NAVIGATING THE NEXUS OF CONSTITUTION-MAKING AND PEACE MEDIATION IN A MULTIPOLAR WORLD: A PRACTICAL GUIDE

EUROPA-UNIVERSITÄT
VIADRINA
FRANKFURT (ODER)

Berghof Foundation

To cite
Claudia Wiehler, Lars Kirchhoff, Luxshi Vimalarajah, Anna Dick, Carla Schraml, Felix Würkert. 2025. Navigating the nexus of constitution-making and peace mediation in a multipolar world: A practical guide. Berlin/Frankfurt (Oder): Berghof Foundation and Europa-Universität Viadrina.

About the authors
Dr. Claudia Wiehler is a researcher in Berghof Foundation's Negotiation and Mediation Support Department. She specialises in process design and ceasefire mediation and has field experience in South Asia, West Africa and Latin America. She is also part of the OSCE Mediation Expert pool and holds a PhD from ETH Zurich.

Prof. Dr. Lars Kirchhoff is the Academic Director of the Institute for Conflict Management/Center for Peace Mediation at the European University Viadrina in Frankfurt (Oder). He has more than 20 years of experience in the design and facilitation of mediation processes in both domestic and international political contexts.

Luxshi Vimalarajah is a Senior Peace Mediation Advisor at the Berghof Foundation. Since 2003, she has been both conceptually and practically involved in designing, leading and facilitating dialogue and mediation processes and providing on-demand support for negotiators, advisors, special envoys, and mediators.

Anna Dick is a researcher and certified mediator. Since 2019, she has worked with the Viadrina Mediation Hub at the German Federal Foreign Office and contributed to related research. She focuses on mediation methodology and conflict analysis, teaches civil conflict transformation, and works as a mediator and trainer.

Dr. Carla Schraml is an Advisor Mediation & Negotiation Support at Berghof and a certified mediator. Her focus areas include innovation in peacemaking, faith-based (insider) mediation, and addressing identity conflicts. As a trainer, she supports conflict parties, insider mediators, diplomats and peace practitioners, among others.

Dr. Felix Würkert is a postdoctoral researcher in the University of Hamburg's Faculty of Law and a trained lawyer and mediator. He previously worked for the Viadrina Mediation Hub in the German Federal Foreign Office. His main research interests include the interaction of law and legitimacy in peace mediation, and the general role of norms in mediation.

Acknowledges
We are grateful to the mediation and constitutional experts who shared their knowledge and experiences in the process of developing this guidance. Our sincere thanks also go to the colleagues who reviewed the study and offered their expertise on specific methodological or thematic questions, including Tom Breese, Prof. Dr. Cheryl Saunders, Prof. Dr. Martin Wählisch, Björn Gehrmann, Theresa Lünemann, and Nicole Töpperwien. This publication was made possible by the support and funding from the German Federal Foreign Office.

Copy editing: Hillary Crowe
Design: AMBERPRESS, Gosia Warrink, Katja Koeberlin
Cover photo: ©gettyimages

Published by

Berghof Foundation

EUROPA-UNIVERSITÄT VIADRINA FRANKFURT (ODER)

Funded by

Federal Foreign Office

Berghof Foundation Operations gGmbH
Lindenstraße 34
10969 Berlin / Germany
www.berghof-foundation.org

Europa-Universität Viadrina
Große Scharrnstraße 59
15230 Frankfurt (Oder) / Germany
www.europa-uni.de

NAVIGATING THE NEXUS OF CONSTITUTION-MAKING AND PEACE MEDIATION IN A MULTIPOLAR WORLD: A PRACTICAL GUIDE

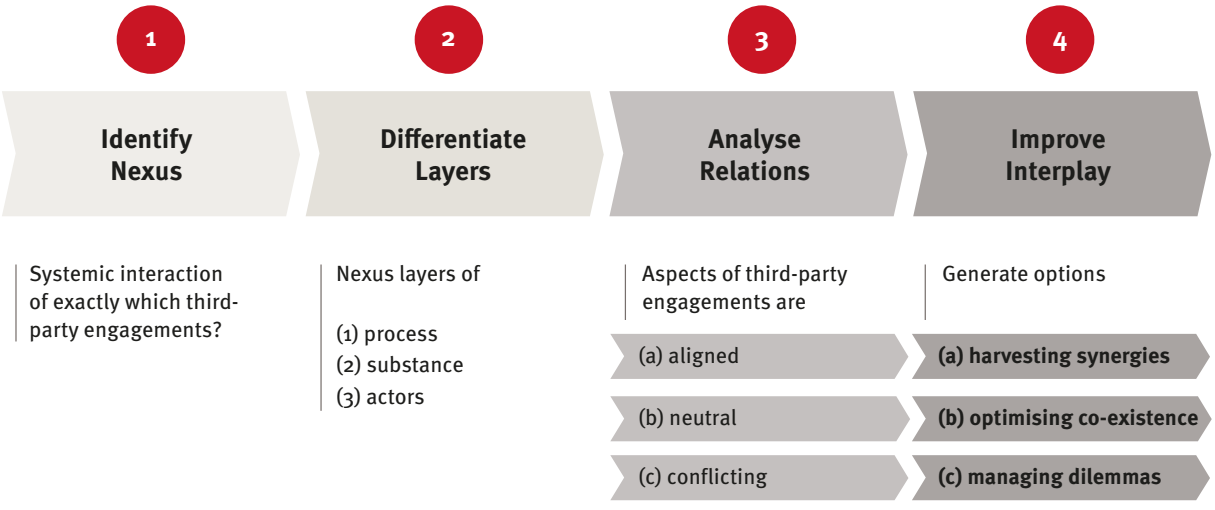
Table of contents

Executive summary

THE PROBLEM: Peace mediation almost inevitably deals with issues of constitutional relevance, and constitution-making efforts in fragile contexts are intensely affected by parallel or previous peace talks. Both processes strive for conflict transformation and sustainable peace. Nonetheless, constitution-making and peace mediation are not necessarily coordinated or well-integrated. Neglecting the 'constitution-mediation nexus' can have tremendous consequences, undermining and devaluating both processes and their aspired outcomes. The spectrum of challenges and risks includes but is not limited to unconstitutional commitments during peace negotiations, unintended path dependencies, legal challenges to peace agreements, lack of legitimacy of resulting peace treaties or constitutions, and the detrimental lack of societal ownership.

THE GOAL: This guidance aims to support constitution-making and peace mediation practitioners in navigating the nexus in times of geopolitical change by providing an analytical framework and methodological toolbox that, in principle, can also be applied to other nexus constellations, including the HDP Nexus (Humanitarian–Development–Peace).

OUR APPROACH: This guidance adds value in two respects: it suggests a refined framework to navigate peace process nexuses by distinguishing and systematically analysing the process, substance, and actor layers of these nexuses. The figure below summarises this generic 'nexus navigation method'. On that basis, it offers concrete methodological guidance on how to address the constitution-mediation nexus, going far beyond problem description and analysis. In so doing, the guidance builds on existing research and practice, interviews with mediation, constitution-making, and country experts, and case examples, including from Israel/Palestine, the Philippines, Libya, and Syria.



KEY FINDINGS ON PROCESS PRINCIPLES:

- **A NUANCED PERSPECTIVE ON CORE INTERESTS:** By focusing on the interests underpinning process logics and principles, the guidance can provide a more nuanced perspective on the tensions between – but also alignment of – the two processes. Previous work rightly emphasised the central tensions between peace mediation striving for participation and buy-in of the de facto power holders and constitution-making aiming at a broad participatory process with the goal to limit the power of the former. Yet the alignment in limiting the influence of external actors, the potential for co-existence of different regulatory logics, and overlapping normative frameworks have received less attention.

- **MOST TENSIONS ARE MANAGEABLE:** Some interests of constitution-making and peace mediation are undoubtedly in conflict, and their respective implementation strategies can seem mutually exclusive. However, diligent application of dilemma management strategies allows these conflicts to be addressed, for example, by prioritising interests, sequencing inclusion modalities, or compartmentalising regulatory logics within agreement texts.

- **WATCH OUT FOR FALSE FRIENDS:** An additional challenge at the constitution-mediation nexus is that conflictive logics can be hidden behind similar or even identical terminology. For instance, when a constitutional expert speaks of ownership, their understanding of the term most likely differs from that of a peace mediator. Third parties hence need to be attentive to these differences in meaning by considering who speaks about what in which context.

KEY FINDINGS ON SUBSTANCE:

- **CONSTITUTIONAL CHANGE CAN TAKE MANY FORMS:** Discussions on constitutional change in the context of peace mediation often focus on amendments or the adoption of a new constitution, going as far as a complete rupture with the previous constitutional order. However, these are only two of many options along a spectrum of constitutional change, including less invasive options like reinterpretation.

- **HIDDEN IN PLAIN SIGHT:** A pre-eminent task of peace mediators is to identify those peace mediation issues that have constitutional relevance or potentially develop it at a later stage. This task can be challenging because constitutional relevance goes far beyond the regulation of political power: it may equally concern issues in the realms of security, socioeconomics, and justice. In addition, procedural features of the peace mediation process can lead to the unconstitutionality of an agreement after its conclusion. Identifying those issues and procedural questions requires an in-depth understanding of the constitution in the context in question and the 'usual suspects' from a comparative constitutional perspective.

- **CONSTITUTIONAL CULTURE, POWER, AND FEASIBILITY:** When peace mediation practitioners support conflict parties in navigating constitutional change, they should consider the constitutional culture, power, and feasibility as the cornerstones for evaluating which options for change might be suitable or detrimental. Constitutional

culture includes a focus on the degree of rigidity of the constitution, the political power constellation highlights for which options support can be secured, and the technical feasibility lens considers which change options are at all viable in a given context.

KEY FINDINGS ON ACTORS:

- **DIFFERENT, YET COMPATIBLE:** Both processes are accompanied by highly specialised third parties. Their values, mandates, and skill sets, to name a few attributes, differ but also have a high potential for complementarity. Nexus-sensitive process design is one approach to harness this potential, for example, through joint conflict analysis, bringing together and integrating the expertise from both sides.

- **APPRECIATION AND AWARENESS AS THE BASIS FOR COLLABORATION:** Practitioners from both sides often lack awareness about the value that the other's expertise can add. Additionally, their desire to maintain autonomy and keep the complexity of processes manageable discourages them from working together. A first step towards improved collaboration at the nexus is therefore to raise awareness and foster appreciation for the other professional community. For instance, donors can use their convening power to bring these different actors together during informal or formal gatherings, or practitioners can be trained on the nexus and its implications.

- **REDUCING STRUCTURAL BARRIERS TO COLLABORATION:** Third parties willing to collaborate at the nexus face many structural barriers, including short project cycles, time pressure during daily operations, competition over donor funding, and demands for confidentiality. These barriers should be reduced, for example, through integrated funding schemes, project roles specifically designed for bridging the processes, and enhanced coordination among donors.

KEY CONCLUSIONS OF THIS GUIDANCE:

- **CONTEXTS DIFFER BUT METHOD ALWAYS MATTERS:** The unique traits of each context can make it tempting to deal with the nexus in an intuition-based and ad hoc manner, reacting to how the case in question develops. Certainly, there are no one-fits-all solutions to address the nexus. However, diligent analysis, identifying a range of options, and a conscious choice among them are crucial to allow for forward-looking management of the nexus, enabling third parties to counter tensions early on and create as much synergy as possible. This is especially important in complex multi-level environments where international, national, and local interventions interact, requiring multi-scalar and system thinking. The art lies in balancing appreciation for the uniqueness of each case with an analytical and methods-oriented mindset.

- **UTILISE STRUCTURAL CHANGE TO IMPROVE THE NEXUS INTERPLAY:** The dramatic shifts in the geopolitical environment and the related changes in the constitution-making and peace mediation fields require third parties to fundamentally reconsider their goals, strategies, skills, and ethics. This moment of upheaval might be a window of opportunity to better integrate nexus thinking in peace processes, identify common

goals and interests, and fundamentally rethink the interaction with the other field. By shifting the focus away from rigid procedural adherence to one of the two processes, practitioners can develop context-sensitive options that enhance integration rather than force trade-offs.

- **HETEROGENEITY AS AN OPPORTUNITY – FINDING ALLIES:** Organisational identity, individual conviction, and context shape the style of intervening third parties. The enormous heterogeneity in the degree of interventionism and normative objectives in both professional communities can make it challenging to arrive at any generalisable conclusions about them. Yet this diversity also offers a valuable entry point to increase cooperation at the constitution-mediation nexus. Third parties can seek to identify and build alliances with like-minded actors with shared values 'on the other side' who might appear closer to them than some colleagues from their own field. Together, they can then try to find innovative solutions to the many challenges at the nexus.

1. Introduction

In Burundi, power-sharing principles from the Arusha Peace Accords (2000) were meant to be enshrined in a future constitution. However, when a previously excluded armed group gained power, the constitution-making process overwrote these earlier principles, critically undermining the original peace agreement (Nindorera, 2019). In Nepal, marginalised groups in the Terai region protested in 2015 against a new constitution that failed to address their concerns (Dudouet and Lundström, 2016) – partly because political elites were able to assert their preferences in closed-door negotiations in the aftermath of the Comprehensive Peace Accord in the Maoist conflict. In Libya, by contrast, constitution-making was attempted in the absence of a political settlement between 2011 and 2015, leading to a blockage of the constitution-making process and contributing to the division of the country (Bell and Zulueta-Fülscher, 2016).

These examples showcase the complexity and risks at the nexus of constitution-making and peace mediation. Positive examples like the Ohrid Framework Agreement (2008) in North Macedonia are comparatively rare. The Ohrid Agreement had included drafts of constitutional amendments, which were then adopted through the regular parliamentary procedures (Stankovski, 2019, p. 13). At the same time, the complexity and risks at the nexus can hardly be avoided: constitutional questions lie at the heart of almost all armed conflicts since such conflicts are typically competitions over political power, territory, and the nature of the state – exactly those issues codified in constitutions. Thus, in conflict-affected contexts, constitution-making and peace mediation can be seen as sub-processes of an overarching peace process, seeking to achieve conflict transformation and sustainable peace (Mubashir, Klauke and Vimalarajah, 2021, p. 335).

Yet both processes may critically undermine each other if not managed well. This is because tensions and dilemmas between the two approaches are manifold. For example, popular sovereignty and balancing political power are central to constitution-making, while peace mediation often prioritises facilitating agreements between key actors and those with military power to end violence (Würkert, 2022, p. 146). Also, the rupture with the existing constitution might appear a necessary step to forge such an agreement from a peace mediation perspective, whereas the 'killing of a legitimate constitution' might seem unjustifiable for constitution-making support actors. To address these challenges, collaboration and coordination between constitution-making and peace mediation practitioners would be critical, but the third parties' desire to safeguard their autonomy and keep the complexity of interventions manageable too often prevents them from doing so.

Some of these challenges at the constitution-mediation nexus have been scrutinised and unpacked during the last few years, including in the Primer on Constitutions and Peace Processes by the Berghof Foundation and UN DPPA (2020). Furthermore, research on this topic has analysed which principles underlie each of the two approaches (e.g. Töpperwien, 2019; Saunders *et al.*, 2024), the legal status of peace agreements (e.g. Nathan, 2020), when and how constitutional issues arise in peace processes (e.g. Berghof Foundation and UN DPPA, 2020), and the value and pitfalls of interim constitutions in post-conflict contexts (e.g. Zulueta-Fülscher, 2015; Bell and Zulueta-Fülscher, 2016), among other things.

Yet existing work mostly stops at defining the problems and challenges at the constitution-mediation nexus. The practical and methodological implications of these findings for the work of third parties from both professional communities remain unclear. How can third parties practically deal with the described challenges that arise from the nexus in the specific contexts they are working on?

This guidance seeks to add value by going beyond problem description and analysis. To be able to do so, the guidance builds upon existing research and practice, an in-depth analysis of existing guidance documents, a comprehensive review of existing case studies, and interviews with constitution-making and peace mediation experts. Specifically, the guidance is intended to support the work of practitioners from both fields in two ways:

1) It introduces the generic nexus navigation method that offers a refined analytical and methodological framework to improve the interplay at peace process nexuses. A central contribution of this approach is the analytical separation of the underlying process logics and principles, substantive issues, and third-party attributes and interests at the nexus. This method can be applied beyond the intersection of constitution-making and peace mediation, for example, at the Humanitarian-Development-Peace (HDP) nexus.

2) On that basis, the guidance provides concrete methodological options to deal with the constitution-mediation nexus. These options help to address tensions between the two approaches, e.g. through applied dilemma management, but also highlight specific recommendations to foster synergies and manage the co-existence of constitution-making and peace mediation where possible.

The constitution-mediation nexus has experienced new challenges and developed new forms of relevance through the shift towards a multipolar world order that has characterised the 2020s to date. The spectrum of globally accepted governance systems has widened significantly, and the fading of the liberal peace paradigm has made it necessary to have a fresh look at questions surrounding both peace and constitution-making. Indeed, the escalation of armed conflicts in Ukraine, Sudan, and Gaza, the often-invoked rise of transactional peacemaking, and the weakness of central state institutions in many contexts appear to call the importance of constitution-making and peace mediation into question (Bell and Ainsworth, 2022; Hellmüller and Salaymeh, 2025).

However, a sole focus on the new multipolarity of geopolitics and the massive military escalation of several conflicts directs the attention away from the fact that nonviolent tools for conflict transformation and sustainable peace remain essential. The contemporary competition between different value systems and approaches to good governance does not affect the importance of mediation in finding both elite and societal consensus on exactly these questions – even if the design of the processes leading to such consensus may differ (Thornton, 2024). Similarly, constitution-making is still identified as having the potential for "progressive change" (Bell and Ainsworth, 2022, p. 11). Not least, current examples underline the continuing relevance of and opportunities at the constitution-mediation nexus: the current developments in Syria in the aftermath of the ousting of the Assad regime; the ongoing fight of the Ethnic Armed Organisations in Myanmar for the toppling of the military junta and a substantial change of the 2008 constitution; and the striving for greater regional autonomy in the north- and southwest of Cameroon, the accommodation of which will require changes to the constitution of the centralised Cameroonian state. That said, basing both approaches on systematic analysis and sound methods will be central to steering through the geopolitical upheaval of these times.

To provide such practical guidance, this publication proceeds as follows: the next section introduces the constitution-mediation nexus in more depth and suggests a step-by-step approach to analyse and practically tackle peace process nexuses in general and the constitution-mediation nexus in particular. A key feature of this approach is to analytically separate the nexus layers of process, substance, and actor. Accordingly, each of the subsequent three sections focuses on one layer in depth, analysing how constitution-making and peace mediation relate to each other in the layer in question and suggesting methodological options to improve their interplay. The guidance concludes by presenting key takeaways and reflecting on the need for future work on the nexus, both in research and practice.

2. Navigating the nexus of constitution-making and peace mediation

Constitution-making and peace mediation are closely intertwined: to prevent or resolve armed conflict, peace mediation needs to directly engage with questions related to access to and the exercise of political power over territory. These questions in turn are typically codified in a constitution (or similar documents codifying the basic law of a country). As Töpperwien (2019, p. 12) put it: "Keeping [peace and constitution-making] processes separate is an illusion." This guidance refers to the system of these interlinkages as the constitution-mediation nexus, meaning that overlapping issues and questions are addressed by third parties in peace mediation and constitution-making processes, creating complex interdependencies.

This section introduces the analytical and methodological framework underpinning this guidance. The first part unpacks the concept of the constitution-mediation nexus and illuminates its practical implications, employing Israel/Palestine, the Philippines, and Libya as examples. Against this background, the nexus navigation method is proposed in the second part, a four-step approach to address interlinked third-party engagements in the context of a peace process.

2.1 Constitution-making and peace mediation in an overarching peace process

Constitution-making and peace mediation can be thought of as two distinct but interlinked sub-processes of an overarching peace process, sharing the common goal of creating lasting peace (Töpperwien, 2019, p. 7; Mubashir, Klauke and Vimalarajah, 2021). Constitution-making is understood as "a broad concept that covers the process of drafting or amending a constitution, the substance of constitutional text, and the subsequent implementation of a constitution" (*Guidance Note of the Secretary-General on United Nations Constitutional Assistance*, 2020, p. 1).[1] Peace mediation in turn is defined as "a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements" (*UN Guidance for Effective Mediation*, 2012, p. 4).

The focus of this guidance is on constitution-making and peace mediation processes with a basic commitment to liberal and democratic principles. As such, both strive for conflict transformation and democratisation. At the same time, putting this commitment into practice can be challenging as the buy-in of political and military elites is needed, and authoritarian structures might be stabilised by accommodating their preferences. This discrepancy between ideals and practice may

1 Constitution-making is sometimes differentiated from constitution-building, although the distinction between the two is blurred. Constitution-making tends to focus more narrowly on the process of amending or adopting a constitution, whereas constitution-building can be understood as the long-term process "of establishing and maintaining a constitutional order" (Berghof Foundation and UN DPPA, 2020, p. 26).

apply to both processes. However, depending on how the processes unfold in each case, it can also lead to a fundamental tension between them: while constitution-making overall strives to limit elite power, peace mediation sometimes enshrines the de facto power of the elites in a peace agreement to bring violence to an end.

The elements and sequence of constitution-making and peace mediation processes are unique to each case. While sometimes presented linearly, the reality is much more complex as processes can stall, break down, or rewind. For example, the constitution-making process in Yemen, which started first through political negotiations under the auspices of the Gulf Cooperation Council (2011) and continued through a large National Dialogue process (2013), has been stalled by the outbreak of the civil war in 2014 (Berghof Foundation, 2017, p. 306). Nonetheless, a few commonalities across processes can be identified. The adoption of a new constitution tends to initially involve closed-door, high-level negotiations to agree upon a constitutional commission. The latter can then open the process to the public and establish a constitutional assembly and/or other participatory mechanisms to adopt the final constitutional document. Similarly, peace mediation often begins behind closed doors, including informal explorative talks and mandated discreet talks. These talks might then transform into formal negotiations, culminating in the signing of a peace agreement and definitive ceasefire. Prisoner exchanges, other confidence-building measures, and preliminary ceasefires can be agreed upon throughout the process. Yet again, this sequential presentation is a strong oversimplification: several 'loops' of informal and formal talks and negotiations may be required before an agreement is reached; in other cases, the process does not extend beyond more limited transactional agreements.

In addition to the complexities of each process, constitution-making and peace mediating efforts are often not coordinated or well-integrated. On the contrary, the overarching peace process can comprise disjointed initiatives by a variety of actors (Arévalo, 2024). Even within the field of peace mediation alone, the increase in parallel, yet uncoordinated initiatives poses a challenge to practitioners – a phenomenon recently referred to as multimediation (Bell, 2024). One implication is that constitution-making and peace mediation can relate to each other in very different ways – depending on the timing and structure of each process and the overarching peace process. Constitution-making and peace mediation can be sequenced or take place in parallel. Sometimes, only one of the two processes is fully developed.

Five process constellations, depicted in Figure 1, can be identified.[2] The first and most common constellation is that peace mediation is followed by constitution-making. Typically, the peace mediation process results in an agreement providing for the amendment or adoption of a constitution or making a constitutional change necessary, even if this is not explicitly stated in the agreement. An example of this constellation is the post-electoral crisis in 2008 in Kenya, which was resolved by a power-sharing agreement and the subsequent amendment of the constitution (Horowitz, 2008). In some cases, interim constitutions are leveraged in peace agreements as a bridge between the old and new constitutional order (Zulueta-Fülscher, 2015, p. 27). An interesting example of this is the interim constitution in South Africa in 1993/1994, which was crucial in ending the apartheid regime and was replaced with a permanent constitution three years later (ibid.).

The second constellation describes how both processes evolve in parallel. This constellation is especially challenging from a third-party perspective because the developments in one process can have direct repercussions for the other. In the aforementioned case of Libya, for instance, constitution-making and peace mediation processes happened simultaneously but remained disconnected from each other. Consequently,

2 Evidently, the delineation between these different constellations can be blurred as processes overlap and can hence be partly sequential and partly parallel. Notwithstanding, these five constellations can function as a point of orientation for practitioners seeking to map the processes in their respective cases.

Figure 1: Process constellations at the constitution-mediation nexus

both processes undermined each other, among other things, because they produced concurrent constitutional outcomes (Bell and Zulueta-Fülscher, 2016). The third constellation emerging in principle is rarer empirically: constitution-making is followed by peace mediation. It is relevant if constitutional changes are the precondition for negotiations to start in the first place or if issues arising in a constitution-making process are deliberately made subject to future negotiations. The latter was the case for the status of contested territories between Sudan and South Sudan, for example.

The fourth and fifth constellations, which do not count as nexus constellations in the strict sense, refer to situations in which only constitution-making *or* peace mediation takes place as fully-fledged processes, yet still contains elements of the other. When constitution-making is the only process, this can be termed 'constitution-making as peace-making' (Töpperwien, 2019, p. 11). For instance, the Bonn Agreement (2001) set up an interim government and constitution-making process to fill the power vacuum after the toppling of the Taliban government in Afghanistan. When peace mediation is the only process and deals with issues of constitutional relevance, this can be summarised as 'peace-making as constitution-making' (ibid.). A frequently mentioned example is the US-led peace talks on Bosnia and Herzegovina, resulting in the Dayton Peace Agreement (1995) including a new constitution in the annex.

In light of these conceptual considerations, the question which arises is what the constitution-mediation nexus looks like in practice. What are the challenges practitioners face? Three short case studies are provided, underlining why it is crucial to think about constitution-making and peace mediation together, not as isolated processes.

Example 1: How constructive ambiguity in the Oslo Accords prevented the legal precision needed for developing Palestinian statehood

The 1993 Oslo Accords between Israel and the Palestine Liberation Organization (PLO) are a renowned example of what peace mediators call constructive ambiguity. The Oslo Accords (for good reasons) did not address core issues of the conflict and allowed for strongly diverging interpretations: the Palestinian leaders, on the one hand, believed that the Oslo Accords and the following process would lead to Palestinian statehood. Israel and the United States, on the other hand, insisted that the Oslo Accords contained no whiff of any such commitment (Brown and Alsarghali, 2024). This led to a situation in which the then Prime Minister Yitzhak Rabin called Jerusalem the "ancient and eternal capital of the Jewish people" which "must remain united and be our capital forever". Conversely, PLO Chairman Yasser Arafat interpreted Oslo to mean that "the Palestinian flag will soon fly over Jerusalem" ('Road Map Torn by Ambiguity', 2003).

Yet this ambiguity, which had made the Accords possible from the perspective of the main mediators (Pehar, 2001), turned out to impair subsequent constitution-making processes and the creation of a functioning Palestinian state. Domestic and international leaders could use the ambiguity to bend and break the newly established institutions to their liking (Brown and Alsarghali, 2024).

Specifically, the Oslo Accords created the Palestinian National Authority (PNA), including a legislative council. This council drafted the Basic Law as its transitional constitutional basis, but the law was full of gaps and omissions. For instance, the law did not define the length of terms, the modalities of second elections, or functioning enforcement structures. Partly, this was due to the transitional nature of the Basic Law, as it was assumed that the PNA would soon be dissolved into an emerging Palestinian state.

These limitations of the Basic Law contributed to the violent escalation in 2007, resulting in the splitting of the PNA between the West Bank and Gaza and a dysfunctional legislative council. While elements of the Basic Law survived, the law could not create political authorities in the West Bank and Gaza accountable to the Palestinians (ibid.).

Example 2: How a clash with existing constitutional law led to the collapse of the Bangsamoro peace process in the Philippines in 2008

On 5 August 2008, the peace negotiation teams of the Philippine government and the Moro Islamic Liberation Front (MILF) were scheduled to sign the Memorandum of Agreement on Ancestral Domain. The memorandum was considered a breakthrough on the way towards a permanent resolution of the secessionist conflict over the Mindanao/Bangsamoro region in the Philippines. Yet, to the surprise of the mediators and parties gathered to sign the memorandum, it was declared unconstitutional by the Supreme Court after a wave of protest against the agreement (Williams, 2010). As a result, the violence between the government and MILF resumed.

The memorandum had provided for the granting of territorial autonomy to the contested region, including the establishment of the Bangsamoro Juridical Entity (BJE). The Supreme Court concluded that the intended devolution conceded too much power to the region and that the proposed "association" between the newly established autonomous territory and the national government ran "counter to the national sovereignty and territorial integrity of the Republic" (Supreme Court decision cited based on Ozcelik and Sapiano, 2018). It is noteworthy that talks between the government and the MILF were held under the agreement that "the MILF would not bring up the topic of complete independence" and that the Philippine government "would not negotiate within the framework of the Filipino constitution" (Williams, 2010, p. 1). However,

this agreement clashed with the strong role of the Supreme Court in the Philippines, to which civil society actors opposed to the agreement had appealed.

As a consequence of the memorandum having been ruled unconstitutional by the Philippine Supreme Court, the awareness of the importance of the constitution-mediation nexus was much higher in the peace negotiations during subsequent years. The possible unconstitutionality of the results of the negotiations was carefully considered, and a Supreme Court judge was included on the government negotiating team. This had implications for the design of the Bangsamoro Organic Law, which constitutes the comprehensive agreement settling the conflict in 2014 (Ozcelik and Sapiano, 2018).

Example 3: How parallel processes and uncoordinated actors resulted in contradicting agreements in Libya

From 2011 on, constitution-making and peace mediation processes were conducted in parallel in post-Gaddafi Libya. Both processes had overlapping goals, yet the involved third parties and party representatives approached them very differently, leading to different organisational setups and assessments regarding the prioritisation of the processes. The results of the processes were also partly contradictory.

The ultimate goal of the UN-led mediation efforts was to unify Libya by replacing rival parliaments and associated governments with one set of political institutions acceptable to all (Watanabe, 2019). Similarly, the constitution-making process aimed to create unified political institutions, which were to be legitimised through elections. Many national and international actors saw constitution-making as the key process of Libya's transition (van Lier, 2018, p. 7) – yet the mediation process was equally supposed to be the "dominant framework for negotiating a political solution to the conflict" (Watanabe, 2019, p. 2).

The constitution-making process was conceived of as a rather technical process, aiming to bypass partisan politics, e.g. in the composition of the Constitution Drafting Assembly (CDA). In hindsight, however, this strategy was unsuccessful as it could not accommodate the highly political nature of the constitution-making process. Specifically, a rather rudimentary interim constitution (also called the 'Constitutional Declaration') in 2011 set the constitution-making process in motion. It stipulated that the General National Congress (GNC) should be elected, which could then designate a prime minister and legitimise the CDA to draft a constitution (Bell and Zulueta-Fülscher, 2016, p. 32). However, before the CDA could present the final constitutional draft, the GNC called for elections for the new House of Representatives, ultimately contributing to the split of the government between Tripoli and Tobruk in 2014 (ibid.). Pressing ahead with elections and a constitution-making process without any political agreement had contributed to the emergence of this situation (Bell and Zulueta-Fülscher, 2016, p. 33).

After the split of the government, the UN-led political process moved forward, and finally the Libyan Political Agreement was reached between representatives of both governments in 2015. This framework was, in essence, a second interim constitution, outlining a process towards a final constitution as part of a new effort to broker a political settlement. The relationship between the Libyan Political Agreement and the Constitutional Declaration is ambiguous, not least in terms of legal supremacy (Bell and Zulueta-Fülscher, 2016, p. 33).

2.2 Introducing the nexus navigation method

As the preceding discussion showed, peace processes are a complex amalgamation of sub-processes. Relevant processes are not limited to peace mediation and constitution-making but also include those focusing on human rights, transitional justice, humanitarian aid, and sustainable development, among others (e.g. *Humanitarian-Development-Peace Nexus*, 2020; Månsson, 2023). The interlinkages of these processes can have severe consequences for the prospects for peace if not handled well. Therefore, the goal of this guidance is to introduce a new analytical framework and methodological toolbox – in short, the nexus navigation method – which is then applied to the constitution-mediation nexus in the subsequent sections. The suggested method proceeds in four analytical steps, as the overview in Figure 2 demonstrates. Note that employing this method in practice requires constant re-evaluation and adaptation to the evolving context. As with any analytical framework and method, the nexus navigation method is meant as a simplifying scheme that helps to deal with the ever more complex reality.

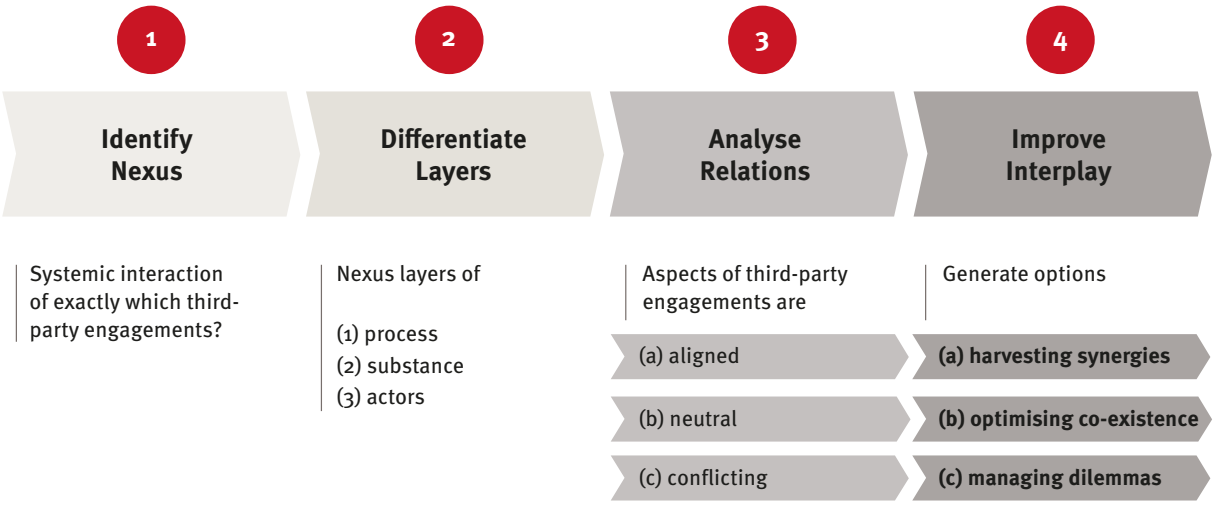


Figure 2: Step-by-step approach to address peace process nexuses

Step 1 – Identify the nexus: In the first step, it is essential to identify the nexus in question by considering which third-party engagements systemically interact. This can be challenging because usually a multitude of processes and initiatives take place in the same context – as in Syria at the time of writing. A clear problem definition and analytical prioritisation are required to select the most relevant ones.

> *>>> **Constitution-mediation nexus:** In this guidance, the two selected third-party engagements are constitution-making and peace mediation, as they are two of the most important approaches to create lasting peace, yet they also have the potential to undermine each other.*

Step 2 – Differentiate and flesh out the nexus layers: The second step aims to make the complexity of the nexus more manageable – analytically and methodologically – by differentiating the process, substance, and actor 'layers' of the nexus. The process layer focuses on the process logics and principles that are driving and constraining the third-party activities in question. The substance layer sheds light on the substantive issues at the centre of each process, and the actor layer analyses the characteristics of

the third parties involved. Note that the distinction between the nexus layers provides the scaffolding for this guidance, as the following three sections will each unpack one layer in detail.

>>> ***Constitution-mediation nexus:*** *Constitution-making and peace mediation demonstrate differences and commonalities across the three nexus layers: for example, both have their own understanding of process principles like ownership, discuss overlapping issues and questions related to access to public power, and are supported by highly specialised third parties with distinct mandates and value sets. Table 1 provides an overview of the aspects analysed in each layer at the constitution-mediation nexus.*

Nexus layers		
Process: Logics and principles	**Substance:** Issues relevant to constitution-making and peace mediation	**Actors:** Attributes and interests of third parties
Ownership, participation, and inclusion	Political power	Goals, values, and beliefs
Regulatory logic	Security	Mandate and tasks
Normative frameworks	Justice	Knowledge and skills
	Socioeconomics	Institutional and operational constraints

Table 1: Overview of nexus layers and corresponding aspects relevant to both constitution-making and peace mediation

Step 3 – Analyse the relations: The intertwining of third-party engagements is unavoidable and not per se problematic – it depends on *how* they relate to each other. Accordingly, the third step zooms in on each layer, seeking to understand how specific aspects of the process, substance, and actor layers relate to each other. For example, one might ask how the knowledge and skills of mediating parties relate to the knowledge and skills of the third parties in charge of a humanitarian intervention. More precisely, the nexus navigation method suggests that the relationship between the layer-specific aspects can be considered as aligned, neutral, or conflicting. *Aligned* means that an aspect is in agreement and harmony for both third-party engagements. *Neutral* is used if aspects differ, but this difference does not lead to conflict – instead, both approaches can peacefully co-exist or even complement each other. *Conflicting* means that third-party engagements are competitors regarding this specific aspect: the fulfilment of one precludes the fulfilment of the other – a zero-sum logic applies.

>>> ***Constitution-mediation nexus:*** *Three examples from the constitution-mediation nexus illustrate this point: An example of alignment in the substance layer is if the regulation of a substantive issue in a peace agreement is in harmony with the regulation of the issue in the existing constitution of a country. An example of a neutral relationship is the knowledge and skills of constitution-making and peace mediation practitioners. Both professional communities have distinct technical expertise which*

can enrich each other's work. Finally, a conflict arises in their respective understandings of ownership in the process layer: the narrower understanding of ownership in peace mediation focusing on the conflict parties stands in conflict with the aspiration for a broad societal commitment advanced in constitution-making.

Step 4 – Improve the interplay: The fourth and final step seeks to improve the interplay of the third-party engagements at the nexus by identifying and applying concrete methodological options. Building on the preceding analysis, the chosen methods should carefully consider which aspects are aligned, neutral, or conflicting. Managing and resolving conflicting aspects is of utmost importance as they have the potential to undermine the success of both engagements. Here, dilemma management strategies as elaborated by the Tough Choices Project involving Viadrina University, ETH Zurich and the Kyiv Mohyla Academy (Kraus *et al.*, 2019) are suitable. These strategies can open up new options and avoid undue compromises. By contrast, when aspects are neutral or aligned, this can offer opportunities for optimising the co-existence of and for creating synergies between the third-party engagements. That said, any methodological option needs to be adapted to the context, and its viability will be strongly shaped by the power distribution between the actors involved.

*>>> **Constitution-mediation nexus:** Each of the following sections will discuss methodological options to improve the interplay in the process, substance, and actor layers of the constitution-mediation nexus. An example of applied dilemma management is the incremental increase in participation and inclusion throughout sequential peace mediation and constitution-making processes. Co-existence is optimised when the agreement texts of the constitution-making and peace mediation processes and their specific regulatory logics are kept separate. Finally, synergies are created through nexus-sensitive process design, fostering collaboration and coordination between third parties.*

3. Process: Unpacking logics and principles

Constitution-making and peace mediation follow distinct logics and principles. This section, focusing on the nexus process layer, unpacks them and suggests how to translate them into practice at the nexus. While numerous logics and principles are at work in both processes, three clusters seem to have the biggest impact on the process dynamics unfolding:

- Principles of ownership, participation, and inclusion, dealing with the questions of who should be involved when and with how much agency,
- The regulatory logics of both processes, dealing with the differing scope and nature of regulation that they aim to achieve,
- The diverse and partly overlapping normative frameworks serving as reference points in both processes.

These logics and principles can contradict each other and thereby endanger the success of both processes. Revisiting the example of the Israel-Palestine conflict, the constructive ambiguity in the Oslo Accords as a result of a peace mediation process clashed with the regulatory logic of constitution-making, which would have required much more precision and technical detail. One additional challenge is that conflicting logics can be hidden behind similar or even identical terminology. For example, both constitution-making and peace mediation emphasise the importance of ownership and respect for domestic and international norms but have a different or even conflicting understanding of what that means – a complication referred to here as 'false friends'.

The phenomenon that both processes follow their own, partly colliding logics and principles has already been described in recent years (e.g. Töpperwien, 2019; Saunders *et al.*, 2024). How to best deal with this insight remains an open question since many commentators limit themselves to raising the problem as such. An advanced attempt to address the problem of colliding principles has been developed by Töpperwien (2019), suggesting two potential avenues: either to prioritise between the processes and consciously let the more compelling logic prevail or to identify additional, overarching principles that reflect "the needs of the overall peace process" (ibid., p. 7). Seen from a method-based dilemma management perspective, however, this approach only reflects two out of many methodological responses to colliding logics and principles.

Building on this existing work, this guidance strives to offer an in-depth analysis of the goals and interests implicitly driving the logics and principles: for instance, *why* is it that a peace agreement can and possibly should use less precise language than a constitution? Importantly, the initial analysis of these underlying interests is indispensable because only if it is understood which of them are aligned, neutral, or conflicting can appropriate methodological options be developed. An illustrative overview of the key interests of constitution-making and peace mediation is provided here before the following sub-sections analyse them in depth.

Main interests driving constitution-making processes:

- Find a political settlement by translating popular power into political power,
- Maximise societal identification with the future state,

- Shield the process from external influence,
- Ensure governance of society in the long term,
- Foster a national identity,
- Establish functioning state institutions,
- Pay necessary respect to international norms,
- Ensure legal soundness of constitution,
- Ensure an effective and legitimate process.

Main interests driving peace mediation processes:

- Find a political settlement by translating de facto power into political power,
- Shield process from external influence,
- End violence in the short and medium term,
- Create an initial political vision for the post-conflict society,
- Stabilise international normative frameworks,
- Ensure legal soundness of the peace mediation agreement,
- Ensure an effective and legitimate process.

Before turning to the in-depth analysis, a caveat is warranted: the principles can be understood and enacted very differently *within* the respective realms of constitution-making and peace mediation. Accordingly, there is no generic level of friction or harmony in the process layer of the constitution-mediation nexus; rather, it varies across contexts and their respective third-party styles (cf. Box 1). One implication of this heterogeneity *within* the fields is that a gentle, inclusive mediation style and a careful, open approach to constitution-making might fit together relatively well – and potentially much better than two different styles of peace mediation would, for example.

3.1 Ownership, participation, and inclusion

Ownership, participation, and inclusion are key principles in constitution-making and peace mediation alike. The three concepts overlap and evolve around the questions of who participates, how, and with how much agency, i.e. ability to influence the process. Participation and inclusion usually focus on the first part (who and how). Ownership, in turn, is concerned with the influence different domestic and international actors have on a process, i.e. their agency, assuming that larger influence leads to higher support and commitment. Against this background, inclusion can be a necessary but insufficient precondition for ownership (Alvarez *et al.*, 2013, p. 15). Yet, as demonstrated in the following, the specific understanding, practical implications of, and interests driving ownership, participation, and inclusion drastically differ for constitution-making and peace mediation. In practice, this can lead to contradicting assumptions about how their respective processes should be designed, preventing an integrated and effective approach to the constitution-mediation nexus.

One of the core goals of constitution-making is to translate popular power and the will of the people into political power and a sustainable institutional structure reflecting societal needs. This means that the society as a whole holds the constitution-making power and should be able to decide how it wants to be governed in the long term, not least ensuring societal identification with the future state. The people as the source of power in constitution-making has been the subject of an extensive debate in constitutional law, the philosophy of law, and beyond. From a legal perspective, the people as the holder of the constitution-making power *(pouvoir constituant)*

Box 1: Overview of third-party styles and approaches

The degree of interventionism can serve as a common denominator to differentiate between styles and approaches in constitution-making and peace mediation alike. The degree of interventionism is understood as the tendency of third parties to impose their ideas, norms, and envisioned results on the context in question. Presumably, both the organisational identity and the convictions of the intervening individual determine the observable degree of interventionism.

Against this background, at least three peace mediation styles can be distinguished (e.g. *Basics of Mediation*, 2017). A facilitative style means that mediation actors organise and facilitate communication between the parties in a non-directive manner, refraining from making substantial suggestions. Formulative mediation, by contrast, is slightly more directive, meaning that mediation actors structure the process and offer options. As for facilitative mediation, the consent of the parties is seen as essential. This is different for power-based mediation, in which mediation actors deploy leverage in the form of material and immaterial sources of power and use strategic tactics and incentives to influence both the process and the outcome of negotiations. The conflict parties are encouraged – or even pressured – to compromise by applying positive and negative incentives, i.e. 'carrots and sticks'. Note that there is no clear-cut division between these styles in practice: mediation actors can combine different styles at different stages of the mediation process.

Approaches to constitution-making can also be differentiated based on whether they are more facilitative or formulative. In addition, the question of normative aspiration is particularly relevant for constitution-making: Is the constitution-making support designed to foster (liberal) democracy, human rights, and the rule of law, or are its ultimate goals more world-view neutral, such as precluding the exercise of arbitrary public power without a more specific – and possibly intrusive – normative agenda?

needs to agree to any transfer of its power to the institutions by which it will be governed *(pouvoir constitué)*. From a philosophy of law perspective, only a constitution approved by the people can be legitimate and have a substantive validity claim (Böckenförde, 1986, p. 8). By emphasising *national* ownership in constitution-making, a further assumption is that the people can exercise their rights undisturbed by external influences.

Practically, the constitution-making power of the people implies that any constitution-making process should offer the broad public an opportunity to engage, including "national authorities, a broad range of political actors, ethnic, religious and minority groups, civil society, including women's groups, and the general public" (*Guidance Note of the Secretary-General on United Nations Constitutional Assistance*, 2020, p. 3). Even if a constitution-making process can begin with discreet talks between elites, including armed groups, the process is intended to open up at later stages (Brandt *et al.*, 2011; Bell and Zulueta-Fülscher, 2016). Public participation can take the form of the election of a constitution-making body, referenda, and public debate and deliberation, to name a few. Also, once a constitution-making body has been elected, engagement can continue through the submission of drafts to constitution-makers or responses to drafts published by the body. Once a constitution or an amendment has been agreed upon, building the capacity of domestic actors to ensure implementation and establish mechanisms to monitor and enforce the constitution is critical to ensure the accountability of the government to the population. In sum, the focus of ownership, participation, and inclusion in constitution-making is on the engagement of the full breadth of societal actors. Saunders *et al.* (2024) have labelled such a conception of ownership as thick ownership.

By contrast, peace mediation often has the central goal of translating the de facto power distribution (foremost military but also economic, normative,

or moral) into political power. Typically, this requires forging an elite agreement that resolves specific conflict issues and can stop violence in the short and medium term – potentially at the price of stabilising non-democratic regimes. Reaching such an agreement is challenging as the conflict parties are engaged in a struggle over life and death and must respond to highly polarised constituencies. Particularly in the early stages of a process, negotiations therefore tend to be limited to the few most important actors and strictly confidential. Similarly, peace mediation acknowledges that ownership requires the support of the parties' constituencies and society, but this does not necessarily translate into their direct participation in the peace mediation process (Alvarez *et al.*, 2013, p. 15).

Nevertheless, peace mediation under the liberal peace paradigm is also committed to conflict transformation and democratisation as normative goals, sometimes creating a serious dilemma with the need for elite buy-in described above. The notion of inclusion has gained particular prominence in recent decades due to effectiveness and normative concerns: inclusive processes on average lead to more durable agreements, and the conflict parties can often not be considered legitimate representatives of the whole society. It should be noted, however, that the inclusion modalities discussed in the peace mediation realm are often less comprehensive than in constitution-making, focusing on the participation or consultation of representatives of certain civil society groups rather than on broad engagement across societal levels. Also, the peace mediation field is diversifying and fragmenting rapidly at the moment, calling the emphasis on inclusion into question.

Importantly, the notion of ownership in peace mediation goes beyond participation and inclusion. It assumes that the commitment needed to sustain and implement a peace agreement can be reached by limiting the influence of external actors, including international third parties (*UN Guidance for Effective Mediation*, 2012, p. 14; Berghof Foundation and UN DPPA, 2020, p. 66). Saunders *et al.* (2024) have labelled this focus on the external dimension as thin ownership. Limiting the influence of external actors is assumed to create space for context-specific solutions and a feeling of being in charge and responsible – in contrast to a situation where the conflict parties are pressured into an agreement (Alvarez *et al.*, 2013, p. 15). The other side of the coin is that the conflict parties can be held accountable for the lack of implementation (Saunders *et al.*, 2024, p. 42). Furthermore, the limited influence of external actors has been promoted on normative grounds to safeguard the sovereignty and self-determination of the conflict parties and the affected society. In practice, peace mediation by international third parties does not always live up to this ideal. As an interviewed mediation expert criticised: "We neglect ownership. Take Libya and the Berlin One Conference. There was not a single Libyan around the table but the whole world. […] We lose our value system."[3]

The preceding analysis brings to light a deep conflict between constitution-making and peace mediation. Since both processes try to translate fundamentally different sources of power into political and institutional structures, they prioritise different and countervailing strategies of engagement: the full breadth of society constituting the people versus the most powerful elites. The strategies can appear mutually exclusive because a constitution based on an inclusive constitution-making process can run counter to the interests of the elites enshrined in the peace mediation agreement.[4] Bell (2024, p. 27) described this as the difficult task of translating an "elite political-military bargain into a social contract". In addition, public constitution-making processes with polarised and heated confrontations might undermine the conflict parties' leeway in compromising. Finally, the difference in time horizons can lead to frictions. Peace mediation's focus on the short term to stop violence conflicts with the broad, time-consuming participation envisioned in constitution-making

3 Interview with mediation expert, 17 October 2023, online.

4 Interview with constitution-making expert, 6 November 2023, online.

(Mubashir, Klauke and Vimalarajah, 2021, p. 341).[5] An example of this tension is the process culmin ating in the Dayton Agreement in Bosnia and Herzegovina where an end to the extreme, often one-sided violence was prioritised over inclusive constitution-making. Nevertheless, the issue of conflicting time horizons is more complex since peace mediation often also strives towards conflict transformation in the long term, creating tension within peace mediation practice as much as between the processes (Nathan, 2020, p. 1559).

Constitution-making and peace mediation align in their interest to limit the influence and pressure of external actors on the processes. Recall that the notion of ownership in peace mediation is focused on limiting external interference. Constitution-making stipulates this interest through the concept of *national* ownership, understood here as the ownership of the people who are or will be subjected to a constitution.[6] This commonality has previously received less attention in the literature where the differing understandings of ownership and inclusion have been emphasised (e.g. Berghof Foundation and UN DPPA, 2020; Saunders *et al.*, 2024).

What are the implications of these findings for third parties supporting constitution-making and/or peace mediation? Inspired by dilemma management methods, this guidance suggests:

- **Mind the gap:** The more exclusive and elite-centred a peace mediation process is, the larger the gap to a democratic, participatory constitution-making process, making it more difficult to reconcile the processes and practices. Narrowing this gap is hence yet another reason to work towards more inclusive peace mediation processes. At the same time, the resistance to more inclusive processes is precisely one of the core challenges for third parties. Here, it is important to consider the full variety of inclusion modalities, including those that go beyond formal participation in the peace process (Paffenholz, 2014). Non-binding consultations of civil society actors, the granting of observer status, and steady communication with constituencies can also narrow the gap between the processes. This allows the conflict parties and third parties to anticipate future resistance and increase the willingness of societal actors to safeguard peace mediation results in subsequent constitution-making.

- **Prioritise approval over participation:** From the perspective of constitution-making, it would be ideal if the population could actively participate in the constitution-making process. However, if the ideal of a fully-fledged participatory process is not possible in the context of armed conflict or its aftermath, the approval of a new constitution or amendment in a referendum might be the second-best option. This way, the people have the final say in passing a constitution and can thereby legitimise it, but the delicate negotiations between the conflict parties are safeguarded from a potentially polarised and slow public constitution-making process. As Saunders *et al.* (2024, p. 43) pointed out, constitution-making support actors must be realistic about what is achievable in a given context. Importantly, referenda can be used in a more creative and thereby promising fashion than for one single make-or-break moment. Instead, they can be employed incrementally to approve specific provisions or can focus on the approval of a process rather than the results (Berghof Foundation and UN DPPA, 2020, pp. 71–72). Incremental approaches, however, can lead to central provisions being sidelined. In short, all strategies come with their advantages and disadvantages, which need to be weighed against each other.

- **Expand from the core:** This option proposes to increase participation incrementally, always safeguarding the results from the previous

5 Ibid.

6 Note that Alvarez *et al.* (2013) question the concept of national ownership for peace mediation on the grounds that a state can comprise a plethora of nations. Instead, the term 'local ownership' should be used, meaning ownership by those affected by conflict – which for national-level conflicts is usually the population of a state. Here, the two fields use differing terminology but mean the same.

stage. Peace mediation could begin by focusing on the most important conflict parties. Once an initial agreement has been reached, the process can be opened up subsequently, culminating in the election of a constitution-making body. Importantly, conflict parties and the public both have to have an incentive to take their respective processes seriously and stay committed. The conflict parties need to be sure that their agreements were not concluded in vain but will be guaranteed in a constitution-making process. The public in turn needs to know that their involvement at a later stage can still make a difference. This can be achieved by deliberately excluding relevant issues from the peace mediation and 'saving' them for the constitution-making process. A mix of referenda and a constitution-making body may also be conceivable, e.g. by allowing deliberations on some issues but 'only' granting the option of approval by vote to others. When choosing the 'expand from the core' option, it may be possible to utilise the difference in time horizons of constitution-making and peace mediation. Urgent grievances might need to be addressed immediately through peace mediation, while principles for a future society could be the focus of the constitution-making process. Similarly, selected issues can be regulated in sunset clauses, guaranteeing an agreement for a predetermined period but requiring their review later on.

- **De-demonise:** A peace mediation agreement without broader public participation can be perceived as undemocratic and elitist, whereas a public constitution-making process can seem frightening to conflict parties who might have risked their lives fighting for their goals and ideals.[7] While both perspectives are understandable, additional nuance and an adjusted framing – and thereby de-demonisation – can help to make visible the necessity and added value of both approaches and prepare the ground for the options discussed above. For one, public campaigns can inform about the importance of the peace mediation process and can foreshadow a later opportunity for participation, e.g. a referendum. Expectations about the transformative nature of a peace mediation result need to be managed as compromises with the old elites might be necessary. For another, the negotiating elites need to be assured that they will not completely lose their power in a more public process; this can be achieved by exempting certain concessions from the public process or by highlighting their means of influence in the new political system, for example.

- **Think outside the western box:** Especially in times of heightened geopolitical competition, it can be a common interest of constitution-making and peace mediation to shield the processes against external influences, including those that result from western third parties trying to impose their ideas and norms. Being responsive to this interest as a third party entails questioning one's own role and engaging with and giving space to traditional and context-specific conflict resolution and decision-making procedures. These follow their own principles and logics and might be less conflicting than the peace mediation and constitution-making principles discussed here. Afghanistan's Loya Jirgas in 2002 and 2004 are an example where traditional and codified approaches to constitution-making were interlinked (Smith, 2019).

3.2 Regulatory logics

One easily overlooked yet crucial question is which regulatory logics are at work in constitution-making and peace mediation. Both processes seek to translate a complex political agreement into a carefully drafted text. Yet the functions of these texts and their corresponding regulatory logics differ fundamentally. This concerns the thematic scope of the texts, the language used, the degree of regulation, and the enforceability of provisions. These differences can appear hard to reconcile: How narrow or wide should the initial

7 Interview with constitution-making expert, 6 November 2023, online.

agenda be, and which topics should be prioritised or consciously avoided? Is language employed to fine-tune legal workings or prototype a political idea? The challenge for third parties lies in the fact that constitution-making and peace mediation processes are often so interwoven that these differing logics can hardly be kept separate. Among other things, this can lead to constitutional texts that are so ambiguous and charged with political messaging that they are difficult to implement.

Constitution-making aims to convert the agreement on the nature of the future state into the state's supreme legal text which, among other things, will be able to provide for functioning state institutions, define the relationship between individuals and the state, and limit elite power. As the founding document of the state, a constitution should, furthermore, ensure long-term governability by carefully balancing the stability and flexibility of the constitution and anticipating the needs of the prospective society. In addition, the vision for the future state is to be established and a national identity among its subjects created. In short, the constitutional text should create a functioning state through a sophisticated and ambitious normative blueprint.

The function of the constitutional text is mirrored in its broad thematic scope, covering all issues required for a functioning state, as aptly reflected in the various handbooks and checklists of the constitution-making field (e.g. Brandt *et al.*, 2011). The language is legal in nature in most parts, using precise normative phrasing to ensure predictability, a smooth functioning of institutions and political processes, and interpretability by courts (ibid., p. 210). However, there is also variation in a constitution's level of technicality, depending on the type. For example, Böckenförde, Hedling and Wahiu (2011) differentiate between legal and political constitutions, whereby the latter can be more ambiguous with political practice determining the interpretation. Also, constructive ambiguity can be used in small doses if an agreement on specific issues cannot be reached (Saunders, 2019) (cf. Box 2). For example, the extent of the state's federal character was left open in the South African constitution (ibid., p. 348). Turning to the next manifestation of regulatory logics, the degree of regulation is high, meaning that the constitution imposes many restrictions and requirements on public or private life. At the same time, details can be left open and elaborated through ordinary law. Enforcement mechanisms play a crucial role, striving to establish a culture of adherence to the rule of law and effectively preventing violence between and among the state and its citizens (Nathan, 2020, pp. 1561–1562).

Box 2: Constructive vs. unintended ambiguity

Constructive ambiguity is an intentional strategy that designs provisions so that they can be interpreted in different ways by the agreeing parties (Byers, 2021). It allows the parties to postpone issues until the post-agreement phase and present their constituency with a favourable interpretation of the issue in question (Saunders, 2019). It is fundamentally different from unintentional ambiguities that can endanger or prevent the implementation of peace agreements and constitutions alike by creating unforeseen disputes about the 'correct' interpretation. Unintentional ambiguity can be considered a technical flaw and should be avoided in constitution-making and peace mediation alike.

In the case of peace mediation, the goal is to convert the agreement on specific conflict issues between armed groups into a text that can end the violent conflict and create a vision for a post-conflict society by conveying core political messages. More generally, peace deals are characterised as simple, bi- or multilateral contracts – although their legal status is a point of debate and varies across cases (Nathan, 2019). The goal to end conflict puts the emphasis on gathering elite and public support and reaching an acceptable agreement text that addresses the incompatibility underlying the

conflict. This can weigh more heavily than technical sophistication in defining state institutions.

As a result, the thematic scope of peace mediation tends to be more limited, depending on the conflict issues in each specific case, the mandate of the mediation, and the agenda agreed upon by the conflict parties. The language is political rather than legal, and imprecision and constructive ambiguity can be tolerated if they enable an agreement to be reached between the conflict parties. That said, peace mediation agreements can also include parts that need to be technical and precise, such as the technical specifications for a ceasefire (Buchanan, Clayton and Ramsbotham, 2021). As for the degree of regulation, peace agreements are less predetermined and more flexible than constitutions. If necessary, they can afford a superficiality that constitutions simply cannot, a phenomenon likely to become more relevant in times of more transactional peacemaking. The enforceability of peace agreements differs widely. With enforceability usually not streamlined throughout the text, specific enforcement mechanisms can be created. These focus on enforcing the termination of violence between the conflict parties rather than in the society more generally, as is the case with peacekeeping missions, for example.

The analysis shows the strong differences in the regulatory logics of constitution-making and peace mediation. In principle, these differences could co-exist in a neutral manner as long as the texts and their functions are kept separate. However, conflicts arise if an agreement text mixes elements of constitution-making and peace mediation or if an agreement text is aimed at fulfilling a function it was not made for. Examples of this are a peace agreement that tries to specify the functioning of state institutions or a constitution that is blurry in language to facilitate agreement between the conflict parties. Specifically, differences in language, degree of regulation, and enforceability hold the potential for conflicts in such cases. For instance, the tendency to comprehensively or even over-regulate constitutional questions (to make the constitution waterproof in the long run) is not compatible with the tendency to under-regulate in peace mediation (to make an agreement possible in the first place). By contrast, the thematic scope is a regulatory dimension where constitution-making and peace mediation can align more easily since the issues discussed in peace mediation are often a subset of the issues relevant to the constitution. Here, it is critical to not create contradictions or unintended path dependencies; this is discussed in more detail in the next section.

These analytical insights lead to several options for practitioners operating at the nexus:

- **Think together, but keep texts separate:** This guidance follows recent calls that constitution-making and peace mediation need to be 'thought together' and should not be kept separate (e.g. Töpperwien, 2019; Mubashir, Klauke and Vimalarajah, 2021). However, writing the agreement texts might be the exception that proves the rule. Third parties should be conscious of the function and nature of the text they are drafting (or whose drafting they are supporting). In particular, if peace mediation precedes constitution-making, the agreement's precision and scope can be progressively expanded during the subsequent constitution-making process.

- **Allow for well-dosed permeability:** Even if constitution-making and peace mediation texts are kept separate, they should 'speak well to each other'. It may therefore be appropriate to allow for conscious and well-dosed permeability between the two, for example, by using a few selected legal terms in the peace agreement – likely to be taken up during the constitution-making process – or by accepting a specific political framing for the constitution as established in a previous peace agreement.

- **Compartmentalise within the agreement:** Writing separate agreement texts may not always be feasible or desirable. In such cases, third parties can seek to use different regulatory logics for different parts of an agreement text. In some parts, political language can be accepted while technical functionality is to be ensured for others. For example, the preamble of the constitution can be political in nature, while

the section describing the constitution of the parliament should be legally sound. Also, the interests of constitution-making in fostering a national identity and of peace mediation in creating a political vision can align well.

- **Consciously bypass:** If no solution can be found on how to reconcile the two regulatory logics, one possible strategy is to consciously leave an issue out in one of the documents. For example, the regulation of how to deal with transitional justice issues might not be touched upon in a peace agreement but is then addressed in detail in the constitutional process. A related option is to use constructive ambiguity, which is to a limited degree acceptable in both processes, to allow an issue to be postponed until some future time.

3.3 Normative frameworks

Normative frameworks are important reference points in constitution-making and peace mediation alike. They can be understood as the "collective expectations about proper behavior for a given identity" (Jesperson, Wendt and Katzenstein, 1996, p. 54). Within this broad concept of collective expectations, three important distinctions can be made. First, legal norms can be considered binding rules, while general norms describe behavioural expectations relating to methods, ethics, or politics (IMSD, 2019, p. 2). Second, domestic and international norms can be differentiated based on the jurisdiction they apply to. Finally, it is expedient to distinguish norms related to the *processes* of constitution-making and peace mediation – e.g. who should be involved in a constitution-making process – from those related to the *content* or result of these processes – e.g. which norms should be integrated into a peace agreement (Hellmüller, Palmiano Federer and Zeller, 2015).

A key reality of conflict is that actors with different normative frameworks interact, leading to a multi-layered normative complexity surrounding any peace process. Third parties should therefore be aware of the normative expectations held by conflict actors, the mandating entities, (regional) stakeholders and themselves (Alvarez *et al.*, 2013, p. 16) – and possible clashes between them. In addition, norms are not static, but third parties need to understand how they might have been contested and modified (Acharya, 2013) – a particularly challenging task in times of a changing world order.

As a process aimed at creating a binding legal framework, constitution-making has an overall interest in respecting existing norms. At the same time, especially in scenarios where an old constitution is replaced, constitution-making can also include an act of massive normative rupture, illustrating the ambivalence of the undertaking. As already alluded to, internationally backed constitution-making has often sought to promote liberal norms like human rights, rule of law, representation, and transitional justice.[8] In post-conflict countries, human rights relating to accountability and non-discrimination against indigenous peoples, displaced persons, and minorities have been deemed especially relevant (*Guidance Note of the Secretary-General on United Nations Constitutional Assistance*, 2020, pp. 3–4). Recent practice, however, might indicate a more modest approach, prioritising the self-determination of the country in question and finding context-specific solutions that address and balance the interests of different societal groups. One of the interviewed experts also described this development: "It was all very, very Europe-centric. So this leads nowhere if you don't get the buy-in. That's why we were gradually moving to the grass-roots."[9]

Nonetheless, the adherence to (rather than promotion of) core principles of international law is still considered crucial, not least to ensure the legitimacy and standing of the country in the international realm, affecting trade and possibly even sanction regimes. For instance, the UN can

8 Interview with constitution-making expert, 31 August 2023, online.

9 Interview with mediation expert, 17 October 2023, online. Also raised in the interview with constitution-making expert, 6 November 2023, online.

decline constitutional assistance if there is a clear tendency to violate international norms and UN values such as inclusivity and popular sovereignty (Bisarya, 2022, p. 19). In addition, decisions about sanction relief, humanitarian support, or investment can be made dependent on future constitutions being in line with core principles of international law.

At the domestic level, constitution-making has a strong interest in creating a functioning and stable system of domestic law by developing and adhering to domestic normative conditions, including relevant cultural and religious norms. Since the success of a constitution-making process critically depends on the integration of an amended or new constitution in the domestic normative system, adhering to that system can even be prioritised over the international normative dimension.

In addition, the UN has produced various process-related norms in the form of guidance notes constituting important – albeit non-binding – reference points (*Guidance Note of the Secretary-General*, 2009; *UNDP Guidance Note on Constitution-making Support*, 2014; *Guidance Note of the Secretary-General on United Nations Constitutional Assistance*, 2020). These norms should ensure an effective, ethical, and legitimate process.

Turning to peace mediation, adherence to international or domestic norms may be secondary if reaching an agreement and stopping the violence is the priority; in such cases, pragmatism prevails. To be clear, peace mediation is also guided by norms and has an interest in stabilising international norms (Würkert, 2022, p. 303). These include non-negotiable jus cogens principles like the prohibition of torture and slavery (cf. Box 3), as well as international humanitarian law, human rights, and international criminal law.[10] As one widely known example, peace mediation refrains from facilitating agreements on general amnesties for individuals involved in war crimes or genocide (*Strengthening the role of mediation*, 2012, p. 28). Yet sometimes ignoring, bending, or violating norms can seem unavoidable. In addition, the responsibility for the adherence to legal obligations is generally considered to lie with the conflict parties. Only in rare cases have mediators openly signalled disapproval of normative decisions made by the parties. At the same time, peace mediation also strives to enhance the stability of reached agreements by integrating them with domestic legal frameworks. Like constitution-making, peace mediation faces the tension that it seeks to pay respect to domestic norms while potentially facilitating a rupture with (parts of) the constitution as the highest normative framework.

Box 3: Jus Cogens

Jus cogens, or peremptory norms of general international law, are fundamental principles of supreme importance deemed "universally applicable" (Tladi, 2016, p. 479). They are considered to have inviolable status, binding all states and safeguarding the core values of the international community (ibid.). They encompass prohibitions against practices such as slavery, genocide, torture, and acts of aggression. Although the concept of jus cogens is widely accepted, disagreement exists about their identification and content (ibid., p. 471).

In light of the focus on reaching an agreement, process-related norms to ensure an effective and ethical process play an important role in peace mediation. The UN Charter recognises mediation as a method; the UN Guidance on Effective Mediation is regarded as "procedural soft law" in that it is not legally binding (IMSD, 2019, p. 4). The guidance provides some of the methodological best practices

10 The publication "The Normative Framework and the International Legal Basis of Peace Mediation" by the Initiative Mediation Support Deutschland (IMSD, 2019) provides an in-depth analysis of relevant international norms.

in the field and formulates normative expectations of the mediation process. Adhering to these norms is perceived as lending legitimacy to the parties, the process, and its results. As for the content-related norms, a "concession to practical necessity" regarding these procedural norms can be tolerated (IMSD, 2019, p. 4).

Taking on a relational perspective shows that constitution-making and peace mediation align in their general commitment to a similar set of international and related domestic norms. Both strive to contribute to the durability, predictability, and sustainability of domestic and international norms. The relevant content-related norms strongly overlap for both fields, e.g. the adherence to jus cogens and human rights treaties in the international sphere. This is different for process-related norms, which are specific to each field and seek to enhance the legitimacy and effectiveness of the processes. These differences can lead to conflict, as the discussion of the ownership principle showed.

A fundamental rift between constitution-making and peace mediation comes to light when considering the importance of these norms in relation to other competing interests. From the perspective of constitution-making, the adherence to norms and the compatibility of agreements with existing normative frameworks are of utmost importance. Constitution-making support actors are not inclined to 'break' international or established domestic law and the gap between norms and practice should be as small as possible. A relevant exception at the domestic level is the decision to replace the constitution altogether.

By contrast, peace mediation might be more willing to diverge from norms insofar as this helps in reaching an agreement between the conflict parties. The acceptable gap between norm and practice can hence be larger. Also, the strong respect for the consent of the conflict parties in peace mediation is often not compatible with trying to promote certain norms in content or process, as favoured in some constitution-making initiatives. As the UN Guidance on Effective Mediation puts it, mediators must "[b]alance the need to adhere to international norms without overtly taking on an advocacy role" (*UN Guidance for Effective Mediation*, 2012, p. 17).

To conclude, it should be noted that established international norms are called into question by the current geopolitical developments. Bell and Ainsworth (2022, p. 11), for example, speak of a "broader degradation of the international human rights norms". A renegotiated, multipolar world order could give rise to a new normative pluralism, with a larger variety of norms and practices to be accepted as sound and legitimate (Hellmüller, Pring and Richmond, 2020, p. 355). It remains to be seen how constitution-making and peace mediation as tools of international peacemaking position themselves in this new context – and towards each other.

Constitution-making and peace mediation align in their general pursuit of norm respect but differ in the importance they assign to norms relative to other process-related goals. Based on this observation, the following recommendations can be made:

- **Utilise the overlap:** The overlap in normative frameworks has great potential. As long as the norms in question help rather than hinder a peace mediation process, constitution-making and peace mediation have a well-aligned interest in adhering to these norms. In practice, third parties can thus join efforts to make these norms the subject of discussion and promote their importance in the two processes. Ideally, third parties from both fields can agree on a joint framing and message. An important first step is therefore to identify these overlapping norms through diligent analysis, potentially together with legal experts (Alvarez *et al.*, 2013, p. 17). This is an area where peace mediation may need to catch up with constitution-making as normative aspects are not yet systematically included in conflict analyses.

- **Collaborative prioritising:** Not all norms can be applied simultaneously, even if the constitution-making or peace mediation realm is considered in isolation – prioritisation is required. It is hence critical to spell out and weigh up normative expectations of mediators, conflict

parties, internal and external stakeholders, and mandating entities. As the Initiative Mediation Support Deutschland points out, this is a "pragmatic appraisal of which divergences from normative requirements are acceptable and justifiable in light of their expected consequences" (IMSD, 2019, p. 12) Critically, this prioritisation should be conducted jointly, not by constitutional experts or peace mediators alone.

- **Leveraging norm pluralism for compartmentalisation:** The plethora of normative frameworks can allow for the division of responsibility for specific norms and normative frameworks across third parties and negotiation formats. This can include a deliberate combination of third parties with different normative backgrounds, e.g. from Switzerland and Qatar, or the creation of negotiating formats that address specific norms for both constitution-making and peace mediation, e.g. in a joint human rights committee.

- **Sequencing from easy to hard:** If the application of norms demanded by constitution-making seems incompatible with peace mediation, a sequenced application can be considered. Since reaching an agreement between the conflict parties is the most important goal in peace mediation, an "easy to hard" order may be most suitable (IMSD, 2019, p. 13). Assuming that peace mediation would be followed by constitution-making, this would entail only applying those norms in the peace mediation that do not hinder the reaching of an agreement – the easy ones. Once an agreement has been concluded, negotiation or application of additional norms during implementation of the agreement and in the constitution-making process can be considered.

- **Empowering for norm adherence:** Capacity-building may be a way to strengthen the norm adherence of the conflict parties while preserving their agency. By providing targeted training and expertise, third parties can enhance the parties' comprehension of critical norms, increasing their willingness to adopt and/or follow (some of) them. For example, if the parties gain a more comprehensive understanding of the requirements and boundaries of the relevant norms, they can better anticipate how norm adherence could shape their relations with the international community.

4. Substance: Peace mediation between constitutional continuity and rupture

Peace mediation usually takes place within an (at least formally) existing constitutional order, which is in principle the binding supreme law of the country concerned. However, the constitution and related questions of public power are often a core issue of contention in armed conflict, especially in identity-based conflicts.[11] Non-state armed groups might aim for the constitutionalisation of government concessions, e.g. by amending or replacing the constitution. This can be a way for these groups to secure the legal status and enforceability of these concessions and create a more widely shared national commitment. In other cases, a new constitution may be required after regime collapse, or constitutional change may be the precondition for negotiations to take place at all. In either case, peace mediation efforts must inevitably engage with the substance of the constitution. This section therefore analyses the substance layer of the nexus and its practical implications, focusing on those procedural questions and substantive issues that are relevant to both peace mediation and constitution-making.

The existing constitutional framework can impact peace mediation agreements in two critical ways. First, the constitution may regulate procedural aspects of the negotiations themselves. If these procedures are not followed, an agreement might be declared unconstitutional – even if its content is acceptable. For example, a peace agreement could be invalidated simply because a non-state armed group was not legally recognised as an entity capable of entering into agreements with the state. Second, the substance of a peace agreement might directly conflict with constitutional provisions. The Memorandum of Understanding in the Mindanao conflict in the Philippines, discussed in Section 2, exemplifies this problem – it was struck down because its content conflicted with the existing constitution. These constitutional considerations cannot be ignored, as doing so creates significant risks: uninformed mediation can undermine constitutional legitimacy, while constitution-making that disregards previously mediated commitments can jeopardise fragile peace.

To navigate the substance layer of the nexus, this guidance proposes two questions, requiring a holistic perspective on the past, present, and future of the constitutional order concerned:

1) Which procedural questions and which issues on the agenda have *potential* constitutional relevance, and how do they relate to the existing constitutional order?

2) How will peace mediation agreements shape the *future* constitutional order, and how can constitutional change – if needed – be navigated?

These two questions should be considered throughout the peace process – not just for the conclusion of the final peace agreement. This is because procedural questions and provisions conflicting with the constitution can become stumbling blocks to agreements earlier in the process, such as ceasefires and framework agreements. Also, path dependencies might be created through early decisions in a process. As one of the interviewed experts put it: "The failure [of

11 Interview with constitution-making expert, 6 November 2023, online.

mediators] to address constitutional matters early in these processes seriously worries me."[12]

The remainder of this section elaborates on these two questions in more depth. First, however, the notion of constitutional change will be unpacked to illuminate the challenging position of mediators when facilitating agreements on constitutional continuity or rupture.

4.1 Introducing the spectrum of constitutional change

Constitutional commitments in peace mediation agreements are not automatically incorporated into the constitutional order – a process of constitutional change may be needed. At the same time, changing the constitutional order is not a yes-or-no question. Instead, constitutional change can be conceived of as a spectrum, ranging from complete continuity, on the one hand, to complete rupture, on the other. In the following, the guidance defines the constitutional order as the totality of constitutional documents, institutions, and judicial practice. The constitution more narrowly refers to the document or collection of documents that codify the constitution of a country. Note that some countries do not have a written constitution or their constitutions are complemented by unwritten rules (cf. Box 4).

Figure 3 provides a non-exhaustive list of options along this spectrum of constitutional change.[13] The most extreme case of continuity is that the negotiating parties agree to adhere to the constitution throughout the negotiations and in their agreements. This was the case in the conflict between the Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Colombian government (2012–2016), where the parties' decision to preserve the constitution in its current form enabled negotiations in the first place (Berghof Foundation and UN DPPA, 2020, p. 30).

A second option still ensuring a high degree of continuity is the reinterpretation of the existing constitution. For example, the term 'national unity' might be reinterpreted to accommodate increased regional autonomy in the post-conflict state. to bend the limits of the constitutional order by suspending certain parts, e.g. through a presidential decree or an informal agreement between the negotiating parties.

Box 4: Unwritten constitutional rules and countries without constitutions

The constitutional order of a country is not always codified in one written document. In some cases, the written constitution is complemented by unwritten rules and practices which are legally not enforceable and yet considered politically binding (*What is a Constitution? Principles and Concepts*, 2014). One example of such a rule is the rotation of the presidency between the north and south of Nigeria (Campbell and Page, 2018). Other countries do not have a constitution, at least in the narrow sense of one document. However, these countries still have an equivalent to a constitutional order, building on various laws, treaties, and judicial decisions. One example of this practice is the United Kingdom. In either case, these unwritten rules or the corpus of regulations also need to be taken into account during peace mediation.

Continuing along the spectrum, amending the constitution is the fourth option and the first to imply changing the constitution as a document. Most constitutions provide for a procedure for the amendment of the constitution, albeit sometimes with high barriers. Positive examples of a successful and rule-compliant amendment in the aftermath of a peace agreement are North Macedonia and Papua

12 Interview with constitution-making expert, 31 August 2023, online.

13 Note that conflict parties might also completely disregard the existing constitutional order. Disregard is different from constitutional change as the parties do not even position themselves relative to this order but (attempt to) operate independently of it.

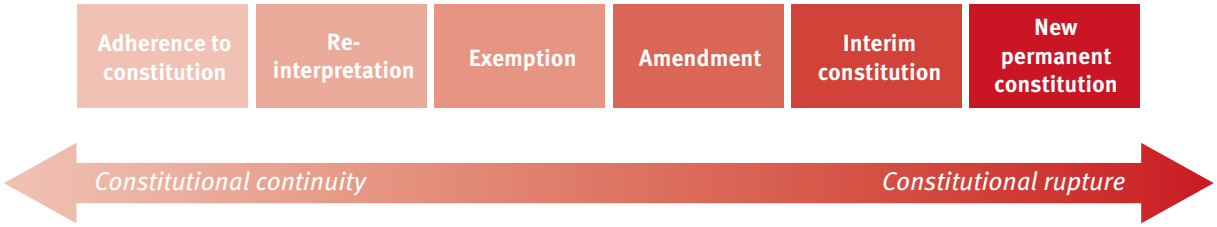


Figure 3: Spectrum of constitutional change

New Guinea (Stankovski, 2019; Nathan, 2020, p. 1556). In other cases, conflict parties might agree to amend the constitution without adhering to the official procedures. This is a problematic endeavour as it weakens the legitimacy and stability of the constitutional order.

The previous options operate at the provision level, i.e. specific constitutional provisions are reinterpreted, suspended, or amended. Depending on the nature of the negotiations and the conflict, this may be sufficient. In other cases, however, a radical constitutional rupture is sought by adopting, or agreeing to later adopt, a new constitution. This rupture will always be formal in the sense that a new constitutional document is to be adopted. The extent of the substantial rupture, by contrast, can vary across cases. Sometimes, there may be strong continuity in the content of the old and new constitutions, and sometimes, the constitutional order may be completely overhauled. In either case, a critical decision is whether the new constitution is an interim constitution for a transitional period (Option 5) or is permanent (Option 6). Interim constitutions are supreme laws intended for a limited period and providing for a future constitution-making process (Zulueta-Fülscher, 2015, p. 9). They have been adopted in South Africa, Somalia, the Democratic Republic of the Congo, and Nepal, among others. A middle ground between the two is the inclusion of sunset clauses in a permanent constitution, i.e. clauses that become invalid after a predetermined period.

In either case, the elimination of an existing constitution during peace negotiations is a dramatic, possibly even revolutionary moment from the perspective of constitutional law. As elaborated in the context of the ownership principle in the previous section, constitutional law assumes that the power to adopt a constitution lies exclusively with the people as the constituent power *(pouvoir constituant)* and not with the state as the constituted power *(pouvoir constitué)* (Böckenförde, 1986, p. 18), let alone non-state armed groups. If the latter nonetheless make decisions on the 'life or death' of a constitution, this violates the key principles of constitutional law. Recall that one of the fundamental tensions at the nexus lies between peace mediation's focus on facilitating agreements among those who hold de facto power and constitution-making's aim to limit these powers through participatory processes.

The degree of desired constitutional change can be highly contested between the conflict parties and often mirrors the power balance between them. State actors tend to favour constitutional continuity to preserve the status quo and thus their power. Non-state actors might favour change to secure government concessions in a constitution, thereby ensuring their binding nature and enforceability. For state and non-state actors alike, constitutional rupture can be a strong political signal of breaking with an old political order, a shared commitment to the results of the peace process, and an instrument of nation-building.

The role of mediating third parties in this decision ought to be a rather limited one: whether a constitutional order should be changed or even completely overhauled is not a decision for third parties. However, if third parties have the mandate to facilitate negotiations around these questions, they need to have an in-depth understanding of those procedural questions and agenda items that might influence or are influenced by the constitution. If they lack awareness, third parties

might unintentionally contribute to a disruption of the constitutional order or undermine the results of negotiations.

4.2 Peace mediation in the context of the existing constitutional order

Confronted with potential constitutional change, third parties should be aware of those procedural questions and substantive issues that might impact the constitutionality of peace mediation agreements. Which parts of an agreement could potentially conflict with the constitution? This is important because constitutionality can be a key factor in determining whether a peace mediation agreement will be implemented, especially in contexts with a functioning judicial system. Here, higher courts may declare peace agreements unconstitutional and thus invalid. This can happen if peace agreements are superseded by constitutions in terms of their legal status.[14]

Identifying procedural questions and issues with constitutional relevance

Identifying procedural questions and the issues on the agenda that are relevant to the constitutional order is not as self-evident as it might seem. For one, each constitution is different. Accordingly, there is no general and exhaustive definition of what is constitutionally relevant.[15] This is further complicated because it cannot be expected that the conflict parties or other third parties will identify those procedural and substantive issues that are indeed constitutionally relevant in a specific case – be it deliberately or out of ignorance. While the constitutional relevance of some issues, such as national power-sharing, is commonly understood, the relevance of security sector reforms and transitional justice provisions, among others, is less evident. Similarly, the constitutional implications, messages, and possible path dependencies of the negotiations themselves – e.g. who sits at the table, and which symbols they display – are often overlooked. One of the interviewed constitution-making experts summed this up: "It's a pretty unknown area. We know very, very little about [constitutional issues in peace mediation]. Even the people who have done most of the hard work on it know that it's a sort of slippery field."[16]

Three steps are recommended to achieve a comprehensive perspective on constitutional relevance in a specific case (cf. the overview in Box 5). First, it is essential to understand which aspects and issues of the negotiations are regulated in the current constitution or comparable texts in the case at hand. It is also important to keep the constitutional history in mind, as issues that were included in previous constitutions might re-emerge in the context of constitutional change. For this step, consulting local constitutional experts may be beneficial as international third parties, in particular, may lack the required legal and country-specific expertise.[17]

Box 5: Three steps to identify relevant procedural aspects and issues

1. Understand what is regulated in the **existing constitution** and its predecessors in the context in question.
2. Identify issues that are regulated in constitutions in **similar contexts**.
3. Note what the conflict parties **explicitly** label as constitutionally relevant.

14 The legal status of peace agreements is the subject of long-standing debate (Nathan, 2019).

15 Interview with constitution-making expert, 31 August 2023, online.

16 Ibid.

17 Interview with constitution-making expert, 6 November 2023, online.

Second, it is important to look beyond the case in question and examine which issues are included in constitutions in similar contexts. Even if the current constitution does not regulate a particular matter, parties may demand its inclusion in the future. Being unprepared for such demands could lead to delays or conflicts later in the negotiations. Third parties should therefore study relevant precedents, focusing on cases with shared regional, cultural, legal, or political characteristics, particularly those with similar colonial backgrounds or regime types.

Third, it is critical to note which issues the conflict parties *explicitly* want to change or add to the constitution – or not. This explicit definition of constitutional relevance can be a strategic decision for the conflict parties and is closely connected to the question whether the conflict parties are demanding constitutional change or trying to prevent it. Ultimately, the question of what is constitutionally relevant is highly political (Würkert, 2022, p. 142).[18] Keep in mind, however, that the conflict parties often lack the technical knowledge of which issues or procedural questions might be affected by the constitution. The parties' perspective is therefore an additional piece of information but is insufficient, on its own, to answer the question of constitutional relevance.

In addition to introducing these three steps, this guidance seeks to raise awareness and share knowledge about the procedural questions and issues that third parties should watch out for at the constitution-mediation nexus: the 'usual suspects'. For the reasons outlined above, it is not possible to provide an exhaustive checklist that applies to every single case. Importantly, this means that just because an issue is not discussed in the following, it cannot simply be discarded as irrelevant. Figure 4 highlights five categories: procedure, political power, security, justice, and socioeconomics.[19]

The categories provide a frame of reference and demonstrate how important it is to consider constitutional relevance across negotiation tracks, far beyond questions of political power. At the same time, the issues presented are still relatively aggregated, and a more granular understanding will be required in practice. For example, which specific provisions on an issue should be anchored in the constitution and which should not? This challenge is exemplified for one issue in each category below.

In the realm of political power, horizontal power-sharing describes how government power is divided between government institutions and different identity groups or parties. Unsurprisingly, the issue is always regulated in the constitution, which defines the government structures. This includes the specification of the checks and balances between the legislative, judicial, and executive branches, and rules on forming and dissolving the government. In some cases, the maximum size of the government and the proportional representation of certain identity groups may be included, although the latter has sometimes also been regulated in ordinary electoral law (Bulmer, 2017, p. 35). By comparison, administrative procedures for appointments to government posts are rarely regulated in the constitution.

Security Sector Reform (SSR) is an issue in the security realm whose regulation in the constitution should be carefully evaluated. Anchoring provisions on the reform process and content can pave the way for an effective reform but, if too detailed and rigid, might also lead to its blockage (Bisarya and Choudhry, 2020, p. 9). Also, provisions specifying principles for the future reformed security sector, such as civilian oversight, need to be carefully linked to the provisions on political power and checks and balances. No matter what exactly is included in the constitution, specifying the details of how SSR is to be implemented through ordinary law will be indispensable (ibid.).

18 Interview with constitution-making expert, 31 August 2023, online.

19 This categorisation has been inspired by the Master of Advanced Studies (MAS) in Mediation in Peace Processes ETH Zurich. Note that these categories are not mutually exclusive. For example, power-sharing arrangements are often subsumed under political power but, in some contexts, also relate to transitional justice.

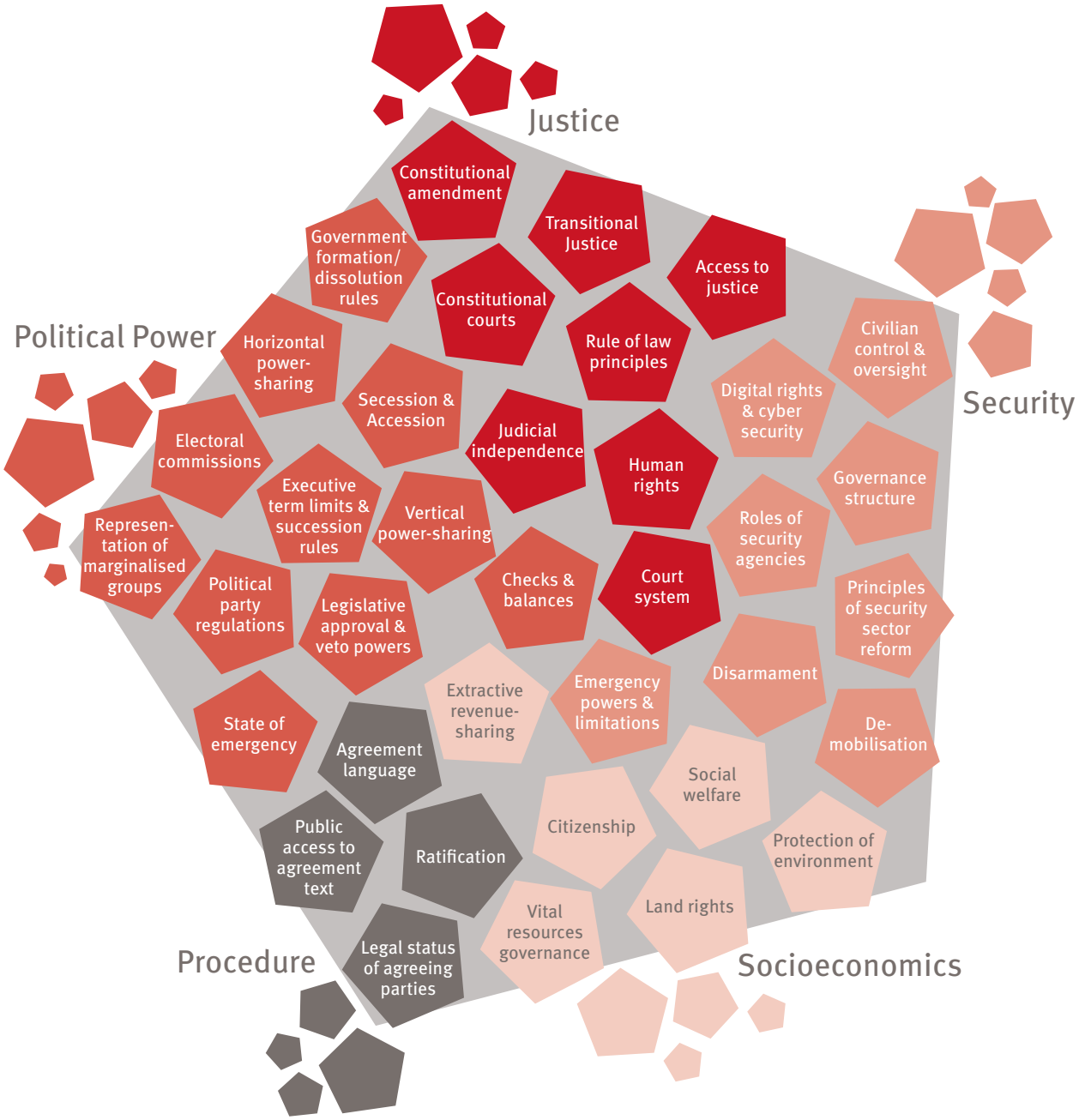


Figure 4: Overview of peace mediation issues with constitutional relevance

Transitional justice is an example of the constitutional relevance of justice-related issues because the four core principles of transitional justice – truth-seeking, reparation, accountability, and guarantees of non-recurrence – have been integrated into the constitution in some cases. For example, accountability is integrated by defining the role of the executive in granting amnesties, while non-recurrence is addressed by guaranteeing access to justice and fair trials and committing to it in principle (Böckenförde, Hedling and Wahiu, 2011, p. 174; Cats-Baril, 2019, pp. 26–28). An example of the latter is the Rwandan constitution (2003), which explicitly commits to "fighting against … genocide ideology and all its manifestations" (Article 10). For truth-seeking, related commissions can be tied to the constitution to increase their resilience. However, in cases like Indonesia and Nepal, they have been established and governed through legislation (Cats-Baril, 2019,

pp. 23–24). The results and recommendations of such truth-finding commissions are then often enacted through ordinary law.

Socioeconomic drivers, including contested land rights, underpin many armed conflicts and are often codified in the constitution. For one, constitutions often include a general ownership statement according to which the land and its resources belong to the central government or 'the people' (Zulueta-Fülscher and Murray, 2024, pp. 3, 22–23, 28). Similarly, many constitutions recognise private property rights while entitling the state to tax (ibid., pp. 13, 33–34). One example of a constitutional codification of property rights is the post-conflict constitution of Côte d'Ivoire, which stipulates that: "Only the State, public communities and Ivoirian natural persons have the right to own rural land" and that their "acquired rights" are guaranteed by the constitution. By contrast, it is a more recent development that constitutions also recognise the rights of nature, climate-related aims, or principles of indigenous land stewardship (Hickey, 2024, p. 11).

Finally, procedural questions may be of constitutional relevance and affect the constitutionality of peace mediation agreements retrospectively once the agreement has been concluded. For instance, it is important to consider whether the agreement would need to be ratified by parliament to comply with the legislative powers anchored in the constitution or in which language(s) it has to be published to meet constitutional requirements on official language(s).

Analysing the relationship with the existing constitutional order

Identifying what is constitutionally relevant is not enough. The next question is how these issues and procedures relate to the existing constitutional order. In the event that an agreement is reached, e.g. on a specific identity-based quota for government posts, would it be compatible with the current constitutional order? Such questions are important because conflicts between peace mediation agreements and the constitutional order can lead to the collapse of the former or undermine the latter.

In line with the nexus navigation method introduced in this guidance, the content of the peace agreement and the constitutional order may be in alignment, relate neutrally, or be in conflict. Note that, in contrast to the process and actor layer of the nexus, it is not possible to make general statements about how constitution-making and peace mediation relate to each other. As the preceding discussion showed, this needs to be carved out by diligent analysis for each case. An additional challenge is simultaneous constitution-making and peace mediation. This constellation is demanding for third parties because the constitutional order is unstable and changing while the peace mediation is ongoing. It requires third parties to have an in-depth understanding of all ongoing constitution-making and peace mediation initiatives – despite complex operating environments and confidentiality.

Alignment means that the result of peace mediation – be it in terms of content or the procedures that led to it – is in line with the constitutional order. For example, the peace agreement that has been reached is published in one of the official languages recognised in the constitution or provisions are diligently designed to not conflict with the constitution, as was done later in the Mindanao peace process (Ozcelik and Sapiano, 2018). 'Neutral' indicates that issues in a peace agreement that typically have constitutional relevance are not regulated in the existing constitution. For instance, land rights can have constitutional relevance but as long as the current constitution does not include them, a peace mediation agreement including land rights is neither aligned nor conflicting with the constitution. Finally, procedural questions or issues conflict with the constitutional order if they violate the constitution. For example, a ceasefire might include provisions on a security sector reform which contradict the constitution. Section 4.3 below will come back to the question of how such conflicts can potentially be addressed by changing the constitution.

The importance of constitutional alignment in peace mediation depends significantly on whether parties seek constitutional continuity or rupture. When maintaining the existing order is the goal, constitutional compliance is crucial; when parties

aim for complete constitutional transformation, immediate compliance may seem less relevant. Counterintuitively, the more fundamental the intended constitutional change, the less pressing constitutional compliance becomes. However, this does not mean that constitutional considerations can be dismissed. Constitutional rupture is often contested during negotiations, with uncertainty about whether a new constitution will actually materialise. Third parties must therefore prepare for both scenarios: agreements that must fit within the current order, and those that might create an entirely new constitutional framework. In addition, even when a new constitution is agreed upon, not all provisions will necessarily change – many elements of the old order may be carried forward.

4.3 Navigating constitutional change

The preceding discussion focused on the existing constitutional order. Now, the focus shifts towards the future: How will peace mediation agreements shape the future constitutional order – directly or indirectly – and how can third parties support conflict parties in navigating the many options for constitutional change? Peace mediation can change the constitutional order directly if the conflict parties agree on amending the constitution or embarking on a constitution-making journey. However, the indirect impact of creating path dependencies should also be considered. Path dependencies are decisions in peace mediation which – intentionally or not – constrain constitution-making later on. Indeed, path dependencies may be desirable if they safeguard mediated peace agreements, e.g. on certain principles and values, throughout the often lengthy constitution-making processes. As one of the interviewed constitution-making experts put it: "An end of a conflict might persuade people to agree on things that they might otherwise [have] argued more about. […] An idealism that was quite rapidly lost."[20] However, future constitution-making might also be hampered in unwarranted ways, e.g. by forestalling meaningful inclusion of civil society demands in constitution-making, as the example from Nepal in the introduction showed. If leveraged, path dependencies need to be carefully designed.[21]

This guidance distinguishes between institutional and content-related path dependencies. Institutional path dependencies describe how decisions on political institutions in peace mediation shape the configuration of constitution-making bodies. Strengthening the political power of certain groups as the result of negotiations likely translates into power in constitution-making as well. For instance, parties might agree on horizontal power-sharing with quotas for specific identity groups, which then provides the basis for demanding a similar configuration of a future constitution-making body. Content-related path dependencies describe how issues agreed upon in the peace mediation limit the possibilities for shaping the content of a future constitution. For example, enshrining revenue-sharing between identity groups in a peace agreement can make it difficult to reverse these resource allocation decisions in a future constitution-making process. Importantly, negotiations themselves can also create such path dependency, for instance, if a minority language is used or certain political symbols are displayed. This can create strong expectations about their subsequent inclusion in the constitution. Similarly, the impact of an interim constitution on the permanent one should not be underestimated (Berghof Foundation and UN DPPA, 2020, p. 40). Third parties should even consider the scenario in which the interim constitution is not replaced and becomes permanent (Würkert, 2022, p. 147).

Note that creating path dependencies does not guarantee their implementation, as constitution-making can also overwrite earlier commitments from peace negotiations. Burundi has been mentioned as an example where the post-conflict constitution diverged from the peace agreement.

By contrast, direct constitutional change takes place if conflict parties agree upon one of the options laid

20 Interview with constitution-making expert, 31 August 2023, online.

21 Ibid.

out above. Conflict parties must be clear on whether they want to change the constitution as a document or pursue less invasive options like reinterpretation or exemptions. If the constitution as a document is to be changed, this could be done through an amendment or by replacing the constitution. If the constitution is to be replaced, another key decision is whether the new constitution should immediately be permanent, include sunset clauses, or be preceded by an interim constitution.

Recall that third parties can facilitate decision-making by the conflict parties on this question but cannot and should not take decisions for them. Nonetheless, third parties should understand which options for constitutional change may be desirable, and under which conditions, in order to anticipate challenges and, depending on the mediation style, to propose suitable options. The remainder of this section therefore offers a set of specific questions, encouraging third parties to examine the constitutional culture, the political power constellation, and the technical feasibility in each case. The focus lies on the empirically most common constellation in which peace mediation is followed by a process of constitutional change that should incorporate the commitments from the peace mediation.

Constitutional culture

- **How rigid is the current constitution?** Even if the parties wish to amend the constitution, it is not always a realistic option. Whether an amendment is possible depends on how rigid a constitution is: What are the formal procedures required for a constitutional amendment? Are so-called eternity clauses even exempted from amendment? Is there a vibrant practice of amending the constitution? Indeed, rigidity is not only a formal question but also a function of the historically evolved constitutional order. For example, the constitution of Papua New Guinea from 1975 provides for a constitutional review process every three years. This practice may have contributed to the successful amendment of the constitution in the aftermath of the Bougainville Peace Agreement in 2001 (Brandt *et al.*, 2011, pp. 39, 45). Also, in contexts in which the constitution is a collection of texts rather than a codified document (cf. Box 4), changes may be feasible more easily. At the same time, more flexible constitutions might make not only amendments but also the replacement of the constitution easier. For example, the constitution of Kenya specifies the procedures to replace the constitution, not just amend it (Brandt *et al.*, 2011, p. 39). It is thus oversimplified to say that constitutional flexibility should always be leveraged to push for an amendment.

- **What is the symbolic significance of the constitution among elites and the population?** Elite and public support is essential for a major change or replacement of the constitution – without support, a constitution can be a useless document.[22] The symbolic significance of the old constitution is key to anticipate whether such support can be secured. On the one hand, if the old constitution is associated with a repressive regime, a constitutional rupture might be welcomed as a signal for a new beginning. On the other hand, if the old constitution is perceived as legitimate and anchored in the national identity, departing from this constitution will likely create resistance and might even undermine the legitimacy of the state as such. An example of the latter is Sri Lanka, where government elites associated the constitution with the unity and stability of the state. Even the possibility of constitutional change through negotiations with the Tamil Tigers thus created strong resistance among them. One indicator of the constitution's symbolic significance is whether the constitution is procedural or prescriptive (*What is a Constitution?*, 2014). While a procedural constitution is a rather technical document that regulates government affairs, a proscriptive constitution enshrines norms and guiding principles for the state. The latter likely has a higher symbolic significance and might therefore be more difficult to change or replace.

22 Interview with mediation expert, 17 October 2023, online.

- **How has the significance of the constitution changed throughout the conflict?** Conflict parties and third parties need to be aware that the significance of the constitution is not static but might change throughout an armed conflict and peace negotiations. For example, the perspective on national unity as a core constitutional principle might have evolved, with public opinion now being more open to regional autonomy or even secession than before.

- **Would yet another constitutional change undermine constitutional authority more generally?** Frequent constitutional changes or even replacements might undermine the significance and legitimacy of the constitution as the constituting document of the state and its function as the supreme law. For example, Egypt, Pakistan, and Vietnam have had six interim constitutions, while Chile and Thailand have even had eight (Grover, 2024, pp. 25–27). Third parties should thus anticipate the indirect adverse effects of another replacement of a constitution even if it might appear desirable in isolation.

Political and military power constellations

- **What is the power constellation between the conflict parties?** Depending on the power constellation between the government and the non-state armed group(s), more or less radical constitutional change may be possible. If the government is powerful, it may be protective of the constitutional status quo and only agree to limited change, such as reinterpretation or exemptions. However, if the military conflict has resulted in a regime change, the adoption of a new constitution might seem politically indispensable, as can currently be observed in Syria. An interim constitution, in turn, signals the transitional nature of the document and, in democratic regimes, can prepare the public for a longer participatory constitution-making process to follow.

- **Can the political and institutional support required for reinterpretation or an amendment be secured?** Reinterpretations and amendments depend on the support of political and judicial institutions. For example, a reinterpretation might only be possible with the cooperation of the courts, which apply the reinterpretation in their judicial practice. An amendment might require some kind of super-majority in parliament. When evaluating constitutional change options, it is therefore crucial to consider whether the support of these institutions can be secured. A positive example is Kenya, where parliamentary support for a constitutional amendment was already garnered during the negotiations to end the 2007/2008 political crisis (cf. Section 2.1).

- **Would broad constitutional change open Pandora's box?** A complete constitutional overhaul by writing a new constitution creates the space and necessity to reconsider every single constitutional provision. In cases of regime change, this is often precisely the intention. However, in other cases, armed conflicts might have been fought over a small number of specific issues, such as revenue-sharing from natural resources. Here, a constitution-making process or even a more limited constitutional amendment process can create additional conflicts over provisions that have not been questioned before. This can unduly prolong the process of finding an agreement between the conflict parties and, in the worst case, lead to its collapse. In line with this reasoning, the government of the Philippines resisted a constitutional reform process because it feared that a broad range of constitutional matters would be brought to the table in its negotiations with the MILF (Berghof Foundation and UN DPPA, 2020, p. 30).

- **What is the risk of spoilers interrupting a constitution-making process?** Constitution-making can take a long time. Such an extended period of political transition and potential instability creates opportunities for spoilers, i.e. formal and informal actors that seek to prevent a peaceful resolution of the conflict.

Spoilers might disrupt constitution-making by nonviolent means, e.g. by blocking negotiations, or by violent means, e.g. by disrupting a referendum on a new constitution. An important aspect when assessing the risk of spoilers is elite cohesion. Does it seem likely that the elites would back an extended constitution-making process? Do they share a common vision for a future state? The lack of elite cohesion is a challenge in Myanmar, for example, where the Ethnic Armed Organisations struggle to reach a consensus on what a new democratic constitution should look like.

- **What is the level of societal polarisation?** Constitution-making puts the political future of a society at stake. In the heated and polarised context of many post-conflict countries, this impedes the search for compromises and the readiness to make concessions (Brandt *et al.*, 2011, p. 25). By contrast, a more incremental approach through constitutional amendments can foster constructive interaction among the elites by building trust and increase support from the public (ibid.). Similarly, a top-down interim constitution might buy time to reduce polarisation before the public constitution-making process for the permanent constitution begins.

Technical feasibility

- **How many provisions need to be changed to maintain a coherent constitution?** When deciding between the amendment or replacement of the constitution, a simple but important question is how fundamental the envisioned changes are. If numerous provisions needed to be changed or if the changes lead to an incoherent document, a new constitution might be the better option (Berghof Foundation and UN DPPA, 2020, p. 57).

- **What are the financial resources at the disposal of the government?** A constitution-making process is expensive, particularly if broad public participation is envisioned. Despite often narrow road maps and timeframes – e.g. 60 days for constitution-drafting in Libya or 100 days in Kenya – writing and approving a new constitution often takes years. Prolonging the constitution-making efforts by first negotiating an interim constitution, to then be replaced by a permanent one, or by choosing time-consuming public participation modes like deliberation has also financial implications. An important question, therefore, is how long international financial support can be expected to continue and which conditions it would be tied to.

- **Can the security of a constitution-making process be guaranteed?** The absence of violence is required for constitution-making (Bell and Zulueta-Fülscher, 2016), e.g. citizens need to be able to participate without fearing for their lives. Yet in many conflict-affected contexts, violence continues after an agreement has been reached through peace mediation. Especially in fragmented conflicts, attacks by non-signatory groups can pose a serious problem. If the security environment is volatile, an interim constitution might buy time until the situation has sufficiently stabilised for a broader process.

- **Is there a valid constitution and stable political arrangement during the transitional period?** Constitutional rupture risks creating a power vacuum by terminating an existing constitutional order – formally or even just by undermining its legitimacy – while the new one is being negotiated. An interim constitution may thus be useful to fill the vacuum until the adoption of the permanent constitution (Böckenförde, Hedling and Wahiu, 2011). For example, Nepal's interim constitution from 2007 was enacted within 10 months while the permanent constitution took another eight years (Brandt *et al.*, 2011, p. 70). Note, however, that the implementation of interim constitutions also creates certain challenges related to their unclear legitimacy, time pressure, and potentially fragmented elites, among other things (Berghof Foundation and UN DPPA, 2020).

How can short-term guarantees be balanced with long-term governability? A central function of constitutionalising the results of a peace process – either through amendment or the adoption of a new constitution – is to secure them in the supreme law of a country. However, overly detailed or rigid provisions, e.g. on veto rights or the distribution of seats in parliament, may impede the long-term governability of a country.[23] An often-cited example of this is the constitution of Bosnia and Herzegovina, agreed upon as part of the Dayton Accords (Schiwal, 2004). Interim constitutions, sunset clauses expiring after a predetermined period, and special laws regulating government affairs without constitutional status can offer a way forward in such situations as they allow for the re-evaluation of provisions with a longer timelag after the end of the conflict (Brandt *et al.*, 2011, p. 216). Nevertheless, sunset clauses should be handled with great care, as they risk creating uncertainty and a legal vacuum if they rely on future compromise.

23 Interview with constitution-making expert, 6 November 2023, online.

5. Actors: Barriers and avenues to collaboration between specialised third parties

This section turns to the actor layer of the constitution-mediation nexus and considers how the interaction between specialised third parties from both fields can be improved at the nexus. Previous research (e.g. Mubashir, Klauke and Vimalarajah, 2021; Saunders *et al.*, 2024) has emphasised the differences between the third parties involved in constitution-making and peace mediation. Indeed, third parties from both sides tend – consciously or not – to be focused on their own process rather than considering the other field's perspectives and expertise. As one participant at the launch event of the constitution-building report by Saunders *et al.* (2024) put it: "There's not much of a constitutional narrative in the mediation field." This separation and lack of coordination and collaboration between the two fields can negatively affect the prospects of reaching sustainable and effective agreements, as the parallel yet countervailing constitution-making and peace mediation processes in Libya showed.

This guidance seeks to add nuance to this picture by exploring why this lack of collaboration develops and persists and by demonstrating that many third-party characteristics align well or at least relate to each other in a neutral way. As the second part of this section shows, this offers a wealth of opportunities for synergies and complementarity between the two fields. Specifically, the dynamics in the actor layer of the nexus are unpacked by analysing four clusters of third-party attributes and interests:

- Goals, values, and beliefs,
- Mandate and tasks,
- Knowledge and skills,
- Institutional and operational constraints.

That the separation of the two fields persists despite the potential for mutual enrichment is partly rooted in and reproduced by the limited interaction between practitioners from different fields. Over recent decades, constitution and mediation experts have developed into specialised professional communities that interact predominantly within their own circles, e.g. at conferences and community of practice (COP) meetings, rather than across professional boundaries.

Nevertheless, the two professional fields are far from homogeneous, and two caveats are in order. First, when this section speaks of constitution-making and peace mediation practitioners as two distinct professional communities for analytical purposes and language simplicity, this conceals the actor constellations and diversity *within* each field. As depicted in Figure 5, the professional community terminology subsumes the acting mediators who facilitate negotiations and the mediation support actors – usually thematic, methodological, or country experts – who support them (*Basics of Mediation*, 2017). On the constitution-making side, this distinction is not applicable as the process is led by national institutions and actors such as constitution-making assemblies, and the constitutional experts merely support them. However, the constitution-making field is also heterogeneous, reflecting both varying scopes of support and the diverse backgrounds of the experts involved, including lawyers, legal drafters, diplomats, and regional experts (Brandt *et al.*, 2011, p. 213; Saunders *et al.*, 2024, p. 45). Both constitution-making and peace mediation also benefit from the input of a broader network providing logistical and institutional support. Here, the distinction between the professional communities is less pronounced.

For instance, the United Nations Development Programme (UNDP) supports constitution-making and peace mediation efforts alike (*UNDP Guidance Note on Constitution-making Support*, 2014, p. 36).

The second caveat is that the current, increasingly fragmented third-party landscape is divided not only on the basis of professional communities but also according to the third parties' affiliations with donors and international, regional, and local organisations. If such divisions align with professional differences, e.g. when constitutional experts are funded by one donor and the mediators by another, this can increase friction in the actor layer of the nexus.

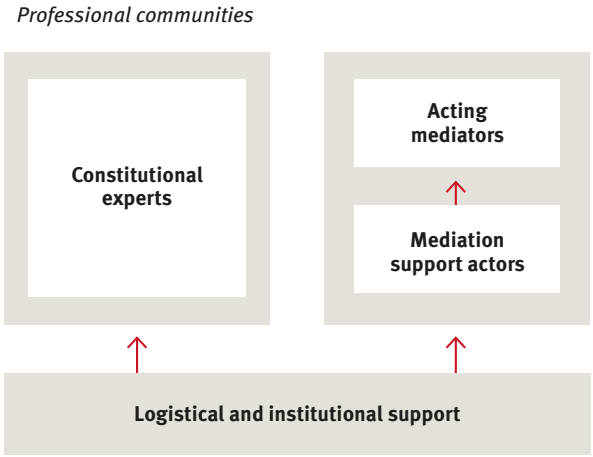


Figure 5: Professional communities at the constitution-mediation nexus

5.1 Unrealised potential for complementarity

This section analyses the aforementioned attributes and interests of the professional communities – their goals, values and beliefs, mandates and tasks, knowledge and skills, and institutional and operational constraints – to assess which are aligned, neutral, or conflicting. The analysis reveals potential for complementarity that is not yet fully realised, partly due to the third parties' focus on managing and safeguarding their respective processes.

Goals, values, and beliefs

Constitution-making and peace mediation practitioners are aligned in striving for sustainable peace through the creation of a new political settlement (Bell and Zulueta-Fülscher, 2016, p. 7; Mubashir, Klauke and Vimalarajah, 2021, p. 348). Both appreciate the value of third-party assistance in reaching this goal and share the understanding of their activities as deeply political. While members of the peace mediation community tend to see constitution-making as a rather technical question, constitutional experts interviewed for this study and existing research (e.g. Nathan, 2020; Cherif, 2021; Würkert, 2022) rejected this representation and emphasised the political nature of constitution-making. As one of the experts interviewed for this guidance put it: "I think we call it technical advice because it's an attempt [...] to make sure no one is thinking it's political advice. But of course, you can't give any advice in constitution-making that isn't actually political."[24] Underlining this point, the Libyan example in Section 2 showed that trying to de-politicise the constitution-making process and keep it separate from political negotiations was unsuccessful and endangered the peace process altogether. Similarly, the UN-led constitution-making efforts in Syria, as a supposedly more technical process following the failed peace talks in Geneva and Astana, remained unsuccessful (*The Constitutional Committee*, 2024).

A difference and potential conflict between constitution-making and peace mediation actors could be their causal beliefs about the peace process – and their perception of the other side's beliefs.[25] Interviewees from both fields expressed concerns that the other side would overestimate the

24 Interview with constitution-making expert, 31 August 2023, online; interview with mediation expert, 17 October 2023, online.

25 Saunders *et al.* (2024) suggest that constitution-making experts and peace mediators can be conceived of as different epistemic communities. Shared, community-specific causal beliefs are one attribute characterising such epistemic communities (Cross, 2013).

importance of its approach. A potential belief in the primacy of one of the processes then reduces the incentive and motivation to reach out and collaborate. Keep in mind, however, that the interviews conducted are not necessarily representative of the field as a whole.

Finally, a fundamental difference between the two professional communities is the value they assign to the constitution. While mediators might be willing to sacrifice the constitution for the sake of settling the conflict by facilitating the rupture with the existing constitutional order, constitution-making experts may be much more reluctant to act against an existing constitution as the expression of popular sovereignty, due to their internalisation of the inherent value of compliance with the law.

Mandate and tasks

The concept of mandating is similar in both fields: mandates build and define the basis and boundaries of legitimate third-party actions. While the source of the mandate and its content can differ between constitution-making and peace mediation, they are not necessarily in conflict. The tasks that need to be fulfilled to implement the mandates also overlap and may complement each other. If managed well, both fields can combine their differing mandates and tasks in a fruitful way. However, if not consciously addressed, differing mandates in the same peace process can also create conflicts over roles, perceived discrepancies in legitimacy, and tasks.

Constitutional experts typically receive their mandates from the national government, while mediators obtain theirs from the conflict parties. The consent of all involved parties as the source of the mediation mandate is thus a critical difference compared to constitution-making support. Although one of the "key fundamentals" of mediation (*UN Guidance for Effective Mediation*, 2012, p. 3), the term 'consent' does not even appear in the UN Guidance on Constitutional Assistance (*UN Constitutional Assistance*, 2020).[26]

Diverse practices exist in both fields on how these mandates are granted. In the case of constitution-making, mandates can range from implicit engagements to explicit mandates and UN Security Council resolutions. Implicit engagements can emerge through generic international third-party programmes on fostering the rule of law, for example, which are leveraged to also extend advice on constitution-making. If the mandate to support the constitution-making process is granted explicitly, this can take the form of formal agreements or memoranda of understanding with the government (Saunders *et al.*, 2024, p. 49). For example, the Nepalese government invited various international organisations and constitutional experts to provide advice and training during the drafting of its post-monarchy constitution (Berghof Foundation, 2017, p. 277). Finally, the UN Guidance on Constitutional Assistance highlights the possibility that the mandate will be based on a UN Security Council resolution or "other UN legislative mandate" and not on government consent (*UN Constitutional Assistance*, 2020, p. 6). This was the case for the constitution-making process in Afghanistan in 2004, whose external support was based on UN Resolution 1510 (2003).

Similarly, peace mediation mandates can vary in formality as peace mediators can also start to engage after an informal request, based on trust and established relationships. Commonly, a formal mandate is granted to the lead mediator, for example by the UN, while a plethora of mediation support actors receive their mandates based on more informal requests to provide expertise, e.g. through training and technical assistance. Similar to constitution-making, these informal engagements can be based on long-standing international third-party programmes. In the shift towards a multipolar world order, the mandate-giving practice for peace mediation becomes even more complex because many overlapping initiatives can take place in parallel (Bell, 2024) as has been the case in Syria, among others.

26 The consent of the conflict parties to the mediation and its results is an ideal that is not always fulfilled for power-based mediation (see Box 1 in Section 3).

These similarities in *how* the mandates are granted notwithstanding, the content of the mandate tends to be very different in the two fields. This goes back to one of the core tensions: constitution-making tends to focus on the empowerment of the people through democratisation, while peace mediators seek to facilitate agreements that can end violent conflict – thus consolidating authoritarianism in extreme cases. However, whether mediators do indeed agree to facilitate a solution that reflects authoritarian values or structures depends on the normative convictions of the mediation support institutions and actors involved. One implication of these differing mandates is that peace mediators might miss the opportunity to engage with constitution-making because they consider this beyond their mandate (Mubashir, Klauke and Vimalarajah, 2021, p. 342) – even though the constitutional implications of their efforts would make this expedient.

To implement their mandates, constitution-making and peace mediation practitioners have to fulfil an overlapping set of tasks:

- Foster trust and dialogue between conflict parties and their constituencies,
- Facilitate consensus-building on a common vision of a future state,
- Support conflict parties in identifying their interests and translating them into options,
- Assist in the drafting of texts,
- Provide the conflict parties with technical expertise, often from a comparative perspective.

This overlap in tasks is ambivalent. In principle, the tasks align well and could be an entry point for collaboration between constitution-making support actors and mediators. For example, if both third parties seek to foster trust between the parties, they could profit from and build on the activities of the other side. Also, both fields have experience in and benefit from creating protected spaces for technical discussions and training, offering a comparative perspective on other cases. However, precisely because of the overlap, the success of the tasks depends on coordination to avoid getting in each other's way. For instance, if constitution-making practitioners work towards reaching a different vision of a future state than the mediators, this can undermine their respective efforts. This guidance suggests that one reason for the lack of coordination between practitioners from both fields is their desire to safeguard their own autonomy and flexibility in the fulfilment of these tasks and to keep the complexity of the processes manageable.

Knowledge and skills

Both professional communities have highly specialised technical knowledge and skills that relate neutrally and could complement each other well. Constitution-making practitioners need a detailed understanding of legal matters, while mediators focus on facilitating negotiations, eliciting interests and options, and relationship-building. Furthermore, both fields have distinct expertise in designing their respective processes. At the same time, their knowledge is structured in similar ways. In both professional communities, a deep understanding of the context has been identified as a precondition for a successful intervention (e.g. Afako, 2022, pp. 17–18; Saunders *et al.*, 2024, p. 131). Yet the focus of the contextual analysis can differ: constitutional experts seek to understand the legal framework and institutions, while mediators tend to concentrate on the armed conflict and de facto governance structures on the ground. That said, international third parties from both communities have been criticised for not always living up to the ideal of having in-depth contextual knowledge.[27] Nonetheless, in principle, these different foci could jointly create a holistic perspective on what is needed for a transition towards sustainable peace.

27 Interview with constitution-making expert, 6 November 2023, online; interview with mediation expert, 17 October 2023, online.

Another commonality is the reliance on comparative case knowledge to inform interventions. For many constitution-making support actors, comparative constitutional law is a strong basis of their work and advice (van Lier, 2018, p. 4). Similarly, mediators and mediation support actors often build their work upon comparative examples. An example of how this comparative perspective plays out at the constitution-mediation nexus is the case of Burundi. Here, the mediators first relied on examples from the Belgian, French, and South African constitutions, but progress in the negotiations was only reached when a broader range of examples of consociationalism in conflict-affected contexts was brought in (Nindorera, 2019, p. 21). Another practice in mediation support is to invite conflict parties to take part in study visits on relevant political systems; this was done in the Sri Lankan process to showcase European models of federalism.

The potential for complementarity is often not realised, however, because of technical language barriers and limited awareness of – and perhaps interest in – the other's expertise. First, the specialisation of the professional communities means that both use technical language that can be difficult to follow for individuals with other professional backgrounds. The interviewed mediation expert underlined the high degree of specialisation in their respective fields: "Some experts might just be brought in to help on devising Article 89b, because dealing with water resources is their speciality."[28]

Second, awareness of the added value of the other professional community's expertise does not always seem to be given. For example, a mediator interviewed for this study claimed: "If you want to have a constitution, just go to ChatGPT. You can have an excellent constitution for any country. So this is not the problem."[29] In stark contrast to this claim, an interviewed constitution-making support actor criticised that mediators did not seek the advice of constitutional experts to an adequate extent: "I wish a little bit more constitutional advice got sought in those moments of mediation [...]. When I look at some of those terrible power-sharing agreements, I sort of wonder, perhaps, just a little bit more skilled constitution thinking may just put a few more ideas into the ring."[30] Similarly, Mubashir, Klauke, and Vimalarajah (2021, p. 342) find that constitution-making practitioners criticise mediators for not engaging them sufficiently. Mediators, in turn, feel that their expertise is not valued.

Institutional and operational constraints

Constitutional experts and peace mediators face institutional and operational constraints, which tend to put them in a competitive position, lowering the incentives to work together. Three constraints stand out in this context: the dependency on donor funding, time pressure, and confidentiality.

The dependency on donor funding creates the need to ensure that successes can be clearly attributed to one's own team in order to secure the next mandate. This means that the contribution to a success like the conclusion of a peace agreement has to be visible, leading to a tendency of overclaiming credit (Saunders *et al.*, 2024, p. 73) and "turf consciousness" (Mubashir, Klauke and Vimalarajah, 2021, p. 342). An interviewed constitution-making expert explicitly criticised the financial pressure at the nexus and pointed out: "You [should] contribute where you are best placed to contribute rather than where you think you can raise money."[31] This in turn disincentivises providing background support for other actors' initiatives, e.g. through the informal sharing of knowledge and expertise. This problem can be especially pronounced if constitution-making support actors and mediators are financed by the

28 Interview with constitution-making expert, 6 November 2023, online.

29 Interview with mediation expert, 17 October 2023, online.

30 Interview with constitution-making expert, 31 August 2023, online.

31 Interview with constitution-making expert, 6 November 2023, online.

same donor and hence directly compete over the same funds. National competition between the donors themselves exacerbates the situation.[32]

Furthermore, practitioners from both fields face considerable time pressure in their daily work, rooted in the desire to stop violence (Johnson, 2017), the need to respond to windows of opportunity, e.g. when conflict parties are willing to negotiate or there is a "sense of shared excitement about the future" among the public during constitution-making (Brandt *et al.*, 2011, p. 38; Bell and Zulueta-Fülscher, 2016), and short project cycles. The latter is related to donor expectations about showcasing results in the short term and reducing the financial costs of the overall process (Brandt *et al.*, 2011, p. 46). At the daily level, time pressure may mean that experts from both sides lack the capacity to acquire knowledge about the other field or to engage in regular dialogue.

Finally, confidentiality is a core promise to the negotiating parties in the early stages of constitution-making and peace mediation alike. Constitution-making often begins with confidential elite negotiations before the process is opened to the broader public (cf. Section 2.1). Similarly, confidentiality is crucial in the early stages of peace mediation when the public at large might not support talks between the government and a non-state armed group. From a nexus perspective, confidentiality can be a major impediment as it prevents coordination and collaboration between third-party initiatives, e.g. by creating incentives to keep the circle of involved experts as small as possible and thus precluding a constructive flow of information.

5.2 Enhancing collaboration and awareness

The preceding analysis highlighted the potential for synergies and complementarity between constitution-making and mediation, which do not appear to be adequately leveraged at present. This section therefore suggests three main strategies to improve the interplay at the actor layer of the constitution-mediation nexus: nexus-sensitive process design, nexus-adapted funding mechanisms, and complementing knowledge and updating perceptions. By focusing on strategies that advance the interaction between different third parties, this guidance follows the recent call to "mediate between the mediators" (Bell, 2024, p. 30) and expand it to 'mediate between third parties of any kind' in an ever more fragmented actor landscape.

Nexus-sensitive process design

The first strategy is to better adapt and expand the established principles and best practices of process design to address the specific challenges of third parties operating at the constitution-mediation nexus. Process design has received extensive attention from mediation practitioners during the past decade (e.g. Lanz and Siegfried, 2012; Arévalo, 2024), arguably a little less so from the field of constitutional experts. Leveraging process design to combine constitution-making and peace mediation activities and actors more effectively is thus in itself an example of potential cross-fertilisation between the two fields. That said, third-party agency over the design of peace processes may be limited due to resistance from conflict parties, interference by international actors, and context factors. In such cases, it is important to at least anticipate the consequences of organically emerging design choices for the constitution-mediation nexus (Bell and Zulueta-Fülscher, 2016).

Specifically, this guidance recommends:

- **Conducting a joint and continuous context analysis that integrates both sides' expertise on the conflict, political, and legal contexts** (Land and Hauck, 2022, p. 37). For example, the conflict analysis tool developed by ETH Zurich (2025) focusing on Actors, Content, Context, and Process (ACCP) could be extended by including an analysis of the normative environment. This

32 Ibid.

can be done as part of a formal collaboration but also more informally through the sharing of resources. While confidentiality might seem to pose a barrier to sharing such insights, it should be critically examined whether parts or a selection of resources can still be shared. Importantly, such an analysis should be conducted early on in a process – not only once the processes are under way – and jointly by international and local experts.[33]

- **Taking previous and current third-party engagements in both the constitution-making and peace mediation processes into account** when developing a new initiative.[34] Here, it is critical to 'cast the net widely' as some engagements might not be framed as constitution-making or peace mediation and hence are at risk of going unnoticed. In so doing, any path dependencies of existing third-party engagements need to be anticipated.

- **Jointly defining, prioritising, and sequencing the strategic objectives of constitution-making and peace mediation.** When defining these objectives, keep in mind that they should be Specific, Measurable, Achievable, Relevant, and Timebound (SMART) (*Advancing the Humanitarian-Development-Peace Nexus Approach*, 2023, p. 5). Setting objectives is particularly important since external support for constitution-making can be selective and on demand, making it challenging to gain a comprehensive overview (Saunders *et al.*, 2024, p. 62).

- **Collectively defining roles and responsibilities across both professional communities**, for example in formal coordination meetings between organisations supporting constitution-making and peace mediation (Töpperwien, 2019, p. 16). This allows scope for identifying and managing overlaps and ensuring complementarity, not least in relation to tasks. It also means asking some critical questions: Who should be included, at what stage and to what end? When doing so, it may be helpful to keep the core interests and beliefs of the two communities in mind to anticipate potential rifts. In cases where scepticism or even tensions between third parties are pronounced, an incremental increase in coordinating roles and responsibilities can be considered to build trust and demonstrate the added value.

- **Ensuring information and knowledge flow** at the constitution-mediation nexus. Here, one of the following three options can be considered:

  1) Unify the lead on both processes in one or two persons who can maintain an overview across initiatives.[35] This option requires a great deal of trust between the professional communities, as well as an individual with the expertise and capacity to take on this role. As Carl (2019, p. 19) points out, many individuals working in the mediation support field have a background in constitutional law, putting them in an ideal position to perform this role.

  2) Establish a nexus-specific role focusing on coordinating the processes (a 'Nexus Coordination Officer'). This person is responsible for following the developments in each process and ensuring coordination and collaboration whenever needed, e.g. by setting up meetings or ensuring acceptable ways of sharing information where the price of confidentiality turns out to be too high. A crucial question is how such a role can be funded – a point that will be discussed below.

  3) When no one has the explicit responsibility to coordinate between the processes, create regular formal or informal spaces for exchange. A potential first step is to

33 Interview with constitution-making expert, 31 August 2023, online; interview with constitution-making expert, 6 November 2023, online.

34 Interview with mediation expert, 17 October 2023, online.

35 Interview with constitution-making expert, 6 November 2023, online.

keep the members of the other community in mind when organising official events and receptions. Similarly, international organisations can use their convening power to bring professionals from both sides together, perhaps even through the creation of a joint committee (Saunders *et al.*, 2024, p. 65).

Nexus-adapted funding mechanisms

The previous section identified competition over donor funding and short funding cycles as key obstacles to improving the interplay at the constitution-mediation nexus. At the same time, donors have leverage to bring professional communities together and incentivise collaboration. Against this backdrop, donors could consider:

- **Creating and financially supporting discussion forums** on nexus questions in the respective contexts and beyond. A positive example of the latter for the HDP nexus is the UN-funded 'Nexus Academy', combining training, community-building, and the provision of expertise on nexus questions in one framework (*Nexus Academy*, 2022).

- **Providing integrated funding** for constitution-making and peace mediation initiatives to reduce the (perceived) competition over funding as much as possible and align project cycles (Land and Hauck, 2022).

- **Expanding the time horizon of funding cycles** for initiatives at the constitution-mediation nexus to allow for long-term planning and collaboration and reduce incentives for claiming successes as exclusive to one process.

- **Budgeting or accepting funding requests for nexus-specific roles** and tasks, such as the 'Nexus Coordination Officer' introduced above.

- **Exchanging and coordinating with other donors** on the constitution-mediation nexus initiatives they are financing.

- **Designing funding initiatives at the nexus together with a network of international experts** to prevent the emergence of several disconnected national initiatives.[36]

Complementing knowledge and updating perceptions

As described above, constitution-making and peace mediation practitioners often lack a profound understanding of what the other side is doing and which value it can add. It is therefore essential to increase mutual understanding and appreciation by:

- **Increasing the professional exchange** by attending events central to the other community, e.g. the annual Edinburgh Dialogue on Post-Conflict Constitution Building or the EU's Peace Mediation Community of Practice meeting.

- **Offering more events** on the link between constitution-making and peace mediation, bringing practitioners and researchers from both communities together. The Edinburgh Dialogue on Post-Conflict Constitution Building is a positive example of this.

- **Training experts** from both communities on the constitution-mediation nexus, enabling them to better understand the skills, knowledge, strategies, and institutional and operational constraints of the other field.

- **Encouraging a critical reflection** on the limits of one's own expertise and blind spots within deployed third-party teams, for example, by fostering an organisational culture that appreciates this kind of 'admission' (Afako, 2022, p. 18).

- **Setting up multidisciplinary teams:** Include experts on constitution-making in the mediation team and vice versa on a more regular basis. A positive – yet insufficient – example is the inclusion of a constitutional expert in the UN Mediation Support Unit's Standby Team.

36 Interview with constitution-making expert, 6 November 2023, online.

These concrete steps notwithstanding, improving the interplay at the constitution-mediation nexus will only be possible if third parties are open and curious to expand their knowledge, willing to explore creative process design options, including the pooling of resources and information, and potentially ready to forego personal prestige for better outcomes (Bell, 2024, p. 48). Keep in mind that "effective cooperation and coordination has become a critical collective obligation" (Afako, 2024, p. 48) for third-party initiatives in a multipolar world.

6. Concluding reflections

This guidance showed that constitution-making and peace mediation are closely interlinked and highlighted the serious consequences if these interlinkages are not well managed. It expanded existing analyses by making the systematic distinction between the process, substance, and actor layers of the nexus. This analytical refinement allowed scope for identifying concrete methodological options in each layer, including advice on how to reconcile conflicting process principles, navigate questions of constitutional substance and change, and manage third parties through nexus-sensitive process design. These options to harvest synergies, optimise the co-existence, or manage dilemmas between constitution-making and peace mediation constitute the key contribution of this guidance.

A bird's-eye view on the nexus in this concluding section further underlines that the three layers of the nexus need to be both clearly separated analytically and thought together practically. An analytical separation of the nexus layers should not distract from the fact that they are deeply interwoven. Frictions in the process layer can have detrimental consequences for joint efforts to address substantive questions, whereas the operational constraints faced by third parties can be critical impediments to effective navigation of these conflicting process principles. Similarly, adherence to specific normative frameworks underpinning the processes can influence the degree of substantial constitutional change required. However, the more radical the desired constitutional change, the more difficult it may be for practitioners from both fields to agree and collaborate, considering their diverging perspectives on the value of the existing constitution.

These observations and the guidance as a whole give rise to five key considerations for constitutional experts, peace mediators, and support actors:

- **ADOPT A NUANCED PERSPECTIVE ON THE NEXUS:** Previous research often emphasised the tensions and conflicts at the constitution-mediation nexus, partly presenting them as irreconcilable. This guidance has added nuance to this narrative by scrutinising the process, substance, and actor layers systematically and highlighting the many aspects in which the two processes align well or can at least co-exist. Practically, this widens the focus from seeing the nexus as a 'problem that needs to be managed' to an opportunity for designing more effective and efficient peace processes and third-party engagements.

- **CONTEXTS DIFFER BUT METHOD ALWAYS MATTERS:** The unique traits of each context can make it tempting to deal with the nexus in an intuitive and ad hoc manner, reacting to how the case in question develops. Certainly, there are no one-fits-all solutions to address the nexus. However, diligent analysis, identifying a range of options, and a conscious choice among them are crucial to allow scope for forward-looking management of the nexus, enabling third parties to counter tensions early on and create as much synergy as possible. This is especially important in complex multi-level environments where international, national, and local interventions interact,

requiring multi-scalar and system thinking. The art lies in balancing appreciation for the uniqueness of each case with an analytical and methods-oriented mindset.

- **UTILISE STRUCTURAL CHANGE TO IMPROVE THE NEXUS INTERPLAY:** The dramatic shifts in the geopolitical environment and the related changes in the constitution-making and peace mediation fields require third parties to fundamentally reconsider their goals, strategies, skills, and ethics. This moment of upheaval might be a window of opportunity to better integrate nexus thinking in peace processes, identify common goals and interests, and fundamentally rethink the interaction with the other field. By shifting the focus away from rigid procedural adherence to one of the two processes, practitioners can develop context-sensitive options that enhance integration rather than force trade-offs.

- **LAYING FOUNDATIONS INSTEAD OF SETTING TRAPS:** Whether constitution-making and peace mediation are sequenced or take place in parallel, decisions made in one process may impose unforeseen constraints on the other: path dependencies are thus created. Sometimes they may be desirable, but sometimes they become major obstacles. The challenge lies in anticipating such interdependencies, as there are no model processes that guarantee certain outcomes. This requires third parties to think proactively about the long-term implications of their interventions and manage unintended consequences. Close strategic collaboration between the professional communities is essential to prevent early decisions from turning into traps down the road.

- **HETEROGENEITY AS AN OPPORTUNITY – FINDING ALLIES:** Organisational identity, individual conviction, and context shape the style of intervening third parties. The immense heterogeneity in the degree of interventionism and normative objectives in both professional communities can even make it challenging to arrive at any generalisable conclusions about them. However, this diversity also offers a valuable entry point for increased cooperation at the constitution-mediation nexus. Third parties can seek to identify and build alliances with like-minded actors with shared values 'on the other side' who might appear closer to them than some colleagues from their own field. Together, they can then try to find innovative solutions to the many challenges at the nexus.

This guidance is another piece in the puzzle in fully grasping the intricate complexity of the constitution-mediation nexus and translating its implications into third-party practice. Future research could broaden the perspective further by considering the interaction of constitution-making and peace mediation with other third-party engagements. For example, Saunders *et al.* (2024, p. 149) point out that sustainable development is "co-dependent" on both constitution-making and peace mediation. Similarly, the link to national dialogues will be worth exploring as these processes share important structural similarities. Another avenue for future analysis is to unpack the implications of the nexus for local conflicts and peacemaking efforts. Finally, additional academic research can help deepen the empirical evidence available through comparative case studies that systematically identify patterns of successful or failed interplay at the nexus.

In addition, unresolved practical challenges remain. This includes the question of how informal governance structures with constitutional relevance or status (e.g. customary

law, religious courts) need to figure in the work of third parties at the constitution-mediation nexus. While this guidance acknowledges the uniqueness of each case and the importance of local knowledge, practitioners are rarely guided in how they can integrate the specificities of the context into their work. Another challenge is the lack of a common vision for the transition from war to peace across third-party engagements including and beyond the constitution-mediation nexus. How is the transitional phase defined? Which formal and informal institutions and actors need to be included? When can a transition be considered successfully concluded? Furthermore, the impact of the increasing digitalisation of societies on the nexus will warrant more attention. How do digital tools, artificial intelligence, and social media influence peace mediation, constitution-making, and the nexus, not least when considering the need for broad societal participation? Lastly, it remains to be seen how the fragmentation of the third-party landscape and the emergence of new, predominantly non-western actors change the practices at the nexus for better or worse.

The current shifts in the geopolitical landscape will undoubtedly affect the constitution-mediation nexus. In an era marked by increasing militarisation and scepticism towards non-military approaches to conflict resolution, the very notion of success for third-party involvement in peace mediation and constitution-making might have to be reconsidered. The expectation that these processes can deliver definitive and comprehensive solutions appears increasingly unrealistic. Instead, success may need to be measured in more pragmatic terms: sustaining dialogue where it risks breaking down, reaching sustainable issue-based agreements, and keeping space open for political transformation even in hostile environments. Well-designed multilateral peace mediation processes combined with the creation and strengthening of resilient constitutional structures will then have the potential to serve as stabilising forces amidst the erratic, disruptive politics shaping the future.

7. Bibliography

Acharya, A. (2013). The R2P and Norm Diffusion: Towards A Framework of Norm Circulation. *Global Responsibility to Protect*, 5(4), pp. 466–479.

***Advancing the Humanitarian-Development-Peace Nexus Approach through IASC Global Clusters* (2023).** IASC Guidance Note. New York: Inter-Agency Standing Committee (IASC). Available at: https://interagencystandingcommittee.org/sites/default/files/2023-12/IASC%20Guidance%20Note%2C%20Advancing%20the%20Humanitarian%20Development%20Peace%20Nexus%20Approach%20through%20IASC%20Global%20Clusterss.pdf (accessed: 22 October 2024).

Afako, B. (2022). *A Field of Dilemmas: Managing Transitional Justice in Peace Processes.* Geneva: OHCHR. Available at: https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/SG-GuidanceNote-Brief-Field-Dilemmas-digital.pdf (accessed: 21 October 2024).

Afako, B. (2024). Pursuing Effective Partnerships: Innovation and Collaboration in Peacemaking in the Horn of Africa, in: T. Whitfield (ed.). *Still Time to Talk.* London: Conciliation Resources (Accord, Issue 30), pp. 44–48. Available at: https://www.c-r.org/accord/still-time-to-talk (accessed: 9 September 2024).

Alvarez, M. *et al.* (2013). *Translating Mediation Guidance into Practice: Commentary on the UN Guidance for Effective Mediation by the Mediation Support Network. New York/Accra: Mediation Support Network.* Available at: https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/Discussion_Points_2_Translating_Mediation_Guidance_into_Practice.pdf (accessed: 10 February 2025).

Arévalo, J. (2024). *Process Design: A Tool to Navigate the Complexity of Peace Negotiations.* Policy Brief. Basel: Swisspeace. Available at: https://www.swisspeace.ch/assets/publications/Policy-Briefs/2024/PB22024Process-Design.pdf (accessed: 17 October 2024).

***Basics of Mediation: Concepts and Definitions* (2017).** Fact Sheet Series: Peace Mediation and Mediation Support. Berlin: Federal Foreign Office & Initiative Mediation Support Deutschland. Available at: https://berghof-foundation.org/library/basics-of-mediation-concepts-and-definitions (accessed: 9 December 2024).

Bell, C. (2024). 'Multimediation': Adapting in Response to Fragmentation, in: T. Whitfield (ed.). *Still Time to Talk.* London: Conciliation Resources (Accord, Issue 30), pp. 27–31. Available at: https://www.c-r.org/accord/still-time-to-talk (accessed: 9 September 2024).

Bell, C. and Ainsworth, R. (2022). *Constitution-Building and Disruption: Addressing Changing Conflict Patterns.* Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/constitution-building-and-disruption-addressing-changing-conflict-patterns (accessed: 26 October 2024).

Bell, C. and Zulueta-Fülscher, K. (2016). *Sequencing Peace Agreements and Constitutions in the Political Settlement Process.* Policy Paper 13. Stockholm: International IDEA. Available at: https://www.idea.int/sites/default/files/publications/sequencing-peace-agreements-and-constitutions-in-the-political-settlement-process.pdf (accessed: 14 August 2024).

Berghof Foundation (2017). *National Dialogue Handbook: A Guide for Practitioners.* Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/national-dialogue-handbook-a-guide-for-practitioners (accessed: 16 August 2024).

Berghof Foundation and UN DPPA (2020). *Constitutions and Peace Processes: A Primer.* Berlin: Berghof Foundation, UN DPPA. Available at: https://berghof-foundation.org/library/constitutions-and-peace-processes-a-primer (accessed: 5 May 2024).

Bisarya, S. (2022). *Advice on Applying Mediation Fundamentals in UN Constitutional Assistance.* New York: UN DPPA. Available at: https://peacemaker.un.org/sites/default/files/document/files/2023/11/2222171-dppa-mediation-constitutional-assistance-finalweb-22nov22.pdf (accessed: 7 April 2025).

Bisarya, S. and Choudhry, S. (2020). *Security Sector Reform in Constitutional Transitions.* Policy Paper 23. Stockholm: International IDEA, The Center for Constitutional Transitions. Available at: https://constitutionnet.org/sites/default/files/2020-10/security-sector-reform-in-constitutional-transitions.pdf (accessed: 27 January 2025).

Böckenförde, E.-W. (1986). *Die verfassunggebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts.* Frankfurt a.M.: Alfred Metzner.

Böckenförde, M., Hedling, N. and Wahiu, W. (2011). *A Practical Guide to Constitution Building*. Stockholm: International IDEA. Available at: https://constitutionnet.org/sites/default/files/2022-02/a-practical-guide-to-constitution-building.pdf (accessed: 26 October 2024).

Brandt, M. *et al.* (2011). *Constitution-Making and Reform: Options for the Process*. Geneva: Interpeace. Available at: https://www.interpeace.org/wp-content/uploads/2011/09/2011_11_Constitution-Making_Handbook_English.pdf (accessed: 15 August 2024).

Brown, N.J. and Alsarghali, S. (2024). Why an Interim Constitution Could Help Palestine: The Domestic and International Payoffs. *Carnegie Endowment for International Peace*, 8 April. Available at: https://carnegieendowment.org/research/2024/04/why-an-interim-constitution-could-help-palestine-the-domestic-and-international-payoffs?lang=en (accessed: 7 March 2025).

Buchanan, C., Clayton, G. and Ramsbotham, A. (2021). *Ceasefire Monitoring: Developments and Complexities*. London: Conciliation Resources. Available at: https://www.c-r.org/accord/ceasefire-monitoring-developments-and-complexities (accessed: 6 August 2024).

Bulmer, E. (2017). *Government Formation and Removal Mechanisms*. Constitution-Building Primer 17. Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/government-formation-and-removal-mechanisms (accessed: 7 October 2024).

Byers, M. (2021). Still agreeing to disagree: International security and constructive ambiguity. *Journal on the Use of Force and International Law*, 8(1), pp. 91–114.

Campbell, J. and Page, M.T. (2018). *Nigeria: What Everyone Needs to Know*. New York: Oxford University Press.

Carl, A. (2019). *Constitution Making in Contexts of Conflict: Paying Attention to Process*. Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/constitution-making-in-contexts-of-conflict-paying-attention-to-process (accessed: 13 August 2024).

Cats-Baril, A. (2019). *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building*. Policy Paper 22. Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/moving-beyond-transitions-to-transformation (accessed: 14 October 2024).

Cherif, N. (2021). *Libya's Constitution: Between Conflict and Compromise*. Technical Report, Middle East Directions (MED). Florence: European University Institute. Available at: https://cadmus.eui.eu/handle/1814/70538 (accessed: 12 March 2025).

Cross, M.K.D. (2013). Rethinking Epistemic Communities Twenty Years Later. *Review of International Studies*, 39(1), pp. 137–160.

Dudouet, V. and Lundström, S. (2016). *Post-war Political Settlements: From Participatory Transition Processes to Inclusive State-building and Governance*. Research Report. Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/post-war-political-settlements-from-participatory-transition-processes-to-inclusive-state-building-and-governance (accessed: 5 February 2025).

ETH Zurich (2025). *ACCP Conflict Analysis Framework – A Video Illustration*. ETH Zürich MAS Mediation in Peace Processes. Available at: https://mas-mediation.ethz.ch/tools/accp-conflict-analysis-framework.html (accessed: 17 March 2025).

Grover, L. (2024). Out of the Shadows: Illuminating the Distinctiveness and Exceptional Use of Interim Constitutions. *International Journal of Constitutional Law*, 22(1), pp. 83–110.

***Guidance Note of the Secretary-General on United Nations Constitutional Assistance* (2020).** New York: United Nations. Available at: https://peacemaker.un.org/sites/default/files/document/files/2022/11/sg-guidance-note-constitutional-assistance.pdf (accessed: 10 December 2024).

***Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes* (2009).** New York: United Nations. Available at: https://www.idea.int/un-and-democracy/library/guidance-note-secretary-general-united-nations-assistance-constitution-making-processes (accessed: 10 October 2024).

Hellmüller, S., Palmiano Federer, J. and Zeller, M. (2015). *The Role of Norms in International Peace Mediation*. Policy Brief. Oslo: NOREF. Available at: https://noref.no/publication-documents/policy-brief-the-role-of-norms-in-international-peace-mediation/Hellm%C3%BCller-et-al_NOREF_The-role-of-norms-in-international-peace-mediation_May-2015_FINAL-CORRECTED.pdf (accessed: 1 April 2025).

Hellmüller, S., Pring, J. and Richmond, O.P. (2020). How Norms Matter in Mediation: An Introduction. *Swiss Political Science Review*, 26(4), pp. 345–363.

Hellmüller, S. and Salaymeh, B. (2025). Transactional Peacemaking: Warmakers as Peacemakers in the Political Marketplace of Peace Processes. *Contemporary Security Policy*, 46(2), pp. 312–342.

Hickey, S.P. (2024). *Natural Resource Management: Development and Environmental Protection in Constitutional Reform Processes*. Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/natural-resource-management-development-and-environmental-protection (accessed: 26 February 2025).

Horowitz, J. (2008). *Power-Sharing in Kenya.* CSCW Policy Brief 03/2008. Oslo: PRIO. Available at: https://cdn.cloud.prio.org/files/c16e8043-b7f3-4c2c-b8a3-d5d3cb8efce2/Kenya%20Policy%20Brief.pdf?inline=true (accessed: 29 March 2025).

***Humanitarian-Development-Peace Nexus* (2020).** Stockholm: SIDA. Available at: https://cdn.sida.se/publications/files/sida62325en-humanitarian-development--peace-nexus.pdf (accessed: 22 October 2024).

IMSD (2019). *The Normative Framework and the International Legal Basis of Peace Mediation.* Peace Mediation and Mediation Support Fact Sheet. Berlin: German Federal Foreign Office, Initiative Mediation Support Deutschland (IMSD). Available at: https://friedensmediation-deutschland.de/wp-content/uploads/2024/08/FS5_The-Normative-Framework-int.-legal-basis.pdf (accessed: 3 March 2025).

Jesperson, R.L., Wendt, A. and Katzenstein, P.J. (1996). Norms, Identity, and Culture in National Security, in: P.J. Katzenstein (ed.). *The Culture of National Security – Norms and Identity in World Politics.* New York: Columbia University Press, pp. 33–75.

Johnson, D.E.W. (2017). Conflict Constitution-Making in Libya and Yemen. *University of Pennsylania Journal of International Law*, 39(2), pp. 293–354.

Kraus, A.I. *et al.* (2019). Dilemmas and Trade-Offs in Peacemaking: A Framework for Navigating Difficult Decisions. *Politics and Governance*, 7(4), pp. 331–342.

Land, T. and Hauck, V. (2022). *HDP Nexus: Challenges and Opportunities for its Implementation. Brussels: European Commission*. Available at: https://international-partnerships.ec.europa.eu/system/files/2023-05/eu-hdp-nexus-study-final-report-nov-2022_en.pdf (accessed: 22 October 2024).

Lanz, D. and Siegfried, M. (2012). *Mediation Process Matrix.* Bern: Swisspeace. Available at: https://www.swisspeace.ch/articles/mediation-process-matrix (accessed: 2 September 2023).

van Lier, F.-A. (2018). *Constitution-Making as a Tool for State-Building? Insights from an Ethnographic Analysis of the Libyan Constitution-Making Process*. Working Paper 192. Max Planck Institute for Social Anthropology. Available at: https://www.eth.mpg.de/pubs/wps/pdf/mpi-eth-working-paper-0192 (accessed: 24 September 2024).

Månsson, K. (2023). *Human Rights in Mediation: The Heart of the Matter.* Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/human-rights-in-mediation (accessed: 12 September 2024).

Mubashir, M., Klauke, J. and Vimalarajah, L. (2021). The Nexus of Peace Mediation and Constitution Making: The Case for Stronger Interaction and Collaboration, in: C. Turner and M. Wählisch (eds.). *Rethinking Peace Mediation.* Bristol University Press, pp. 333–354.

Nathan, L. (2019). The Imperative of Constitutionalizing Peace Agreements. Thematic Paper. Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/the-imperative-of-constitutionalizing-peace-agreements (accessed: 16 August 2024).

Nathan, L. (2020). The Real Deal? The Post-Conflict Constitution as a Peace Agreement. *Third World Quarterly*, 41(9), pp. 1556–1574.

***Nexus Academy. Learning, Community, and Capacity for HDP solutions* (2022).** UN-DAC Dialogue Group. Available at: https://interagencystandingcommittee.org/sites/default/files/migrated/2022-01/Nexus%20Academy%20Explainer%20Jan%202022.pdf (accessed: 17 March 2025).

Nindorera, W.P. (2019). *Interactions Between Peacemaking and Constitution-Making Processes in Burundi. A Stabilising or a Crisis Factor?* Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/interactions-between-peacemaking-and-constitution-making-processes-in-burundi-a-stabilising-or-a-crisis-factor (accessed: 26 August 2024).

Ozcelik, A. and Sapiano, J. (2018). The Bangsamoro Organic Law: A Concrete Step towards Peace in Mindanao. *PeaceRep*, 28 August. Available at: https://peacerep.org/2018/08/28/6832/ (accessed: 9 March 2025).

Paffenholz, T. (2014). Civil Society and Peace Negotiations: Beyond the Inclusion–Exclusion Dichotomy. *Negotiation Journal*, 30(1), pp. 69–91.

Pehar, D. (2001). Use of Ambiguities in Peace Agreements. *Diplo Resource*, 3 August. Available at: https://www.diplomacy.edu/resource/use-of-ambiguities-in-peace-agreements/ (accessed: 7 March 2025).

'Road Map Torn by Ambiguity' (2003). *The Washington Institute for Near East Policy*, 28 May. Available at: https://www.washingtoninstitute.org/policy-analysis/road-map-torn-ambiguity (accessed: 7 March 2025).

Saunders, C. (2019). The Processes of Constitutional Transitions in the Face of Territorial Cleavages, in: G. Anderson and S. Choudhry (eds.). *Territory and Power in Constitutional Transitions.* Oxford University Press, pp. 330–351.

Saunders, C. *et al.* (2024). *External Support to Constitution Building Processes.* Report 2024:06. Stockholm: The Expert Group for Aid Studies (EBA). Available at: https://eba.se/wp-content/uploads/2024/10/External-support-to-constitution-building-processes-2024-06.pdf (accessed: 21 October 2024).

Schiwal, J. (2004). *Beyond the Dayton Accords: Resolving Bosnia-Herzegovina's Frozen Conflict.* Washington, D.C.: United States Institute of Peace. Available at: https://www.usip.org/publications/2024/10/beyond-dayton-accords-resolving-bosnia-herzegovinas-frozen-conflict (accessed: 28 February 2025).

Smith, S.S. (2019). *Loya Jirgas and Political Crisis Management in Afghanistan: Drawing on the Bank of Tradition.* Washington, D.C.: United States Institute of Peace. Available at: https://www.usip.org/publications?keywords=%22Scott%20Smith%22&page=1 (accessed: 15 September 2024).

Stankovski, B. (2019). *Peacemaking and Constitutional Change: Negotiating Power-Sharing Arrangements and Identity Issues.* The Republic of (North) Macedonia and The Ohrid Framework Agreement. Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/peacemaking-and-constitutional-change-negotiating-power-sharing-arrangements-and-identity-issues-the-republic-of-north-macedonia-and-the-ohrid-framework-agreement (accessed: 26 August 2024).

***Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution* (2012)**. Session 66. New York: United Nations General Assembly. Available at: https://peacemaker.un.org/sites/default/files/document/files/2022/09/sgreportstrenghteningtheroleofmediationa668110.pdf (accessed: 1 April 2025).

***The Constitutional Committee: Between Stagnation and Regional and International Power Conflicts* (2024).** *The Syrian Women's Political Movement.* Available at: https://syrianwomenpm.org/statements/the-constitutional-committee-between-stagnation-and-regional-and-international-power-conflicts/ (accessed: 29 March 2025).

Thornton, C. (2024). Eyes on the Long Term: Reconceptualising the Negotiation of Political Settlements, in: T. Whitfield (ed.). *Still Time to Talk.* London: Conciliation Resources (Accord, Issue 30), pp. 54–57. Available at: https://www.c-r.org/accord/still-time-to-talk (accessed: 9 September 2024).

Tladi, D. (2016). *Jus Cogens.* A/CN.4/693. UN Office of Legal Affairs. Available at: https://legal.un.org/ilc/documentation/english/a_cn4_693.pdf (accessed: 14 February 2025).

Töpperwien, N. (2019). F*rom Armed Intra-State Conflict to a Functioning Constitutional Order. Reconciling Principles of Third-Party Support – a Reflection.* Berlin: Berghof Foundation. Available at: https://berghof-foundation.org/library/from-armed-intra-state-conflict-to-a-functioning-constitutional-order-reconciling-principles-of-third-party-support-a-reflection (accessed: 16 August 2024).

***UNDP Guidance Note on Constitution-Making Support* (2014).** New York: United Nations Development Programme. Available at: https://www.undp.org/sites/g/files/zskgke326/files/publications/Constitution-Making-Support-Guidance-Note.pdf (accessed: 20 December 2024).

***United Nations Guidance for Effective Mediation* (2012).** New York: United Nations. Available at: https://peacemaker.un.org/sites/default/files/document/files/2022/09/guidanceeffectivemediationundpa2012englisho.pdf (accessed: 13 September 2024).

Watanabe, L. (2019). *UN Mediation in Libya: Peace Still a Distant Prospect.* CSS Analyses in Security Policy 246. Zurich: Center for Security Studies. Available at: http://hdl.handle.net/20.500.11850/345379 (accessed: 9 March 2025).

***What is a Constitution? Principles and Concepts* (2014).** Constitution Building Primers. Stockholm: International IDEA. Available at: https://constitutionnet.org/sites/default/files/what_is_a_constitution_0.pdf (accessed: 14 November 2024).

Williams, T. (2010). The MoA-AD Debacle – An Analysis of Individuals' Voices, Provincial Propaganda and National Disinterest. *Journal of Current Southeast Asian Affairs*, 29(1), pp. 121–144.

Würkert, F. (2022). *Rechtsnormen und Legitimität in der Friedensmediation.* Baden-Baden: Nomos.

Zulueta-Fülscher, K. (2015). *Interim Constitutions: Peacekeeping and Democracy-Building Tools.* Policy Paper. Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/interim-constitutions-peacekeeping-and-democracy-building-tools (accessed: 25 August 2024).

Zulueta-Fülscher, K. and Murray, C. (2024). *Shaping the Post-Conflict Landscape? The Role of Constitutions in Natural Resource Governance.* Stockholm: International IDEA. Available at: https://www.idea.int/publications/catalogue/shaping-post-conflict-landscape-role-constitutions-natural-resource (accessed: 26 August 2024).

Berghof Foundation
Operations gGmbH
Lindenstraße 34
10969 Berlin
Germany

www.berghof-foundation.org
info@berghof-foundation.org

@berghoffnd.bsky.social
@BerghofFnd
/BerghofFoundation
/berghof-foundation
@berghoffnd

Europa-Universität Viadrina
Große Scharrnstraße 59
15230 Frankfurt (Oder)
Germany

www.europa-uni.de

@viadrina
Europa-Universität Viadrina
Europa-Universität Viadrina Frankfurt (Oder)
@viadrina