



Critical substantive issues at
the nexus of peacemaking and
constitution-building

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1 Introduction

Mediation and constitutional processes are tasked with transforming the root causes of protracted societal conflicts, as well as redressing abuses of power and human suffering caused by conflict. They hence deal with a wide range of political, security, socio-economic, legal and judicial or even psychological issues. This paper examines the most critical substantive or thematic issues which lie at the heart of both peacemaking and constitution-building endeavours. The selection of topics was guided by the following questions: What are the recurring dilemmas, tensions, challenges and opportunities around substantive issues at the nexus? At what stages do they tend to appear or are they heightened? Which specific substantive issues addressed in peace negotiations require institutionalisation in the constitution to come into effect? Which substantive issues might require short-term arrangements as trust-building mechanisms during the process of negotiating or moving towards permanent/long-term settlement? And finally, what are examples of substantive issues where third parties helped put in place a productive, responsive and timely balance of legal/thematic/constitutional and mediation expertise in order to achieve an acceptable solution for all conflict parties?

The paper analyses successively four main thematic issues, dealing respectively with horizontal power distribution between and within different branches of government (Section 2), vertical or territorial power distribution between central and sub-national levels of governance (Section 3), security sector reform and governance (Section 4) and transitional justice mechanisms (Section 5). For each topic, the section describes their relevance for the peacemaking/constitution-building nexus and delves into key challenges, dilemmas and areas of tension for third-party intervention. The paper concludes by proposing a number of approaches and strategies to address some of these challenges, based on lessons learnt from past experiences and expert interviews.

2 Inclusive political governance

Good peace agreements seek to reconcile parties to the conflict while contributing to the country's transition to democracy and the rule of law and addressing the conditions that create inequalities. To do so, agreements must make it difficult to concentrate power in the hands of one group, person or entity, since that is often one of the main drivers of conflict. Generally speaking, there are three mechanisms to guard against the concentration of power, namely the division of power between and within the three branches of government (legislative, executive and judicial); competition for power (another mechanism to disperse power, primarily through periodic elections); and power-sharing mechanisms (which may take many forms, from Governments of National Unity to ethnic quotas and reserved seats in legislatures). When present in a peace agreement, these mechanisms must be built into the political system and as such constitutionalised, at least in part (McEvoy and O'Leary 2013: 10).

2.1 Division of power

In theory, the **executive branch** is only one of three equally important branches of government. Its role in a political system is to implement the law as laid down by the legislature and interpreted by the judiciary. In practice, however, especially in authoritarian contexts, the executive tends to amass a high degree of power and attempts to take full control over the other branches. For this reason, struggles around executive power (to keep it, curb it, extend it or take control of it) are often at the heart of violent conflicts (Wahiu 2011: 33). Thus, one of the major challenges for mediators is how to deconcentrate executive powers through a political agreement and/or constitutional reform. Attempts by elected governments to extend their tenure beyond the terms permitted in the constitution also illustrate the limited reach of constitutional provisions that lack political support (Burkina Faso, Côte d'Ivoire,

Gabon, Uganda). To avoid this, some constitutions have made presidential terms immutable (El Salvador, Honduras, Niger). In **Burundi**, President Pierre Nkurunziza used various strategies to counter or reinterpret the Arusha peace accord and subsequent constitutional texts in order to extend his reign beyond two presidential terms. He eventually eliminated the two-term limit by unilaterally amending the constitution, aided by fierce repression and the failure of international initiatives to stop him and to contain the crisis.

Challenges here go beyond strengthening the role of the judiciary and legislature. In contexts where confidence in the political system is low, citizens need assurances that certain key issues will be protected from governmental abuse or failure – especially from manipulation by the president or the cabinet. Often, **independent commissions** or other bodies are set up either in the constitution or in subsequent laws as a way to address a crisis of confidence in the government's integrity. They are an attempt to safeguard or implement certain functions necessary to enhance democracy (for example the investigation of human rights violations or combating corruption), independently of the formal government.

Kenya

The AU-led mediation in Kenya's 2007/2008 post-election crisis managed to bring an end to the conflict through a political agreement titled the National Accord and Reconciliation Act (NARA), which was passed into law by the Kenyan parliament in 2008. One of the problems that the constitution-makers had to contend with was the very popular perception that those who had held office as president in the past had abused their position for private gain and that no public official had stood up to them. As a check against such a scenario in the future, Chapter 15 of the 2010 Kenyan constitution set up several constitutional commissions on various issues, from human rights to land and revenue allocation, and established independent Offices of the Auditor General and the Controller of Budget. Mediators and constitution-builders faced key questions such as: how much detail should be included in an agreement, how much in the constitution, and what should be left to the law? Reflecting back on the process, the Katiba Institute writes: *"Having devised a system of independent commissions, [the constitution-makers] left the details of appointments processes to law (made by Parliament). And they gave the National Assembly the power to approve (or disapprove) commissioners, and the role of deciding whether a complaint against commissioners should lead to removal proceedings"* (Wanyoike 2016). This led to problems, with the independence and integrity of individual commissioners being questioned, for example, within the Electoral Commission.

2.2 Competition for power (elections)

Mediated peace agreements often see elections as a critical component of the transitional timeline. A narrow focus on elections as the main mechanism for a transition to democracy can be problematic, however, since democratisation is a much more complex process than allowing citizens to choose their representatives freely (Wahiu 2011: 8). Attention to the political party landscape, efforts to improve the parties' ability to engage in democratic processes and the enabling environment for the free exchange of ideas and information – in which media and civil society are key – are essential to democratisation in the long run.

Regarding the design of the electoral system, countries have several options, all of which are fraught with efficiency/representation dilemmas. For example, the **first past the post** system, whereby a legislator is elected by a simple majority in an electoral constituency, is seen as conducive to stable and efficient (majority-based) parliaments, but is criticised for under-representing minority parties. On the other hand, the system of **proportional representation** generally results in a more inclusive legislature by enabling a wider range of political parties to secure seats. But it can also be inefficient, since it can make it more difficult for legislators to reach the consensus needed to enact necessary legal reforms.

An option for increasing the representation of women and ethnic or other minorities in the legislature is to introduce **reserved seats or quotas** for specific social groups. Countries as diverse as **India, Croatia and Niger** use this system.¹ These representatives are sometimes elected only by members of the particular minority community designated in the electoral law or the constitution. While provisions on reserved seats are often enshrined in the constitution, candidate quotas are predominately regulated in electoral laws (Böckenförde 2011: 193). They are often used to increase the representation of women, by requiring parties to field a minimum percentage of female candidates. These mechanisms, while aiming to improve representation in legislatures, are also contested (especially by members of the majority parties or dominant social groups) on the grounds that they require adjustments to the electoral system which may give rise to resentment both inside and outside the legislature.

¹ For a useful overview, see The Electoral Knowledge Network, aceproject.org/main/english/es/esc07b.htm (accessed 6 March 2020).

Burundi

The Arusha peace talks in Tanzania to end the conflict in Burundi started in June 1998. They were initially mediated by ex-Tanzanian president Julius Nyerere, succeeded by Nelson Mandela after his death, with the assistance of international experts. Following long negotiations on power-sharing and electoral mechanisms, the parties eventually agreed on the principles of a consociational system of democracy, allowing the Hutu majority to take back power through universal suffrage, while introducing mechanisms to prevent future power monopoly over any political force or ethnic group. These included the right of veto for the Tutsi minority and strong majority requirements to pass bills. The 2000 Arusha Peace and Reconciliation Agreement for Burundi was designed to serve as a possible constitutional model for the transitional regime and post-transition status quo. The 2004 constitution was the culmination of a complicated negotiation process among the political parties and the main rebel group CNDD-FDD, which had joined the transitional government after signing a separate peace accord endorsing the Arusha agreement. The main bone of contention concerned the distribution of, and competition for, power in the different branches of government. The Tutsi parties demanded quotas for the political-ethnic groups and an ethnic changeover at leadership level, while Hutu parties, including CNDD-FDD, considered these demands unfounded, given the already important concessions to the minority. An agreement on power-sharing was finally signed in August 2004. For the first time, ethnic quotas (60% of Hutus and 40% of Tutsis) were clearly reflected in the composition of the government and parliament. After a referendum endorsed the new constitution, general elections produced a resounding victory for CNDD-FDD. Even though the new regime implemented the ethnic quotas within governmental institutions, it failed in other ways to respect Arusha, a peace agreement that the CNDD-FDD did not like because it had not participated in its negotiation, and the new constitution based on it. Therefore, bills and reforms enshrined in the Arusha peace accord were delayed or overridden and various mechanisms to ensure and follow up on the balance of power were manipulated. Since then, Burundi has been mired in a crisis that has effectively resulted in the dismantling of the Arusha peace agreement (Nindorera 2019, Raffoul 2019).

2.3 Power-sharing

Power-sharing, a commonly-used mechanism in peace agreements for accommodating political rivals, may include one or more of four dimensions – security, territory, politics and economics (Hartzell and Hoddie 2007). This section focuses on political power-sharing arrangements, which bring together parties from the executive, legislature and sometimes the judiciary. Securing a deal without power-sharing provisions can be difficult, especially in contexts where ethnic divisions or rivalries are a key feature of the conflict, since negotiating parties seek to institutionalise guarantees for their security and inclusion in the post-agreement phases of the process. As a region, Africa in particular has been the site of peacemaking experiments with power-sharing arrangements, for example in the Democratic Republic of the Congo, Liberia, Rwanda, Côte d’Ivoire, Sudan, Sierra Leone and Zimbabwe (Sriram and Zahar 2009: 13).

Common as it is, power-sharing as a mechanism for peacebuilding does not have a good record of success, both in its short-term implementation and in the longer-term prevention of conflict relapse. Peacemaking that seeks to prioritise stability over democratisation may fall into the trap of overemphasising power-sharing in order to appease warring parties (Wahiu 2011, Raffoul 2019). In addition, power-sharing that attempts to institutionalise the rights of key groups in a conflict might end up reifying or enforcing the same differences that divided those groups in the first place (Mezzerla et al. 2009: 11). Furthermore, while addressing the grievances of some parties, it may simultaneously create new ones or escalate demands for similar arrangements or incentives by groups excluded from the process, for example, rebel groups in the West and East of **Sudan** during the process that led to the 2005 Comprehensive Peace Agreement in Sudan. In the longer term, the prevention of violent conflict relies in part on building states that are democratic, responsive to grievances and robust in channelling grievances in non-violent ways. However, power-sharing arrangements arrived at through mediated agreements may bring to power persons and

groups not fully committed to practising good governance to the benefit of the whole population. For example, in the first post-conflict elections held in **Angola** in 1992, Jonas Savimbi, leader of UNITA (*União Nacional para a Independência Total de Angola*), did not succeed in winning the presidency. This led him to renege on his commitment to the terms of the Bicesse Accords (Sriram and Zahar 2009: 23-24).

2.3.1 Governments of National Unity (GNUs)

GNUs are “arrangements that seek to manage conflict by bringing opposing parties together,” especially during transitional periods such as the formulation of a new constitution or prior to the first post-war elections. It has also become “a popular option for mediators in resolving electoral disputes” (Maina 2011: 4). GNUs seek to ensure that representation in the executive is not based on a simple majority and that there is a recognition that national unity requires different agendas and interests to be accommodated. In order to achieve this, GNUs put in place an executive which consists of different parties that share responsibility for its functioning. **South Africa** is a well-known example of this form of government. a coalition or interim government was formed just before the end of apartheid, during the CODESA conferences and before the 1994 election. However, if carried over to the constitution as a permanent feature of the new system of government, GNUs can turn into a conflictual space, resulting in paralysis or a renewal of conflict dynamics. Post-Dayton **Bosnia and Herzegovina** is often cited as a case in point.

The formation of GNUs following electoral disputes, especially in instances where losers retain power, is highly controversial (e.g. as some argue was the case in **Zimbabwe**; see Maina 2011, also for the following). Furthermore, when GNUs are largely modelled along the lines of power-sharing, there is legitimate concern over lack of public ownership of the new system of government. In **Liberia**, an Interim Government of National Unity (IGNU) was established to bring

about political transition through democratic elections in July 1997. However, the new governing structure was unable to end the violence by the different warring factions. GNUs are thus intended to resolve issues of competing interests in interim post-war transitions, but they are not always good at focusing on the transformation of the state structure that is prone to crisis.

Kenya

In Kenya, one of the outcomes of the 2008 National Accord and Reconciliation Act was the formation of a GNU, bringing together the main stakeholders in the electoral conflict which had erupted the previous year. As a result, Mwai Kibaki of the Party of National Unity (PNU) retained the presidency, while Raila Odinga of the Orange Democratic Movement (ODM) was installed as prime minister. In addition, both parties received an equal share of the 40 ministerial posts, in what was controversially the largest cabinet in the country's history. The two political parties together represented a two-thirds majority in parliament that could alter the constitution. The new constitution enacted in 2010 curbed the powers of the president in favour of strengthening sub-national administration, and the position of prime minister was abolished in the run-up to the 2013 election. Odinga lost the election to Kibaki, and after a failed attempt to legally challenge the results, he accepted his defeat. In sum, the GNU in Kenya provided a platform for the drafting of the new constitution, which was enacted in a violence-free referendum. One of the main roles of GNUs can thus be to provide a temporary platform on which basic political reforms are made and an inclusive constitution-making process can take place.

2.3.2 Enlarged legislatures

Enlarged legislatures provide an alternative or additional mechanism for societies attempting to transition from violence to non-violent political accommodation. Legislatures have three main functions: law-making, representation and oversight. They are typically elected and their structure allows for different interests, points of view and political ideologies in order to accommodate conflict and other parties previously excluded (Wahiu 2011). Importantly, legislatures can allow the accommodation of potential spoilers.

For example, the 2019 political agreement in **Sudan** introduced power-sharing between the two parties to the negotiations: the Forces for Freedom and Change (FFC), a group of political parties and civil society bodies, and the Transitional Military Council (TMC). The interim constitution ("constitutional document") specifies that two-thirds of the (appointed) interim legislative body is to be designated by the FFC, while one-third is to be designated by the military, which has controlled the country for the vast majority of its post-independence history.

3 Territory and power

This section deals with efforts to devolve power in conflicts that are characterised by territorial cleavages within deeply divided societies. The devolution of power here is understood as a mode of restructuring and decentralising state power and includes various models with differences in form, extent and legal basis. The section looks in particular at tensions and challenges that peacemakers and constitution-makers face when designing federal, regional and special autonomy arrangements.

Dealing with territorial disputes, especially in combination with issues of minority exclusion and identity politics, usually necessitates rethinking power structures, authorities and competencies within a political system. In other words, these are issues that go to the very heart of constitutions (Wise 2018, Saunders 2018). Arrangements to redistribute state powers between various levels of government can vary in depth (weak/strong) and mode (symmetrical/asymmetrical).² In cases of secessionist and other armed movements fuelled by the social grievances of excluded ethnic or religious minorities, peacemakers face a highly complex web of interests, claims, expectations, power asymmetries, formal and informal rules and norms and potential path dependencies. Although not every form of devolution requires measures as far-reaching as a federal arrangement, for example, to be put in place,³ all efforts to devolve power must be approached not only cautiously but as part of a well thought-out and holistic package of implementable reforms where constitution-making is key.

3.1 History, emotion and the challenges of legal codification

Mediators sometimes approach devolution as a purely technical or administrative exercise. They tend not to fully account for the deeply politicised, historically-situated and emotionally charged nature of these processes. If not handled sensitively, changes to the distribution of state power through any form of devolution via constitutional, legal and/or administrative reform may further increase conflict, not reduce it. Serious tensions down the line can emerge when mediators and conflict parties make binding decisions within closed-door negotiation processes on the issue of the distribution of powers, despite lacking adequate knowledge of the constitutional/legal implications of such decisions or the range of options available due to the country's political and legal history.

In some cases, mediators find themselves confronted with conflict parties demanding power devolution without being fully cognizant of its far-reaching implications for the existing system of state power. On the contrary, conflict stakeholders might reject proposed devolution measures based on historically negative connotations of certain terms, while being fully supportive of their substantive content. This lack of awareness may also derive from the fact that there are varied understandings of what devolution, especially federalism, implies.

² Symmetric arrangements devolve the same amount of power to the sub-states, whereas “asymmetric” usually means that specific powers are assigned to particular regions only (Melbourne Forum on Constitution-Building in Asia and the Pacific 2018).

³ For the purpose of this study, it is important to note that the term federalism is not restricted to the terms federal, federation and confederal but refers broadly to forms of state design that constitutionally provide for a system of self-rule and shared rule between different levels of government (Töpperwien 2009).

These varied understandings, the strong feelings federalism tends to illicit, and the fact that federalism necessitates constitutional change, often make it a highly polarising topic in negotiations, particularly if introduced early in the process (Wise 2018: 31). While it has the potential to address and accommodate the concerns of diverse groups, it can also fuel a culture of fear and mistrust between the different identity groups.

Sri Lanka

The modern history of Sri Lanka illustrates the complexities of negotiating federalism to resolve ethno-political cleavages and the role of socio-historical realities in limiting or expanding the range of options available to mediators and constitution-building experts. Federalism was discussed for decades before the international peace process started in 2002, and Tamil political parties became increasingly assertive in their demands for regional autonomy for Tamil provinces. Various iterations of a federal solution were discussed by successive governments, although the 1972 constitution (and the subsequent constitution of 1978) strongly emphasised the unitary character of the Sri Lankan state as well as the supremacy of Buddhism. The long-standing tensions between Tamil groups and Sinhalese nationalists culminated in a violent uprising in 1983, which marked the starting point of the armed struggle by the Liberation Tigers of Tamil Eelam (LTTE) around the claim for a separate state. Various constitutional proposals for power devolution (refraining from using the term federalism) were drafted between 1995 and 2000, but none of them was passed by parliament. Fearing that agreeing to a federation of regions would eventually lead to separate states, the Sinhalese majority and political elite continued to resist any form of federal re-organisation. The peace process was eventually initiated by a ceasefire agreement between the government and the LTTE in late 2001, facilitated by Norway. The Oslo Communiqué, a mutual agreement concluded in the third round of talks in December 2002, stated that both parties were willing to explore a “*federal structure within a united Sri Lanka*”. This move reintroduced the possibility of a federal system within the political and constitutional debates, and was understood as an attempt to respond to Tamil grievances by introducing a special autonomy regulation to quell secessionist aspirations. The LTTE, however, soon withdrew its endorsement of the agreement. Many factors led to the ultimate failure of the peace process, including an inter-party power struggle and absence of a shared agency within the government, which contributed to the lack of political will to seriously consider the Tamil demands for self-determination and self-governance. Furthermore, the negotiations lacked a guiding framework and roadmap towards interim state restructuring and a final political solution (Bigdon 2003, Ferdinands et al. 2004, Edrisinha 2005, Belser et al. 2016).

3.2 Extent of power devolution

The decision to favour either “weak” or “strong” (extensive) devolution, or something in between, and the setting of boundaries for regional, federal or autonomous units are very sensitive and contentious issues that can cause major challenges for the overarching peace process (Anderson and Choudhry 2015, Saunders 2018, Wise 2018). Even when the negotiating parties acknowledge the need to rethink the distribution of power and agree to discuss devolution as an option, there is often disagreement on its form and extent. There may be calls for strong devolution of power from the centre to the peripheries, especially in conflict situations in which large numbers of minorities living in specific regions (or having historical claim to them) experience high levels of exclusion and marginalisation. State actors are very likely to oppose such calls, seeing them as a threat to the state’s unity and integrity. For instance, the process of decentralisation constitutes one of the major provisions of the 2001 Ohrid Framework Agreement to provide political and institutional solutions to the ethnic conflict in **North Macedonia**. The decision to decentralise was taken in response to demands for self-determination from ethnic Albanians. Nicole Töpperwien highlights that “federalism and autonomy were rejected, as they were perceived to be possible stepping-stones for secession” (Töpperwien 2010). Accordingly, the Macedonian parliament developed and adopted a set of constitutional amendments and laws on symmetric decentralisation combined with participation rights for the major ethnic communities. Other examples of symmetrical or quasi-symmetrical decentralisation introduced in the wake of violent conflicts include Afghanistan, Cambodia, Guatemala, El Salvador, Angola, Mozambique and Burundi.

In some conflict contexts, federalism has the potential to achieve a balance between minority demands for greater autonomy and participation in decision-making and the state party’s desire to maintain territorial integrity and unity. However, whenever federal arrangements are discussed, mediators must be aware of their inherent risks. A federal system that is strictly based on ethnic affiliation and/or territorial boundaries tends to create clear divisions between the prospective constituent units, thus potentially fulfilling the demands of certain regional ethnic minorities. But it may also risk undermining overall minority rights and national citizenship by creating new “ethnic others” or different forms of exclusionary practices (Töpperwien 2009: 6). In the aforementioned example from **Sri Lanka**, the ethnic heterogeneity of society implied the need to accommodate not only the LTTE and the Tamils from the Northeast, but also all other minority groups facing exclusion and marginalisation, such as the Muslims, most of whom lived in the Tamil-dominated areas. A federal solution should promote equal opportunities for all identity groups that comprise multi-ethnic states.

Federalisation is a deeper form of devolution that must be enshrined in a constitution. However, not every form of devolution requires such far-reaching measures, and other systems to restructure (political, fiscal and/or administrative) state power are usually achieved through changes in statutory law. This also implies that the central authority can more easily modify the competencies and authority given to its sub-units than federal systems can. This ability to “modify” could potentially become a problem of its own, of course. Where the centralisation of power is an element of the conflict, the failure of devolutionary measures to lead to a real redistribution of power may result in a return to conflict (Töpperwien 2010: 4-5).

3.3 Asymmetrical allocation of power devolution

Asymmetric models of power devolution provide an alternative avenue for peacemakers to pursue compromise in the face of diverging demands for power redistribution. These efforts aim to balance radical demands from certain groups/regions and can be incorporated in the framework of a unitary as well as a federal constitution (Töpperwien 2010, Anderson and Choudhry 2015).

At the national level, regions that are home to large minority populations may demand a high degree of self-governance. The national majority and state actors will try to curb these demands, as they typically have an interest in keeping the level of regional self-governance as low as possible. Asymmetrical compromises could help address these competing interests by responding to the demands of regionally-based minority groups, by granting them **special autonomy**. For example, based on the Memorandum of Understanding (MoU) between the Government of Indonesia and the Free Aceh Movement (GAM) of August 2005, the province of **Aceh** was granted a status of self-governance in most domains. The MoU, passed into law through the Law on Governing Aceh (LoGA), underlines that Indonesia will remain a unitary state while guaranteeing an extensive level of self-rule to **Aceh**. Further examples of autonomy arrangements provided through peace agreements – with or without constitutional amendments – include **Philippines** (Mindanao), **Papua New Guinea** (Bougainville) and the **United Kingdom** (Northern Ireland).

However, despite often being intended as a political compromise, asymmetrical approaches to devolution or special territorial autonomy arrangements may end up being unsatisfactory for both sides – with too little devolution and self-governance for certain territorial/ethnic minorities on the one hand, but too much devolution and self-governance for the national majority and central government/elite on the other. Moreover, asymmetrical arrangements in one region may encourage other regions to start mobilising for equal treatment, hence posing a threat to national unity. The dynamics of the CPA in **South Sudan** and its implications for the conflict in Darfur illustrate this challenge.

Spain

The case of Spain, a highly decentralised unitary state by law, but de facto a federal system, illustrates the challenges of asymmetric devolution of power and its conflict-fuelling potential. A multinational society with strong regional identities and interests, Spain went through a state reform process in parallel to the transition from dictatorship to democracy in 1975. A constitutional reform in 1978 converted all regions into autonomous entities, and initiated decentralisation through an open-model approach, by enabling all regions to decide which forms of self-governance they wished to establish for themselves. The Basque Country rejected the new constitution on the grounds that it denied its national rights, thus fuelling the ongoing conflict between the Basque separatist organisation ETA (*Euskadi Ta Askatasuna*) and Spain (Aiertza and Zabalo 2010: 20). Down the road, it became clear that even though democratisation and decentralisation were intended to be interlinked through constitutional reform and envisioned to foster peace, the lack of a common vision between Spanish and Basque legislators negatively affected their relations. It was not until 2011 that ETA declared a permanent ceasefire and initiated a demilitarisation process to transform the armed conflict into a peaceful political conflict.

Moreover, the asymmetrical fiscal decentralisation introduced by the new constitution and further developed through 1980 legislation also became a source of conflict between Madrid and the Catalan autonomous region. This law provided the two regions of Navarra and the Basque Country with authority to raise their tax locally, whereas the remaining 15 regions were vested with only limited tax authority (Carreras 2016: 297). By the late 1990s, dissatisfaction among the autonomous regions under the common tax systems grew, with increasing criticism of the exceptionalism granted to the Basque Country and Navarra as well as the top-down, hierarchical federalism preventing regions from having a say in the devolution of powers to the sub-state entities. As resentment grew in Catalonia, the region began to demand a bilateral agreement to initiate a transition from the multilateral financial system. After the outbreak of the 2008 financial crisis, Catalonia increased its pressure to reform the financial system, while fuelling the dormant aspirations for a separate state (Gray 2015: 13). It is now widely acknowledged that the inflexibility and the lack of adaptability of asymmetrical decentralisation contributed to regional tensions in Catalonia, by provoking separatist aspirations.

4 Security sector reform/governance

Both peacemaking and constitution-building processes entail negotiations on the transformation of the state's security sector, especially where it represents a major contending party, or where its role is seen as a key conflict driver by opposition groups or the population at large. In fact, most peace accords have dedicated chapters on SSR/G, or even separate agreements. In this section, security sector reform (SSR) is defined as a political and technical process aiming to achieve the goal of effective and accountable security sector governance. In turn, SSG reflects the aim of applying the principles of good governance to the structures, institutions and personnel responsible for the management, provision and oversight of national security (OECD 2005, DCAF 2015). The concept of governance also reflects an inclusive, human security approach – as opposed to a narrow state-centric approach – to the provision of security.

In the context of negotiated peace processes and post-war political transitions, SSR/G is a key correlate to the restoration of the state's monopoly of force through the disarmament, demobilisation and reintegration (DDR) of non-state armed groups. Its aim is to ensure that this monopoly is exercised in a legitimate, effective, democratic, impartial and accountable manner, with full respect for the rule of law and human rights, and to guarantee that security institutions are truly protecting and representing the whole nation rather than merely serving those in power.

The most relevant SSR/G elements for peace negotiations and post-war constitutions include:

- ≡ The integration of non-statutory forces into the security apparatus (especially military and police) and into the relevant ministries and oversight structures (e.g. National Security Council);
- ≡ The downsizing and professionalisation of the security sector (through various measures such as early retirement, vetting and lustration, training);⁴
- ≡ The democratisation of security organs to make them fully representative of the makeup of society (for instance by instituting ethnic or gender quotas), or their territorial devolution to accompany political decentralisation processes (see Section 4.2);
- ≡ The de-politicisation of the army, police and intelligence services to ensure they will not be used to further partisan agendas, and the establishment of civilian oversight mechanisms capable of preventing such abuse in the future, by enhancing the role of executive and legislative powers and independent monitoring bodies in managing the security sector;
- ≡ The redefinition of security doctrines, national security strategy, codes of conduct, roles and mandates of the security sector, in order to restore citizens' trust in security institutions, and recalibrate the functions of security forces in a peaceful environment.

⁴ In a few cases, the central security forces were so discredited that the conflict parties agreed to disband them and create a new, more representative army under a new leadership. Such provisions were included, for example, in Liberia's 2003 Accra Peace Agreement and the 1992 General Peace Agreement for Mozambique (Caspersen 2017).

While SSR/G is often seen primarily as a technical endeavour (i.e. ‘train and equip’ approach promoted by some international SSR support missions), this non-exhaustive list shows that it represents an essential component of peace processes with strong political implications and is closely inter-connected with other dimensions of war-to-peace transitions.

The cases of post-2001 **Iraq** and post-2011 **Libya** also demonstrate the dangers of neglecting SSR/G in the wake of political transitions; they also highlight the risks of civil war (or the rise of violent extremist groups) fuelled by the absence of disciplined and effective security services after the fall of an authoritarian regime.

SSR/G is also an essential element of new constitutional orders during political transitions. It often plays a central role at the interface between peacemaking and constitution-building, since many peace accord provisions relating to the security sector are constitutional in nature, and hence will only come into effect if embedded in the (reformed or new) constitution. In **El Salvador**, where the dissolution of the security organs was one of the primary demands put forward by armed insurgents, the peace process was organised around a series of incremental accords: the 1991 Mexico Agreement on constitutional reforms included military, judicial and electoral provisions and set forth the general principles that enabled the negotiation of specific SSR/G clauses on the creation of a civilian police force, vetting procedures for the armed forces and, later, ceasefire, demilitarisation and DDR modalities.

Interim constitutions also play a role in (re) defining SSR/G principles, especially in cases of abrupt regime change to prevent a security vacuum, or when a new country is built ‘from scratch’. For example, in **South Sudan** the 2005 interim constitution legally established a new police service as well as a national army. Finally, organic laws, sectorial agreements and technical protocols usually complement constitutional provisions on the security sector, and are often a matter of continued negotiation between political elites, security personnel and experts well beyond the ‘constitutional moment’. In **South Africa** it took six years between the 1996 constitution and White Paper on Defence, the 1998 Defence Review and the 2002 Defence Act to define and enact the new post-apartheid security sector governance regime.

As with other substantive components of peace processes, security arrangements raise a wide range of challenges relating to the timing and content of formal codification and the long-term materialisation of negotiated security arrangements.

4.1 From path dependencies to (un)constructive ambiguity

As with other substantive issues at the heart of peacemaking processes, security-related power-sharing incentives and principled commitments made at the negotiation table can severely restrict SSR/G constitutional options. When comprehensive peace accords delve into the nature of security sector reforms, the likelihood is high that the same phrasing and content will be reproduced in subsequent constitutional and legal provisions, sometimes word for word. In **Burundi**, inclusive power-sharing arrangements included in the 2000 Arusha peace accord (such as the provision that no ethnic group would be allowed to represent more than 50% of the army and police) laid strong foundations for SSR and established the principles which were to govern the security sector. They then appeared with few modifications in the subsequent sectorial agreements and the final constitution in 2004. This ‘path dependency’ dimension of the nexus, which was already raised in preceding sections, becomes problematic when unrealistic or unethical expectations arise early on in a peace process, which are likely to influence all subsequent decision-making processes. The necessities of power-sharing incentives offered to power-brokers to entice them to the negotiating table can have dramatic consequences for SSR/G as they tend to inflate the security sector at a time when downsizing and professionalisation should be treated as sectorial priorities. This is the case, for instance, with promises of integration for rebel troops, leading to a bloated military, offers of ministry positions leading to an excessively large government structure, or amnesty guarantees for human rights violators within the security apparatus.

A different challenge arises when peace accords or interim constitutions contain excessively ambiguous language on the SSR/G principles and mechanisms, or prioritise some dimensions of security while leaving others largely undefined.⁵ The 2005 Comprehensive Peace Accord in **Sudan** contains a whole chapter on security arrangements, including 30 pages detailing the mandate, mission and organisational structure of the armed forces, whereas only two pages are dedicated to provisions relating to public security, including police reform, rule of law and civilian oversight. SSR/G arrangements are typically vague or insufficient when it comes to defining democratic oversight and accountability mechanisms. In **Liberia**, the 2003 peace accord provided for the reform of the security forces but did not explicitly demand the reform of oversight institutions, nor did it propose the development of a coherent national vision of security that would allow effective governance of the security sector.

The lack of specific provisions in peace accords is not problematic in itself if peace processes follow an incremental, step by step approach, whereby general agreements on points of principle are followed by more detailed negotiations to interpret and specify the content of reforms. The problem arises when the parties’ interpretations of ambiguous clauses become a major source of contention, which can have a detrimental outcome on constitutional deliberations.

⁵ Statistical analysis of all peace accords from 2010 to 2015 found that SSR in peace agreements is commonly addressed selectively, rather than holistically (DCAF 2020).

Nepal

The 2006 Comprehensive Peace Agreement (CPA) in Nepal failed to incorporate a strong commitment to initiating a SSR process, instead offering a vague guideline for the integration of former combatants and a general consensus to end impunity. For instance, Clause 4.4 stipulated: *'The Interim Council of Ministers shall work to supervise, integrate and rehabilitate the Maoist combatants.'* However, neither the CPA nor the interim constitution, promulgated in January 2007, specified which institution combatants should be integrated into. Similarly, both the CPA and the interim constitution mandated the government to prepare an *'action plan for the democratisation of the Nepali Army on the basis of political consensus'*, but no such consensus could be found on the interpretation and operationalisation of this provision. Moreover, both the CPA and the interim constitution failed to visualise the need for a comprehensive SSR which would include developing a new national security policy, reforming the intelligence services, restructuring security institutions and achieving strong parliamentary and civil society oversight and democratic control of the security sector (Upreti and Vanhoutte 2009). As a result, major disagreements emerged between the Maoists, other political parties and the army leadership on the scope of SSR. The latter two favoured cosmetic reforms in a post-war environment and a selective absorption of qualified former fighters into existing security organs, while the former demanded a more radical and holistic restructuring of the whole SSG system. This tug of war had a detrimental impact on the political deliberations to draft a new constitution, as the Maoists refused to disarm until the details of SSR/G were finalised, and in turn insisted that the constitution-writing and the management of the armies were concomitant issues that should be resolved simultaneously, not sequentially (Neupane 2015). It took seven years to unlock this contentious issue and another two years to finalise and ratify the 2015 constitution.

4.2 Aligning external norms and expertise with local SSR/G priorities

SSR/G is seen as a core issue of national sovereignty, and hence ought to be centrally managed by the government and other national stakeholders, with expert support from UN missions and multilateral organisations, bilateral cooperation agencies or INGOs. In a context of a peace process or post-war environment, these entities will typically be involved alongside constitutional experts and mediators. This brings along two sets of challenges. Firstly, as with other dimensions of the nexus, the national ownership of SSR/G processes is often impeded by donors' and experts' tendencies to take a prescriptive approach, infused by Western liberal principles and standards of security governance (Mason 2016). Indeed, the wording of many peace accords and constitutions introduced by international advisors might imply a transfer of norms and organisational structures around, for instance, 'democratic' or 'community-oriented' policing that might not be easily adaptable to the local context (Schroeder et al. 2014: 215-16). This challenge is especially acute in contexts of security sector development in newly-formed states, such as **Kosovo** or **Timor-Leste**, where the content of reforms enshrined in the new constitution was heavily driven by mediators (e.g. Ahtisaari plan for Kosovo) and UN missions/agencies.

The second dilemma relates to the importance of deploying a wide array of experts, trainers and mediators to align negotiated settlements with international standards and to support consensus-building between conflict parties, while ensuring coherent approaches to SSR/G, constitution-building and peacemaking. During consultations and interviews carried out for this study, countless examples were cited of constitutional experts, SSR advisors and mediators intervening in the same political space but in isolation from each other, hence promoting different (and sometimes incompatible) approaches to structural reform. This is highly problematic, as recalled by some experts deployed to **Somalia** over the past decade,

where various iterations of constitution-making have followed radically distinct paths to SSR – e.g. from the centralisation of security organs to their full devolution – according to the respective preferences of international advisors intervening in silos, and without sufficient input from the relevant authorities on the ground.

4.3 Sustainability challenge beyond the 'constitutional moment'

As recalled, constitution-building does not end with the promulgation of a (new or revised) constitutional arrangement; it also encompasses its enactment and implementation to 'make it work'. Challenges at the interface between the constitutional and security dimensions of peacemaking can thus have serious consequences for the long-term materialisation of post-war political settlements.

For instance, when post-war constitutions lack clarity on the legal boundaries, mandates and functions of various security organs and political oversight entities, this can lead to abuses, accountability gaps or inter-agency rivalry in the implementation stage, hence creating a new source of conflict. In **Timor-Leste**, the security sector provisions of the 2005 constitution were excessively vague and broad, especially on the respective roles of the military and police, which led to in-fighting between them and a breakdown of the security sector in 2006 (DCAF 2016).

The sequencing of reforms set by mediators and conflict parties during peace processes can also prevent a timely materialisation of SSR. In the **Democratic Republic of the Congo**, the 2013 constitution redefines the relationship between citizens and the security apparatus, but is conditioned by SSR/G regulations to come into effect. These reforms are yet to be instituted by enacting appropriate legislation, for example on complaint mechanisms for misconduct by the security sector, and some constitutional provisions have thus remained 'empty words' so far. Implementation relies to a large extent on the

good will of those in power, and when political and security institutions are dominated by former rebels with a militaristic mindset (as in **South Sudan** and **Burundi**), SSR/G principles such as the de-politicisation of the security sector are therefore unlikely to come into effect. The most challenging shift which may require one or two generations to materialise is the eradication of the culture of violence (including gender-based violence) which prevailed over the years or decades of conflict. This illustrates once more the long-term interlinkages between peacemaking, constitutional reform and SSR/G well beyond the peace negotiations.

Burundi

In Burundi, the main objectives of the Hutu rebel group CNDD-FDD were to restore the constitutional order of 1993 and to dismantle the (Tutsi-dominated) security forces which were considered to be the true heart of the contested central power. SSR/G was therefore a major component of the Arusha accord and the subsequent constitution. SSR measures were concerned, for instance, with the tripartite nature of security organs, the establishment of civilian oversight bodies and mechanisms, the integration of rebel forces into the national army and police, and the introduction of ethnic quotas to enhance the representativeness of the security apparatus (see above). Many Burundians feared that SSR implementation would plunge the country back into war due to the polarised debates surrounding its negotiation, and the fact that military and CNDD-FDD fighters were not involved in its design – given their absence in Arusha. The reforms and forces integration process were pursued without major incidents, but a number of controversies remained over the effective performance of the security institutions, undermining their perceived legitimacy and impartiality. These challenges include the politicisation of the police and the justice system, along with impunity, corruption, the persistence of criminality, the lack of political will to disarm the civilian population, the inadequate training of some security members, or their non-respect for human rights, laws and codes of ethics and professional conduct (Nimubona et al. 2012).

5 Transitional Justice

Justice and accountability for past crimes can be major points of contention in peace negotiations, but their anchoring in political agreements and post-war constitutions is an essential condition for sustainable peace. Transitional justice is the full range of judicial and non-judicial mechanisms and processes that a society undertakes to come to terms with widespread or severe past violations and abuses (ICTJ 2009). Such mechanisms range from trials and other forms of prosecution, truth-seeking processes, local forms of restorative justice, mechanisms providing for forgiveness and reconciliation at multiple levels, vetting of state officials responsible for human rights abuses, memorialising initiatives, reparations processes and other efforts aimed at ensuring non-recurrence of violations, such as institutional reforms (Jamar and Bell 2018).

One difficulty in dealing with transitional justice is that it tends to be treated as a coherent, monolithic framework, while in reality it represents a diverse and complex field. Furthermore, transitional justice mechanisms often emerge from a peace process in fits and starts, and in response to specific problems, for example how to restructure the armed forces or how to allow armed groups to enter the political scene while accounting for war crimes. In some contexts, a holistic mechanism may be put in place, but even then, practitioners frequently do not take into account that transitional justice processes often take years, if not decades, to fully play out (Duthie and Seils 2017).

Broadly speaking, there are four main pillars to transitional justice: establishing the facts, ensuring that justice is served, reparation and institutional reform (Bleeker 2006). While there are internal debates about the relative benefits or drawbacks of particular transitional justice approaches and mechanisms (Olsen et al. 2010), they are neither mutually exclusive nor a substitute for one another. Not every process

includes all four pillars and in fact, there has been growing consensus that the context must dictate both the tools employed and how they are used.

The ultimate aim of transitional justice is to ensure accountability and achieve justice and reconciliation regarding past violations. However, the role it can play in transitions is much broader than this suggests. Longer-term transitional justice mechanisms can contribute to a reformulation of the broader political and institutional culture and by extension alter citizens' relationship to the state. In other words, tackling issues such as impunity and access to justice can have an impact well beyond the specific goals of a peace agreement. In addition, transitional justice may help stabilise and extend fragile political settlements by providing an overarching and shared narrative of the rights and wrongs of the conflict (Bell 2017). Anchoring the bargains made on transitional justice in a constitution, whether directly or indirectly, can be an important step towards deepening and extending fragile political settlements. But it also raises a set of challenges and questions that both mediators and constitution-building experts must confront jointly, such as:

- ≡ Whether the peace agreement should include transitional justice at all or whether it must remain silent on the abuses of the past;
- ≡ The appropriate scale and scope of transitional justice processes, both in terms of their duration as well as which measures or combination of measures to pursue;
- ≡ The timing and sequencing of these measures, including in relation to judicial and security sector reform;
- ≡ Whether to anchor these measures in a constitution directly or not, and how best to create the constitutional conditions for them to be effective.

5.1 The complex relationship between transitional justice and constitutionalism

By and large, transitional justice mechanisms do not usually make their way into constitutions; rather, their implementation is based on law or administrative authority. In **Burundi**, the Arusha peace accord mandated the parties to establish a National Truth and Reconciliation Commission (TRC), but the post-transition constitution of 2005 failed to mention it, and it was only promulgated through a TRC law in May 2014. Another example is **Tunisia's** Basic Law on Transitional Justice (2013) which established a Truth and Dignity Commission and Specialised Criminal Chambers. The Commission's work met with resistance from some segments of the old elite, resulting in the Economic Reconciliation Law in 2017, which removed some economic crimes from the Commission's jurisdiction and ensured amnesty for some former officials believed to have engaged in corruption.

Even though transitional justice is rarely codified in constitutions, its effective implementation is intricately related to constitution-building, in that the implementation of its measures relies on various constitutional norms, in particular the separation of powers, independence of the judiciary, adherence to the rule of law and respect for human rights. Furthermore, in transitional periods, the legitimacy of transitional justice will depend to a large degree on the embeddedness of these measures within the related branch of government. The overall framework of the constitution must hence be supportive of the implementation of transitional justice and able to ensure, to the extent a constitution can, non-repetition of violations in future.

El Salvador

The Truth Commission for El Salvador was established in 1992, having been mandated by the UN-brokered peace agreements to investigate serious acts of violence which had taken place since 1980 and to recommend how best to promote national reconciliation. The Commission presented its report in 1993, noting the condition of gross violations of human rights, including death squads, was in part possible because *“none of the three branches of Government [...] was capable of restraining the military's overwhelming control of society”* (UN Security Council, Report of the UN Truth Commission on El Salvador 1993: 172). The judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption, since it had never enjoyed genuine institutional independence from the legislative and executive branches. The Commission hence recommended, amongst other things, extensive legal and institutional reform in the judiciary and security sectors, including by amending the Constitution.

5.2 The entanglement of the justice and security sectors

By dealing with past human rights violations, transitional justice can improve the ability of the state to address future human rights concerns. For example, a transitional justice process can spur necessary reforms of the judicial system (as highlighted above). Similarly, it can improve the monitoring and potential accountability of the security sector by recommending the establishment of oversight mechanisms (ICTJ 2009).

A challenge for both peacemaking and constitution-building stakeholders, however, is the strong overlap and mutual dependency between transitional justice processes, judicial sector reform and SSR. The stark reality which faces mediators is that often, conflict parties are implicated in transitional justice processes as suspected perpetrators. While transitional justice can act as a catalyst for broad institutional reforms, it can also, in some instances, reduce the willingness of conflict actors to engage in security and judicial sector reforms due to fear of prosecution (Cohen 2017). Attempts to pursue transitional justice may therefore risk energising “spoilers”, thereby potentially destabilising the transition as a whole, including the constitution-making process, or worse, prompting a return to conflict.

5.3 Potential burden on national justice infrastructures

A major challenge for sustainable peace is that agreements which include transitional justice measures⁶ have often failed to account for how national judicial systems, weakened by conflict, will cope with various requirements and demands, including those made by constitution-building processes. Judicial systems may be faced with the prospect of dealing with a large number of suspected perpetrators while simultaneously undertaking institutional reform processes. In addition, the judicial branch may continue to be compromised in transitions, for example by lacking sufficient independence. Restoring the public’s faith in the judicial sector is also a task that should not be underestimated, and nor should the role that the sector plays in adjudicating electoral disputes or in dealing with domestic legal reform to abide by international human rights standards. This challenge may be one of the reasons why truth commissions – a non-judicial mechanism that favours restorative as opposed to retributive justice – have become so popular in negotiation agendas and final peace agreements.

In addition to the burden that transitional justice processes can place on already overstretched judicial infrastructures, the entanglement of transitional justice with security and justice sector reform requires mediators to be cautious when brokering agreements that include transitional justice measures. Raising expectations that are subsequently not met may exacerbate conflict, rather than reduce it. It may also affect the way in which citizens view the new or reformed constitution’s legitimacy and efficacy in delivering justice.

6 According to Jamar and Bell (2018: 3), “out of 1520 peace agreements, 757 agreements (50%) address transitional justice matters. This includes a total of 1493 provisions that deal with transitional justice across various categories: reconciliation (22%), prisoners’ release (17%), amnesty and sanctions relief (14%), victims (13%), reparations (11%), establishment of mechanisms (7%), courts and judicial accountability (6%), general commitments or call to deal with the past (6%), missing people (4%), and vetting (1%). Out of these 1493 provisions, only 46 agreements include gender-specific transitional justice provisions (3%)”.

Rwanda

The civil war in the early 1990s and the following 1994 genocide, which ended with an RFP-led military defeat of the Hutu extremists and government forces, proved a massive challenge to both Rwandan and international efforts towards transitional justice. The Arusha peace accords, a series of power-sharing agreements negotiated back in 1993, had introduced mechanisms to support national reconciliation in a post-conflict Rwanda. However, the genocide and its devastating consequences caused these processes to be revised. Post-genocide Rwanda, now headed by an RFP-dominated 'Enlarged Transitional Government', adopted a new constitution in 1995. A Commission for National Unity and Reconciliation (NURC), envisaged in Arusha, was only established in 1997 and began to officially operate in 1999. Besides the NURC, no further significant measures of transitional justice or national reconciliation were adopted. In fact, the Rwandan transitional government decided to take the road of criminal prosecution in order to deal with genocide; in consequence, it neither set up a Truth Commission nor adopted provisions for amnesty for other crimes and combatants. Support for national prosecutions was to be provided by the International Criminal Tribunal for Rwanda (ICTR), an international criminal court established by the UN in Arusha and mandated to investigate and prosecute war crimes, genocide and crimes against humanity committed in the territory of Rwanda in 1994 (UN Security Council Resolution 955). Both the national and the international prosecutions were almost exclusively tailored to holding the perpetrators of the genocidal events accountable, at the expense of investigating crimes against humanity and/or war crimes committed during the civil war, or attacks and massacres of Hutu civilians in the wake of revenge killings in post-genocide 1994. Crimes of sexual violence were also only rarely prosecuted in courts. The exclusive focus taken by the ICTR, despite its broader jurisdiction, is at least partially explained by the immense pressure on the RFP to cease its cooperation with the Tribunal if it started investigating crimes with RFP involvement (Nowrojee 1996, Huyse and Salter 2008, Waldorf 2009).

Timor-Leste

The case of Timor-Leste, a sovereign state since 2002 after the Indonesian occupation ended in 1999 with a UN-backed referendum, illustrates the challenges of addressing transitional justice in a political and legal vacuum. When Indonesia started a large-scale invasion of Timor-Leste in 1975, 24 years of occupation began, causing the deaths of a third of the population and massive human rights violations. In 1998, the fall of the Suharto regime gave rise to Timorese claims for a referendum, which eventually took place in 1999. The unambiguous result, with roughly 80% of the votes in favour of independence, caused another series of violent attacks by the Indonesian armed forces and trained militias on Timorese independence supporters. Within a short period of time, 1,200 Timorese were killed and more than 200,000 were forcibly displaced, so the UN decided to step in and take over administration of East Timor in October 1999. The UN Transitional Administration in East Timor (UNTAET) was in charge of exercising executive and legislative authority, including the administration of justice, until East Timor's formal recognition of independence with the enactment of its first national constitution in 2002. With so many people killed or forced to leave the country, the newly independent state of East Timor was faced with the daunting challenge of building a state from scratch whilst suffering a severe shortage of workers. UNTAET therefore had to put in place mechanisms, processes and institutions to fill the political and legal vacuum. A national court system was established, including the District Court of Dili and the Court of Appeal, the latter designed to also host hybrid Special Panels staffed with international and Timorese judges and given jurisdiction to deal with acts of genocide, war crimes and crimes against humanity. Additionally, the Serious Crimes Unit (SCU) was established to investigate and prosecute alleged perpetrators of serious crimes. However, the new system suffered from insufficient staffing and inadequate security guarantees for witnesses. UNTAET therefore decided that the SCU should disregard crimes committed during the Indonesian occupation and solely focus on post-referendum violence. By the time the SCU ended its work in 2005, very few high-level officials had been brought to trial. Violence returned in 2006, when initially internal conflicts in the military triggered violent disputes with and amongst members of the police and wider society. Despite international recommendations to continue prosecuting serious crimes, none were implemented and the focus of transitional justice efforts shifted instead to human rights violations committed in 2006. While capacity building was indeed promoted over recent years, the local court system still lacks systematic financial support and strategic training and mentoring (Hirst and Varney 2005, ICTJ 2010, Vieira 2012, Kent 2013).

6 Strategies and Approaches

To conclude this chapter, this final section proposes strategies and methods for both peacemakers and constitution-builders to address the substantial challenges identified above, and to maximise their complementarity and synergies.

6.1 Mechanisms to promote inclusive and participatory governance

In addressing the substantial challenges outlined above, it is essential to enhance the influence of relevant constituencies in negotiating and codifying sectorial reforms, and to improve the representativeness and accountability of governance systems and policy-making arenas.

6.1.1 Inter-elite and social inclusion in decision-making processes

Quite a number of tensions identified throughout the preceding sections point to the challenge of gathering and channelling the sheer variety of interests, grievances and demands of different actors relevant to the conflict. The expectations/delivery gap, observed across the issues outlined, may be reduced by having all relevant actors at the table and/or consulting them in the negotiation and codification of thematic arrangements or agreements. For example, the involvement of military, intelligence, oversight institutions and military commanders from non-state armed groups (among others) in negotiations on constitutional and technical provisions on SSR/G will ensure that they do not play ‘spoiling’ roles later on. Indeed, their participation may provide reassurances that structural reforms (such as the military/police integration of non-statutory forces) will not cause too much disruption to settled hierarchies and vested interests.

Much of the hard pressure for including ambitious reform provisions in peace agreements and post-war constitutions is usually exerted by groups most directly affected by the root causes of the conflict (i.e. inequality or oppression) and its direct manifestations (violence and repression) – including civil society or women’s organisations. Mechanisms for social inclusion in both peacemaking and constitutional processes should thus include capacity-building support to leverage the influence of civil society groups, so that their visions and priorities are reflected in the negotiation and codification of new national strategies for security and political governance, territorial arrangements and transitional justice.

Dealing with measures to adequately address past human rights violations is a challenging endeavour that needs to be both flexible enough to ensure that agreements and their subsequent constitutionalisation are able to account for the iterative nature of these processes and are solid enough to support the required long-term investment. The participation of victims’ groups in determining appropriate transitional justice measures is another important principle. In the security domain, experiences from **Sierra Leone** and **Liberia** have shown that the inclusivity of peace negotiations proved to be one of the critical catalysts in the transformation from narrow ‘warlord security’ reflected in earlier peace agreements to ‘public security’ and rights-based concepts of security in the later agreements (Hutchful 2009: 14). In **Guatemala** as well, the role of the Civil Society Assembly proved crucial in inserting provisions addressing political reforms, SSR and other root causes of the conflict into the peace agreement.

6.1.2 Guarantees for inclusive and accountable state institutions and policies

In addition to procedural inclusion, it may be useful and adequate to build in mechanisms and guarantees to ensure equality, non-discriminatory practices and minority inclusion within reformed social and political institutions beyond the peace process. The experiences in post-war countries dominated by former conflict protagonists or power-sharing coalition monopolising both political and security institutions, such as **Burundi** and **Timor-Leste**, bring to the fore the challenges of maintaining accountable and inclusive sectors of government.

Mention has already been made of the importance of mechanisms for civilian or public oversight and of non-discrimination guarantees such as ethnic or gender quotas to promote minority inclusion and equality in post-conflict contexts shaped by ethnic or religious division and marginalisation. Such mechanisms allow non-dominant minorities to participate in national, regional and local institutions, and prevent new forms of exclusion from emerging. While quotas can serve as permanent mechanisms when enshrined in electoral systems and constitutions, they may also be introduced as interim arrangements to redress historical grievances while long-term structural reforms are being devised. For example, in **Northern Ireland**, the new police service was established in 2001 with 50% quotas for Catholics in order to better reflect the makeup of the community. This was only set up as a temporary measure in order to correct imbalances in the composition of the police service, to be revoked once satisfactory representation was reached. It was discontinued after the devolution of the policing and justice sectors in 2010 (McEvoy 2012).

While existing forms of exclusion and power monopolies may be altered throughout a peace process, for example with the help of decentralisation efforts, new vulnerable groups or forms of exclusion can be created. Establishing dispute resolution mechanisms as part of constitution-building can help prevent one group

from dominating the political process, and can allow for a renegotiation of governance frameworks if conditions drastically change. Such mechanisms may take the form of special supervisory commissions, or stronger rights provisions in the constitution that would allow constitutional or other courts to interpret the constitution and legal framework in a progressive manner. This issue is also relevant for mediators since peace agreements that highlight rights protection, women's rights and minority rights are more likely to be translated to constitutional form in a way that reinforces those rights.

6.2 Multi-sector coordination and holistic sequencing of sectorial reforms

Given the various risks associated with 'path dependencies' when early deals or arrangements constrain the development of further creative options throughout the transition process, it is important for conflict parties to carefully synchronise the content and timing of relevant thematic provisions during both peace negotiations and constitutional processes. For example, SSR/G hinges on reciprocal measures to demobilise irregular armed forces through DDR, to account for past human rights violations by the security sector through transitional justice mechanisms and to reform other state sectors such as the judicial and political systems. All these concomitant measures should ideally be planned and codified in parallel, so that they can reinforce each other. Acknowledging and keeping these interdependencies in mind, mediators can support conflict parties in devising how to best time and sequence the negotiation and implementation of multi-sectorial reforms.

This correlates with the importance of mobilising, coordinating and synchronising relevant external expertise throughout the transition. Keeping in mind the substantive components of peace(building) processes, this means that peace mediation teams and constitutional support teams need to consult each other, but also that thematic

expertise needs to be brought on board in a timely manner. For instance, in the last five years there has been, and rightly so, an increased uptake of SSR training courses for (UN and other) mediators (Brickhill 2018: 12), and the IDEA publication on the SSR/constitution nexus (Barany et al. 2019) and on the interactions between constitution-building and transitional justice processes show that these topics are also being taken seriously by the constitution-building community.

As highlighted in this section, although constitutions play a crucial part in the establishment of clear roles, functions and boundaries for the various branches of the political, security and judicial sectors, not all components of peace processes need to be codified at the constitutional level. For example, in the case of SSR/G, many other instruments can be used to fine-tune security regulations, from organic laws and executive decrees to sectorial mechanisms (a national security strategy or army code of conduct, for instance). These instruments might also be more equipped to adapt rules and regulations in the security sector to newly emerging threats in an evolving environment, since constitutional amendments are usually more difficult to operate, procedurally and politically, than statutory changes. In **Kenya** and **South Africa**, the constitution sets normative baselines or foundations on which legislation structuring the security services in more detail must build, thus setting the agenda for subsequent legislative action (Barany et al. 2019).

6.3 Balancing expert advice and national ownership

To preserve the sovereign nature of peace- and state-building processes, the priority should be to rely first and foremost on domestic/national experts rather than on international experts coming with ready-made solutions. Instead, the international community might focus on guiding the process of negotiation and decision-making by encouraging compliance with international standards (on human rights, inclusion,

transparency etc.), providing comparative learning from other processes and offering capacity-building support, while the content of reforms is decided on by the involved parties, which respects their decision-making autonomy.

When it comes to territorial reforms, the consultation of domestic constitutional expertise, in the form of both legal and political advice, ought to be an integral part of peace processes and taken up by mediators facilitating a federal solution to a conflict, as federalism has to be constitutionally enshrined. A local constitutional expert can help answer key questions such as: What is the current governmental system? How will it be changed by the introduction of federalism? What additional reforms are necessary to support it? What is the constitutional history of the country? Since constitutional law is the primary source of state sovereignty, any “outside” input on issues of sensitive constitutional nature can lead to mistrust and may be perceived as undermining national ownership. It can hence be a challenge for experts to address the issue of the redistribution of state power and the potential need to reform constitutional law for this purpose while also being aware of and self-reflective on their own role in the process. Trust-building and expectation management thus become a very important precondition for dealing with federalism at the nexus of peacemaking and constitution-building. In that vein, mediators should also consider whether to assist each party to seek reliable constitutional expertise of its own.

Beyond the peacemaking and constitutional moments, implementation oversight bodies run by the UN or other international actors can provide reassurance to the opposition or the broader population that the promised reforms will materialise, hence addressing “credible commitment problems” (Raffoul 2019: 11). Here as well, it is important to involve local (state and non-state) actors in oversight and monitoring activities and plan for a timely transfer of these competencies to inclusive national bodies.

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