴² This measure sought to guarantee the secrecy of the ballots and to avoid inter-regional disharmony should the outcome be different across different locations.

Finally, the fact that there was a **prescribed deadline** also facilitated implementation. In contrast to the transfer of functions and powers under the autonomy arrangements, which has been incremental and ongoing, the referendum was a single public event and had to be held by June 2020. Breach of the BPA would be obvious were the deadline not met. It can safely be assumed that the deadline focused attention on the need to comply with the requirement, from supporters and opponents of Bougainville independence alike, triggering the process of implementation that began in 2017 and ended with the referendum process in early 2020.

Conclusions

The requirement for a referendum on independence for Bougainville was a critical feature of the package through which peace was secured under the BPA. From the standpoint of PNG, it also was one of the least welcome and, so, most vulnerable features of the BPA. Its protection in the PNG Constitution was significant for this reason. The terms of the BPA, which provided that the PNG government 'move' constitutional amendments to guarantee the referendum were an appropriately cautious reflection of the modalities of constitutional change. Acceptance of the amendments by the PNG Parliament, together with passage of the associated Organic Law, was necessary to ensure the 'guarantee' that the BPA promised and was an important step in implementation in its own right. In addition, as this part has shown, there was effective substantive implementation of the commitment as well, during which outstanding issues were resolved between the parties, leading to a referendum vote that was accepted as free and fair. It can reasonably be concluded that the steps taken in relation to the referendum, under the BPA and through implementation of the Constitution, advanced the prospects for sustainable peace.

⁴⁰ *ibid* 15.

⁴¹ *ibid* 27.

⁴² *Bougainville Referendum Commission Issuance under s 62 of the Organic Law on Peacebuilding in Bougainville: Mixing of Ballots across Voting Districts*, 24 October 2019.

The price of agreement on an independence referendum under the BPA was its deferral for 10-15 years. Deferral had the additional advantages of enabling Bougainville to develop experience with a significant measure of autonomy and of providing a period of peaceful co-existence during which the relationship between the parties could consolidate. Whatever the deficiencies of the implementation of the BPA over that time, the context that emerged from it proved conducive to a successful referendum. This part has identified a range of factors that contributed to this result. Some of these are specific to the PNG/Bougainville context but others may have salience for peace-building elsewhere, where deferral of a referendum is necessary to reach agreement on measures to end conflict. Factors in this latter category include the extent of local ownership of both the initial commitments under the BPA and their implementation over time.

Part III. Resolving the status of Bougainville in the wake of the referendum

The second outstanding aspect of the BPA, not covered in our first report, is the process to be followed in the wake of the referendum, leading to a decision about Bougainville independence or other status. This is a separate step, or series of steps, because the BPA does not provide that the referendum result is binding. The parties agreed instead that the referendum result would be subject to consultation between the two governments, leading to a form of decision by the PNG Parliament. Given the history of the conflict, it seems evident that both the consultation process and the outcomes to which it leads will be critical for sustainable peace, within Bougainville and between Bougainville and the rest of PNG.

This aspect of the BPA is not yet complete, however. While steps have been taken to set up the consultations, they were not fully underway at the end of 2020. Even once consultations begin, the outcome may not be known for some time, in the absence of any clear view of the time the consultations will or should take. This part of the addendum to the report therefore canvasses the issues for implementation that are likely to arise at this stage and reflects on their implications for peace.

Textual implementation

In contrast to the high level of detail about the autonomy arrangements and, even, about the conduct of the referendum, there is very little guidance in the BPA on this final aspect to be implemented. The procedure for textual implementation of the referendum requirement in the PNG Constitution was described in the previous part. Thereafter, the BPA provides only that the Bougainville and PNG governments ‘will consult over the results of the referendum’ and that ‘the outcome will be subject to ratification (final decision-making authority) of the National Parliament’.⁴³

Unusually, given the record of textual implementation of the other provisions of the BPA requiring constitutional protection, on this issue the PNG Constitution is framed in slightly different terms to the BPA. Section 342 provides that the PNG and Bougainville governments shall consult over the results of the Referendum, and subject to that consultation, ‘the Minister responsible for the Bougainville Referendum shall take the results of the Referendum in the National Parliament and the Speaker of the National Parliament shall furnish to the Bougainville Executive a copy of the minutes of the relevant proceedings

⁴³ *Bougainville Peace Agreement* arts 309, 311.

and of any decision made in the National Parliament regarding the Referendum'. Some good practices for intergovernmental consultations are prescribed in section 323 of the PNG Constitution.

The uncertainty about how the Parliament must or should respond to the results of the consultations, coupled with the inconsistency between the BPA and the Constitution, the significance of which is unclear, are additional factors that may affect the dynamics of the consultations and, ultimately, have implications for peace.

Substantive implementation

Beyond these scant provisions in the BPA and the PNG Constitution for determining the final status of Bougainville, all remaining issues are left to be determined between the parties, in the course of substantive implementation of the Peace Agreement through the Constitution. These issues include the following.

The process for consultations between the two governments. It is left largely to the governments to determine a process and framework for consultations. In terms of process, so far the governments have continued to use the Joint Supervisory Body as the forum for consultations. In March 2020, the Joint Supervisory Body directed the relevant ministries in the PNG and Bougainville governments to establish the 'Post Referendum Joint Ministerial Council Preparation Team to lead the consultation process.⁴⁴ Civil servants in both jurisdictions have undertaken preparatory work through a Joint Technical Team to support the political consultations.⁴⁵ In addition, a Post Referendum Planning Taskforce comprising Ministers and officials from both governments was established by the Joint Supervisory Body in 2018, with a view to ensuring peace during the post-referendum period. This taskforce has been assisted by international organisations including the United Nations and Conciliation Resources. Initial talks between Prime Minister Marape of PNG and newly elected President Toroama of Bougainville led to the announcement that former President Bertie Ahern of Ireland, who had previously chaired the Bougainville Referendum Commission, would serve as an international mediator.⁴⁶

Designing a framework for the consultations is more complicated, as there are several possible pathways to reaching agreement on the crucial question of the nature of the future relationship between Bougainville and PNG. Following the referendum, the Bougainville government will clearly seek independence, but this could be secured in different forms, including transitional arrangements whereby Bougainville has a form of free association with PNG, or which evolve over time as Bougainville's capacities develop. Any resolution of the high-level question of the future relationship between PNG and Bougainville also may be affected by an assessment of Bougainville's economic sustainability and capabilities, in the short and the longer term. In other work, we have suggested that the negotiating parties may be assisted by agreeing at the outset on principles to guide decision making and procedures

⁴⁴ Official Joint Statement of the Joint Supervisory Body Meeting in Port Moresby by Co-Chairs Hon James Marape PM, Prime Minister of Papua New Guinea and Dr Chief John Momis GCL MHR, President of the Autonomous Region of Bougainville (12 March 2020).

⁴⁵ Government of Papua New Guinea and Autonomous Bougainville Government, 'Record of Joint Technical Team Meeting' (26 November 2020).

⁴⁶ 'Ahern to Moderate Bougainville Negotiations with PNG' (RNZ, 10 November 2020)

<https://www.rnz.co.nz/international/pacific-news/430302/ahern-to-moderate-bougainville-negotiations-with-png>.

for consultation. Such an agreement would provide a shared reference point for all parties and would help to facilitate negotiation on issues that otherwise might prove more difficult.⁴⁷

The timeframe for the consultations. The absence of a predetermined timeframe for the consultations between the two governments over the referendum outcomes is positive in the sense that it allows time for the governments themselves to set the agenda and work to achieve common ground. There also is risk, however. If consultations take too long without substantial progress, or if one or other government is seen to be obstructive, the government or the people of Bougainville may lose trust in the process. President Toroama reflected this concern in his inaugural speech when he urged the people of Bougainville to be patient saying

We can only exercise political control of our destiny through independence – we must pursue independence by all peaceful means. It may happen in one year, or it might take a few more years, but we must never lose focus however long it may take. My people of Bougainville, you have endured this far and your continued patience is all I ask of you.⁴⁸

There has already been considerable delay, due to a range of factors. Consultations were due to begin after the Bougainville elections, but these were pushed back from May to late August, due to the Covid-19 pandemic. The election results were announced on 23 September 2020, revealing significant leadership changes. Ishmael Toroama, a former commander in the Bougainville Revolutionary Army and key leader in the peace process, was elected President. There was a high degree of turnover in the Bougainville House of Representatives, with many new members of parliament elected.

Political instability at the national level then further delayed consultations. The JSB meeting scheduled for late November 2020, which was to agree on a framework for inter-governmental consultations as well as to discuss issues of funding and diplomatic representation in Bougainville, was postponed because of political instability in the PNG parliament, as the opposition sought to bring a no confidence motion against the government of Prime Minister James Marape.⁴⁹ In the end, after complicated political and some legal maneuvering, the Marape government survived, but not until it was effectively too late in the year for consultations to get underway.⁵⁰

Such delays may be unavoidable but need to be handled in ways that preserve faith in the process, between the parties and amongst the population at large. This reflects the importance of a finding made in the first report, about significance of the *process* of implementation for peace. In post-conflict contexts, where there is already likely to be a high degree of distrust, shortcomings in implementation, even where there are understandable reasons, can be easily perceived as evidence of bad faith or obstruction on the part of one or both governments.⁵¹

⁴⁷ Anna Dziedzic and Cheryl Saunders, 'Institution Building in Post-Referendum Bougainville' (National Research Institute Papua New Guinea 2020) part 2.

⁴⁸ Ishmael Toroama, 'Inaugural or Maiden Speech by Bougainville President' (Bougainville Parliament, 29 September 2020) 9.

⁴⁹ 'PNG: Worries Political Turmoil May Be "Detrimental"' (*ABC Radio Australia*, 23 November 2020) <https://www.abc.net.au/radio-australia/programs/pacificbeat/worries-png-political-turmoil-detrimental-to-bougainville-talks/12909846>.

⁵⁰ 'Marape Government survives challenge: 2021 budget passed again' (*Business Advantage PNG*, 17 December 2020) <<https://www.businessadvantagepng.com/marape-government-survives-challenge-2021-budget-passed-again/>>.

⁵¹ Dziedzic and Saunders, 'Constitutional Implementation for Sustainable Peace' (n 1) 42.

The meaning of ‘ratification’. The point was made earlier that it is unclear exactly what is required when consultations end. The BPA provides that the outcome is subject to ratification by the PNG Parliament, while the Constitution refers to merely to ‘any decision’ by the National Parliament. The Joint Technical Team has sought legal advice from Papua New Guinean lawyers and international advisers on the definition of ratification in the BPA. Whatever the answer, it is likely to inform the interpretation of the Constitution.⁵² Even if both the governments and the PNG Parliament agree to give effect to the clear expression of view of the people of Bougainville through the referendum, however, a further decision is needed about the parliamentary procedure to follow. Possibilities include a majority vote by members of the parliament, a special majority vote, a staged process akin to that for constitutional amendments, and potentially, some formal involvement by the Bougainville House of Representatives. Ratification of the outcome of the referendum in favour of independence may also require amendments to the PNG Constitution to permit or to recognise the consequences of secession.⁵³

International recognition. Independent statehood cannot be achieved for Bougainville by decisions within PNG alone. Bougainville already has, or could readily acquire, the core features of statehood identified in the Montevideo Convention.⁵⁴ In practice, however, recognition by other significant states in the international community is necessary for independent statehood as well.⁵⁵ This was clearly on the minds of those negotiating the compromise during the peace talks that led to the BPA; hence the Australian Foreign Minister’s assurances regarding international support in the event of a clear vote in favour of independence. International recognition is not guaranteed, nevertheless. If it were withheld, the consequences are unpredictable.

Conclusions

Ambiguity on this final, central, issue was useful at the time of negotiating the BPA. Now that the point of resolution approaches, however, it is less convenient and more pressing. The idea that ‘we make the road as we walk’ is often invoked to describe Bougainville’s path to autonomy, reflecting the sense that there is no ready-made design to be implemented, but that autonomy must evolve to suit Bougainville.⁵⁶ Until now, this was only partially true. As has been seen, the provisions of the BPA and the PNG Constitution are relatively prescriptive on the content and process of autonomy. This last piece of the road to self-determination, however, has been left to be resolved at the end of a long process. What happens next has major implications for self-determination for Bougainville, for PNG, and for peace.

The two governments will be guided in their negotiations by the BPA, a commitment to peace and Melanesian values relating to consultation and consensus. Negotiations will be assisted by the relationship that has been built since the BPA was finalised that, despite its ups and downs, generally is positive. Each government, however, will represent the interests of different constituencies, with different preferences for the outcome. Following the 2020 elections in Bougainville, the new President and his government have a clear mandate. President Toroama campaigned on independence. In his inauguration speech, he reiterated his government’s priority to continue preparations for independence and conduct of

⁵² Government of Papua New Guinea and Autonomous Bougainville Government, ‘Record of Joint Technical Team Meeting’ (26 November 2020).

⁵³ This issue was raised by the then Minister for Bougainville Affairs, Sir Puka Temu Minister for Bougainville Affairs, Statement to Parliament, *Hansard*, 11 February 2020, 24.

⁵⁴ Montevideo Convention on the Rights and Duties of States 1933 art I.

⁵⁵ James Crawford, *The Creation of States in International Law* (2nd ed, Clarendon Press 2006) ch 1.

⁵⁶ See eg Government of Papua New Guinea and Autonomous Government of Bougainville (n 27) [8.4.9].

consultation and dialogue with the PNG government guided by the BPA, the PNG Constitution and international law.⁵⁷ The approach that the PNG government will take is less clear. Whatever the PNG position on Bougainville independence, however, there are signs that PNG will continue to present Bougainville as an exceptional *sui generis* case, sending a message to provinces of PNG that might seek to follow Bougainville's path towards autonomy and, potentially, statehood. For example, in October 2020, Prime Minister Marape raised the possibility of an amendment to the PNG constitution to prevent any province of PNG from promoting independence or autonomy.⁵⁸

As the moment approaches when a decision is made about the future status of Bougainville it is relevant to ask: when does the BPA end? At what point can it be said that the BPA now is implemented and a new political settlement is in place? There is value in understanding when the BPA and the constitutional changes that gave it effect have run their course. Once this occurs, the Constitutions of both PNG and Bougainville lose their character as post-conflict Constitutions. The Bougainville Constitution, in particular, becomes the Constitution of a polity at peace which has exercised its right to self-determination.

The most likely point at which to conclude that the BPA is spent is when changes are made to the status of Bougainville, once the consultations and all the processes that must follow them are complete. Thus for example, the current Constitution of Bougainville provides that including the establishment of the Autonomous Bougainville Government, the powers to enter into international agreements and declare emergencies, and rules for the interpretation of Bougainville's laws, apply 'until any change in the status of Bougainville that may occur following the Bougainville Referendum'.⁵⁹ On the other hand, the reserved seats for ex-combatants under the Bougainville Constitution initially applied only until the referendum was held, until extended indefinitely by constitutional amendment after the referendum in early 2020.⁶⁰ The idea that the referendum provided the turning point was also reflected in a proposal to change the name of the Bougainville government after the referendum, from 'Autonomous Bougainville Government' to the 'Bougainville Constitution Transitional Government', reflecting the people's vote for independence.⁶¹

Part IV. Courts and constitutional interpretation

The first Report in this phase of the project identified three significant dimensions of substantive constitutional implementation: technical implementation, interpretation and cultural change.⁶² 'Interpretation' refers to the process by which general, ambiguous or conflicting constitutional provisions are read and understood, drawing on whatever interpretive tools are available including, in many cases, constitutional principles and values.

Many actors engage in constitutional interpretation. Interpretation is mostly associated with courts, however, which typically have the authority to make binding decisions about the meaning of the

⁵⁷ Toroama (n 48) 4.

⁵⁸ 'PNG: Enga Governor Says PM Marape's Fears over Further Independence Calls Are Unfounded' (ABC Radio Australia, 6 October 2020) <https://www.abc.net.au/radio-australia/programs/pacificbeat/png-autonomy-debate/12734704>.

⁵⁹ *Constitution of the Autonomous Region of Bougainville 2004* ss 41, 74, 199, 213.

⁶⁰ *Constitution of the Autonomous Region of Bougainville 2004* s 55(5)(b).

⁶¹ A constitutional amendment to reflect this change was not pursued on the basis it would require consultations with the PNG government. It is instead to be reflected as a policy directive: 'Support among Bougainville MPs for Constitutional Changes - Cabinet Minister' (RNZ, 20 January 2020) <https://www.rnz.co.nz/international/pacific-news/407735/support-among-bougainville-mps-for-constitutional-changes-cabinet-minister>.

⁶² Dziedzic and Saunders, 'Constitutional Implementation for Sustainable Peace' (n 1) 7–8.

constitution. Interpretation is most obviously relevant to implementation when it furthers or impedes the incorporation in the constitution of commitments of a constitutional kind made in a peace agreement or understanding of these provisions in a way that is consistent with the peace agreement.⁶³

The first report on this phase of the project said little about constitutional interpretation by the courts in exploring the Bougainville case study. That is because, between the signing of the BPA in 2001 and the beginning of 2020, there were very few court cases concerning the interpretation and application of Chapter XIV of the PNG Constitution or the Bougainville Constitution. There was litigation over the relationship between the customary courts and the criminal law⁶⁴ and judicial investigations concerning the rights of prisoners and persons charged with criminal offences⁶⁵ but these cases, while important, did not raise significant questions about the meaning and intent of the BPA in a way that affects its implementation through constitutional arrangements.

Since the first report was finalised, however, there has been a decision of the Supreme Court of PNG which has some relevance to the link between constitutional interpretation and sustainable peace. The case is reported here, in the interests of completeness and to draw attention to the ways in which interpretation might affect constitutional implementation and, thus, have some bearing on sustainable peace.

In early 2020, following the referendum, the Bougainville Executive referred a question to the PNG Supreme Court, asking whether the provision for presidential term limits under the Bougainville Constitution were inconsistent with the Constitution of PNG.⁶⁶ The referral was somewhat odd, in the aftermath of such an overwhelming vote in favour of Bougainville independence. In effect, an incumbent President of Bougainville was seeking to overturn the apparently clear terms of the Constitution of Bougainville in relation to an autonomous institution by reference to the still superior force of the Constitution of PNG. The outcome had some potential to cause division within Bougainville. The case also provided an occasion for some members of the Supreme Court of PNG to make observations about the post-conflict context in which the case arose.

The circumstances of the case were as follows. Section 89(2) of the Bougainville Constitution provides that a person shall not be elected as President on more than two occasions. The President of Bougainville, John Momis, a highly respected leader for over 40 years who had served in the parliaments of both PNG and Bougainville, sought to stand again for election despite having served two terms already. The elections of 2020 were seen as particularly important, because the new President would be responsible for conducting consultations with the PNG government over the results of the referendum and implementing the people's vote for independence.

A bill to amend the constitution to permit a President to be elected a third time was introduced into the Bougainville House of Representatives. Public consultations were conducted as required by Bougainvillean law. However, when put to the vote, the proposed amendments were not supported by the required two-thirds majority of the House of Representatives. To overcome this obstacle, the Bougainville Executive filed a special reference in the PNG Supreme Court, asking whether the term limits set out in the Bougainville Constitution were inconsistent with section 50 of the PNG Constitution. Section

⁶³ Ozcelik and Olcay (n 3).

⁶⁴ Eg *State v Mattau* [2008] PGNC 269; *State v Geria* [2008] PGNC 295.

⁶⁵ Eg *In re Conditions of Detention at Buka Police Lock-up, Autonomous Region of Bougainville* [2006] PGNC 159
In re Section 57 of the Constitution of Papua New Guinea, Enforcement of Basic and Human Rights [2006] PGNC 201.

⁶⁶ *Special reference re s 89(2) and 91(4)(f) of the Bougainville Constitution* (Supreme Court of Papua New Guinea, 29 May 2020).

50 provides that every citizen (with specific exceptions) has the right ‘to be elected to elective public office at genuine, periodic, free elections’. The referral thus required the PNG Supreme Court to consider the relationship between the PNG Constitution and the Bougainville Constitution and to interpret both constitutions.

The Supreme Court held, by majority, that the term limits set out in the Bougainville Constitution were permitted under the PNG Constitution. Justice Cannings wrote a judgment with which the other majority judges agreed. He dealt with the issue as the Court would deal with any legislation that was challenged on the ground that it was inconsistent with a constitutional right. In PNG, this involves considering whether the law prohibits or merely regulates the exercise of a right and, in the latter case, whether that regulation is ‘reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind’.⁶⁷

Justice Cannings held that the term limit in the Bougainville Constitution did curtail the rights provided in section 50, but because it applied only to a very limited category of persons (that is, persons who had already served two terms), it did not amount to a prohibition on the exercise of the right. He further held that, from the standpoint of the reasonable person, and in particular the ‘reasonable Bougainvillean’ the term limits were justifiable.⁶⁸ In support of this finding, the judge noted that the two term limit had been recommended by the Bougainville Constitutional Commission and included in the Constitution from the outset. It was thus distinguishable from a legislative change introduced for political expediency; for example to target a rival candidate. He also noted that many other constitutions in the world specify presidential term limits; an interesting example of a court in a primarily parliamentary system using wider global experience to better understand the dynamics of presidentialism as it operates in Bougainville.

The three other majority judges agreed with the reasoning of Justice Cannings but added their own observations. In each case, these demonstrated that the context of Bougainville’s autonomy was an element in their reasoning. All three judges drew attention to the transitional nature of the Bougainville constitution and autonomy. Chief Justice Salika noted the results of the referendum and stated that ‘this court must not be seen to be derailing the efforts of the Bougainville people and stopping them to progress’.⁶⁹ Deputy Chief Justice Kandakasi found support for the reasonableness of the term limit restriction in the fact that the Bougainville Constitution is an interim arrangement, pending the referendum and a potential change in Bougainville’s status.⁷⁰ Justice Kirriwom noted that there may come a time when term limits may be changed, but said that that time was ‘not now ... when the Bougainville Constitution has not been given its full run and given the recently conducted Referendum, the Bougainville Constitution is still going through a transition phase’.⁷¹

This case did not involve the status of the Peace Agreement, or conflict between the Peace Agreement and the PNG Constitution. It was therefore a relatively minor test of how a court might contribute to, or detract from, sustainable peace through the process of constitutional interpretation. A different outcome might have had an unsettling effect within Bougainville itself. Nevertheless, as the judgment of Justice Cannings shows, the issues were capable of resolution without the need to draw expressly on the post-

⁶⁷ *Constitution of Papua New Guinea 1975* s 38.

⁶⁸ *Special reference re s 89(2) and 91(4)(f) of the Bougainville Constitution* (Supreme Court of Papua New Guinea, 29 May 2020) 61.

⁶⁹ *Ibid* 3.

⁷⁰ *Ibid* 8.

⁷¹ *Ibid* 18.

conflict context of the issues that arose. Other members of the court did refer to context, however, noting the need for the process of transition to occur without undue interference. One, Justice Kirriwom, urged that ‘conscience guide the Court’ in its respect of the autonomy and law-making powers of the Bougainville House of Representatives.⁷²

A series of insights might be drawn from this decision. It represented a sensitive understanding of the relevance of term limits in a modified presidential system. The outcome removed a source of tension from the Bougainville elections, preparing the way for a transfer of power to a new President with unquestionable legitimacy to lead the consultations on behalf of Bougainville. In resolving the case, the court also drew on standard tools of constitutional interpretation and analysis, strengthening the credibility of the reasoning of the court. Notably, while former President Momis stated his disagreement with the court’s findings, he accepted the result.⁷³

Conclusion

This addendum to the case study of constitutional implementation in Bougainville in the first report confirms many of its findings. It reinforces the importance of constitutional implementation to sustainable peace, in two ways. First, the inclusion of the referendum requirement in the PNG Constitution enhanced the acceptability of the BPA in the first place. Secondly, however, once included in the Constitution, implementation of the provision was crucial. Failure to do so would have risked significant public backlash and, potentially, violence. Failure to implement the referendum requirement in a way that was recognised as free and fair would have diminished the chance of successful consultations and acceptance of Bougainville’s independence by PNG and by international actors.

Bougainville and PNG now face the task of consultations and ratification of the result. This task is more difficult in part because it is the issue on which the BPA and the Constitution are the most vague and ambiguous. In a sense, at this point, constitutional implementation becomes less important than implementation of the Peace Agreement itself. There is so little guidance in the Constitution as to the way in which this critical final decision will be made that both the provisions of the BPA and the spirit in which it was agreed between the parties are likely to prove more useful.

Once that decision is made, however, and given effect through constitutional change in PNG and Bougainville, the force of the BPA seems to be spent. The new constitutional arrangements will themselves require implementation. They will no longer have their source in the BPA, however. The BPA will become an important part of the history of both PNG and Bougainville, but the link between peace agreement and constitution will be broken.

At this point, pending the outcome of the consultations and ratification, it is possible to conclude that constitutional implementation for sustainable peace has, by and large, been successful in Bougainville. What made this so? There are at least two compelling reasons.

The first is that the BPA, and the constitutions in which it was reflected, were predominantly products of PNG and Bougainville. Unlike instances of constitution making that are heavily influenced by external

⁷² Ibid 8.

⁷³ ‘Almost empty House farewells President Momis’ (*The Bougainvillian*, 17 June 2020)

<https://www.facebook.com/TheBougainvillian/posts/almost-empty-house-farewells-president-momisan-almost-half-empty-bougainville-ho/147643230178387/>.

actors both the BPA and the constitutional arrangements through which it took effect were owned and regarded as being owned by the protagonists in PNG and Bougainville and, by extension, their peoples. Effective implementation is enhanced by local ownership and buy-in by political leaders. The significance of local ownership is reflected in the revised Guidance Note of the United Nations Secretary General on United Nations Constitutional Assistance, released in 2020, which places increased emphasis on both national ownership and constitutional implementation.⁷⁴

The second explanation for the relative success of constitutional implementation of the BPA is the careful and deliberate attention that was paid to the relationship between the BPA and the Constitutions of PNG and Bougainville. Constitutionalisation secured the promises of the Peace Agreement, providing a constitutional basis for implementation. There was no serious uncertainty about the practicalities or validity of constitutionalisation of the BPA and substantive implementation of the constitutional provisions has been uneventful, if imperfect in some respects. It is conceivable that questions of constitutionality may arise from the post-referendum consultations or ratification, falling to the PNG Supreme Court for determination, but there is no serious reason to anticipate this at this stage.⁷⁵ In general, the strategies used in relation to the BPA might provide insights for others in similar circumstances when faced with commitments in a peace agreement that require constitutional change.

As in the first report, we conclude this addendum by emphasising the value of further case studies to better understand the connections between peace agreements, constitutions and sustainable peace and to test the significance of constitutional implementation using the framework developed here. For now, this opportunity, supported by the FBA, to further explore the Bougainville case study has provided additional insights into how the relationship between a peace agreement and a constitution can be managed, with positive effects on constitutional implementation and sustainable peace in Bougainville.

⁷⁴ United Nations, *Guidance Note of the United Nations Secretary General on United Nations Constitutional Assistance* (September 2020).

⁷⁵ There have been questions from various sources which have not yet been seriously pursued about the constitutionality of independence for Bougainville: see 'The Constitutional Requirements for the Bougainville Referendum' *Autonomous Bougainville Government: Media Release*, 30 July 2018, <http://www.abg.gov.pg/index.php/news/read/the-constitutional-requirements-for-the-bougainville-referendum>. It was also reported that the PNG Government had considered taking a constitutional reference to the Supreme Court, should Bougainville vote in favour of independence, but that it had dropped this proposal by March 2019: 'Momis Says Latest Activities Not Good for Bougainville' (*New Dawn on Bougainville*, 3 March 2019) <https://bougainville.typepad.com/newdawn/2019/03/030319momis-says-latest-activities-not-good-for-bougainville-new-dawn-fm-news-abg-president-grand-chief-drjohn-momis-says-c.html>.