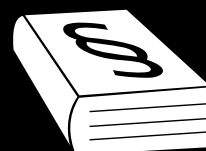


# Sequencing Peace Agreements and Constitutions in the Political Settlement Process

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# **Sequencing Peace Agreements and Constitutions in the Political Settlement Process**

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# Abbreviations

ANC	African National Congress (South Africa)
CA	Constitutional Assembly
CDA	Constitutional Drafting Assembly (Libya)
CDC	Constitutional Drafting Committee (Yemen)
CoE	Committee of Experts
FMS	Federal Member States (Somalia)
GCC	Gulf Cooperation Council
GNA	Government of National Accord (Libya)
GNC	General National Congress (Libya)
HoR	House of Representatives (Libya)
IFCC	Independent Federal Constitutional Commission (Somalia)
ISIS	Islamic State in Iraq and Syria
LPA	Libyan Political Agreement
MDC	Movement for Democratic Change (Zimbabwe)
NDC	National Dialogue Conference (Yemen)
NTC	National Transitional Council (Libya)
MPNP	Multi-Party Negotiating Process (South Africa)
PC	Provisional Constitution
TFC	Transitional Federal Charter (Somalia)
TFG	Transitional Federal Government (Somalia)
UNSMIL	United Nations Support Mission in Libya
ZANU-PF	Zimbabwe African National Union-Patriotic Front



# Key recommendations

1. Peace mediators and constitutional advisors must pay attention to the importance of sequencing in the political settlement process to ensure successful transitions from conflict to stable constitutional order. Where incremental political agreement and trust-building are required, a staged constitution-making process is often necessary. While peace negotiations and constitutional negotiations may occur in different and distinct forums, it is useful to think of the peace- and constitution-building processes as being substantively inter-related, with a common goal of bringing about a new political settlement (i.e. an agreement on how power is to be held and exercised).
2. Consideration of the sequencing of a political settlement process must be based on an ongoing analysis of the extent to which there is sufficient political agreement underlying each stage of the process. Where political agreement is absent or tentative, there needs to be a clear plan to assist the brokering of such agreement. Ensuring some form of negative peace before starting substantive negotiations is vital, as is acknowledging that several phases of agreement and constitution-making may be needed to reach the final constitutional stage.
3. Where a constitution-making process is initiated without sufficient elite buy-in to the political settlement process, public participation will not be enough to build a political settlement. Those supporting such processes should think of the wider political settlement strategies that need to be put in place to support constitutional discussions, and the wider pressures that need to be exerted to ensure that the process of seeking agreement between political and military power brokers continues alongside the constitution-building process.
4. A complex set of trade-offs between the short-term requirements of forging a political settlement and the longer-term requirements of sustaining peace through constitutional arrangements must be managed. These trade-offs must be well understood and well managed, which requires understanding the core dilemmas that sequencing must address.
5. A balance needs to be found between allowing time to build consensus and using deadlines to keep the process on track. Sometimes settlement processes must be pushed forward within short timeframes in which some political consensus for progress is present. However, deadlines—often internationally imposed—that are too tight tend to limit the chances for broader consultation and participation and can lead local stakeholders to lose confidence in the process and even look for extra-constitutional ways to assert leverage. A narrow focus on meeting deadlines can leave underlying conflict dynamics unaddressed. While deadlines are important and often necessary, they should be framed in a manner that leaves some flexibility to rethink the constitution-building process where it faces unforeseen fundamental challenges. Building fixed deadlines into legal instruments that cannot be adhered to (and will likely be disregarded) jeopardizes attempts to foster a commitment to abide by the legal rules of the game (IDEA 2016a: 20).

6. A balance (and the right timing) needs to be found between attaining enough political–military elite buy-in for the peace and constitution-building process, and securing broader social buy-in (through having political elites elected, and/or by directly opening up the process to public participation). Staged constitution-making processes can enable incremental political agreement at an early stage of the process, and broader consultative constitutional processes over time. The issue of how to balance elite participation and broader representation in the process is closely connected to the question of timing, in particular the timing of elections. Sometimes the pressure to hold elections forces an early end to the interim constitutional period, and does not allow enough time for the parties to at least arrive at a partial political settlement. Alternatives might need to be found to ensure broad representation and social inclusion in the process without necessarily or immediately calling for elections.
7. International actors need to make a greater effort to understand the underlying political dynamics of both the political settlement process and the constitution-making process. In particular, where a participative constitution-making process takes place with no (or thin) commitment to a political settlement, international guarantees are likely to be necessary to support the process. However, international actors that mediate and/or guarantee constitutional arrangements in peace talks should also be aware that the longer-term success of any constitutional arrangement will require a level of public consent. They should also be aware that arrangements need to be open enough to change in response to broader demands for inclusion. Navigating between the need for sufficient high-level political agreement and sufficient public engagement involves exercising good political judgement, which in turn requires international organizations to dedicate appropriate resources, and in particular specialized staff deployed for long enough to understand the complexities of the local context.
8. Attempts should be made to include spoilers (those who stay outside the process and attempt to destabilize it through ongoing violence) in the political settlement process, even when the groups and their key demands are considered illegitimate. Where processes have been set up to exclude—or have resulted in the exclusion of—key groups with the capacity to destabilize, spoiler dynamics should be identified and strategies put in place to address them. Where the groups cannot be included or accommodated, their legitimate demands should be identified and constructively engaged by ensuring that the political settlement, including the constitution, maintains a broad appeal to their potential constituents. Where spoilers are successfully included, strategies should be developed to avoid them ‘spoiling the process from the inside’. Approaches such as ‘sufficient consensus’ have been used to enable participation while protecting processes from insider spoiler tactics.

# Executive summary

This Policy Paper focuses on sequencing peace agreements and constitutional arrangements within the broader political settlement processes in fragile and conflict-affected settings. Political settlements comprise the underlying agreed understandings about how power is to be held and exercised. It is often assumed that there is a specific sequence to reach a political settlement: typically, a ceasefire or peace agreement that includes (or is followed by) transitional political arrangements or an interim constitution that culminates in some form of long-term constitutional arrangement. According to this assumption, the political settlement is understood to develop as part of the peace and constitution-building process. In practice, matters are likely to be much more complicated. Peace agreements and constitutional arrangements often fail to reflect a broadly shared political settlement, and require further negotiations to resolve conflict and start building sustainable peace.

Political settlements can be understood, on the one hand, as distinct from peace agreements and constitutional arrangements, but on the other hand as part of the same jigsaw puzzle, which may be arranged in different ways that often depart from the linear model. For instance, while both peace agreements and constitutional arrangements may reflect an underlying political understanding between the parties at the negotiating table, the connection between these documents and any shared political settlement can vary significantly.

While peace agreements primarily aim to end a conflict, and are the result of negotiations between most (if not all) parties to the conflict, they can take different forms, including (a) ceasefires or other pre-negotiation agreements; (b) framework peace agreements that also address the core issues of the conflict; and (c) implementation agreements. Transitional political arrangements, interim constitutions and final constitutions will often be intermingled with ceasefire or peace agreements in complex sequences.

Whether or not the process starts with a ceasefire/peace agreement, the parties often reach some form of transitional political arrangement that sets the stage for how power is to be held and exercised for a limited time. Transitional political arrangements only provide an attenuated legal framework, either working outside the former legal structures or within the arrangements of the pre-existing constitution. Interim constitutions can form an additional step towards a final constitution by providing a clearer constitutional structure with legal supremacy, sometimes enabling elections, and providing a roadmap for negotiating and drafting a final constitution.

Since 1990, a total of 23 political settlement processes in fragile and conflict-affected settings have concluded in a 'final' constitution (see Chapter 3). Based on an analysis of these processes, this paper identifies four broad sequencing patterns:

### **1. Partial peace (or ceasefire) agreements (not including transitional political arrangements) lead to a final constitution or a fundamental review of the old constitution**

This sequencing has tended to involve ceasefire agreements focused on demobilizing non-state actors and integrating them into the state's political and legal structures, as well as commitments to broader democratization, social inclusion and constitutional reform. Direct moves from a ceasefire agreement to a constitution have mostly been enabled by a political–military deal to end the conflict before starting constitutional negotiations, the pre-existence of a viable institutional framework to govern in the interim, and a conflict dynamic in which the state sought accommodation with armed opponents as well as broader progressive social movements. The risks of this sequencing are that powerful military actors negotiating the political settlement may have undue influence over the shape of the future constitution; or conversely, that the political settlement may only contain a broad commitment to constitutional reform which may or may not be forthcoming.

### **2. Transitional political arrangements (either in a peace agreement or a stand-alone document) lead to a final constitution**

In this sequence, post-conflict political settlement processes perhaps involving a ceasefire/peace agreement, either include or lead to some form of 'transitional political arrangement'. Transitional political arrangements outline the next steps of the political settlement process, sometimes laying out the process of producing the final constitution; they often need the support of the international community as guarantors in absence of a strong legal framework. This sequencing pattern has been typically used in cases of post-election violence; it has also been used where a power vacuum needs to be immediately filled before a constitution-building process can start. The disadvantage is that the quick 'fix' of the transitional political arrangement has little traditional democratic legitimacy, and creates pressure to move quickly to elections rather than taking the time for constitutional deliberation and consensus-building.

### **3. An interim constitution, perhaps preceded by a peace (or ceasefire) agreement, fulfils the role of a peace agreement and sets the stage for a final constitution**

In this model, the interim constitution plays the leading role in the political settlement process, until the adoption of a final constitution. Even though peace or ceasefire agreements may precede the interim constitution, these do not include transitional political arrangements. The advantage of this sequencing is that it facilitates a pact between political and military actors regarding the broad parameters of a political settlement, enabling some sort of elections prior to the final constitution-building process, while also enabling a broader participative process. The disadvantage is that

many of the critical elements of the political settlement can be left to the constitution-building process, which creates difficulties if the participative process is unable to agree on difficult issues, or the major political actors are not kept on board.

#### **4. A combination of (2) and (3), whereby transitional political arrangements are followed by an interim constitution, which precedes the final constitutional drafting stage**

This sequencing pattern involves a peace agreement with transitional political arrangements, often preceded by earlier ceasefire/peace agreements, followed by an interim constitution and then a final constitution. This pattern usually occurs in countries that have experienced prolonged conflict, where the institutional framework is weak or non-existent, and where incremental constitutional processes are used to reach a joint political and constitutional settlement. The advantages of this sequencing are that it enables an immediate form of government and an ongoing incremental process that attempts to produce a constitutional text reflecting a political settlement. However, this model generally reflects the difficulty of forging a constitutional settlement in these settings, which are characterized by large-scale conflict and state failure. Constitutional texts produced in this pattern often do not reflect broad-based agreement and struggle to be effective.

These four models include transitions from conflict to peace that, while broadly grouped into generic sequencing patterns, also vary according to the length of the process, the number of agreements attempted or needed, the specific content of the agreements and, perhaps most critically, the relationship between the constitution-making process and the political settlement process.

The very complex and unfinished political settlement processes in Libya, Somalia and Yemen (described in detail in Chapter 4) demonstrate the fact that the sequence of events is often not chosen but emerges in response to other imperatives. Furthermore, experience in each of these countries shows the critical importance of the relationship between peace- and constitution-building processes and the underlying political settlement process. These cases illustrate (a) the complexity of building a political settlement, (b) the fact that a linear model is the exception rather than the rule, and (c) the need to take into account contextual issues in deciding which sequencing pattern is most appropriate in a specific setting. These contextual issues include the nature and scale of the conflict, which actors are involved or excluded, the relative weakness of the institutional framework, the intensity of international interventions, as well as the emergence of critical junctures that either support or threaten to derail the process.

The paper furthermore identifies six process-specific factors that correspond to six short- and long-term requirements that might help in selecting the most appropriate sequencing pattern. These requirements can also be understood as trade-offs that stakeholders need to bear in mind when attempting to reach a political settlement (and a constitutional order capable of sustaining and developing such a settlement). These trade-offs arise because while agreement between warring parties is necessary in order to reach a political settlement, a broader set of more principled commitments is required for constitutional effectiveness and the rule of law, and these two elements are sometimes in conflict. The trade-offs include:

1. *Creating necessary peace versus building sustainable peace.* While the absence of violence is necessary to start constitutional negotiations, some stakeholders require constitutional assurances before laying down their weapons. Staging

constitution-making through interim arrangements and/or interim constitutions can enable a balance between sufficient guarantees to armed actors and sufficient future capacity for the political settlement to be broadened and deepened.

2. *Temporary agreement versus permanent (constitutional) text.* Assuring political/military actors of the permanency of agreements needs to be balanced with the requirement to maintain enough flexibility in the process to allow for future constitutional development.
3. *Requiring speed versus taking time.* Where the parties to the conflict cannot easily agree to the terms of a new political settlement, again a multi-stage approach might be warranted. This approach also needs to balance the short window of opportunity for change, and the related requirement for a quick process—from transitional government structures to final constitution—versus the need to take time to negotiate and build consensus.
4. *Participation versus elite pact.* Political–military buy-in and broad participation are both important for the future implementation of a constitutional framework, and must be secured in different ways at different stages of the process. Depending on the context, elite inclusion may need to be prioritized over broad societal involvement.
5. *Including versus excluding spoilers.* Depending on the nature and virulence of (potential) spoilers, it may be necessary to assess the consequences of including or excluding specific groups in order to avoid a derailment of the process.
6. *International guarantees versus locally owned process.* Depending on the status of the institutional framework, international support for the political settlement process might be needed to reassure local actors. Yet international actors must also pay attention to building and maintaining their own legitimacy while ensuring ‘locally-owned’ processes.

While the design of a process may emerge organically rather than through the conscious choice of the actors involved, it is important to recognize that all process choices come with risks and disadvantages—and to acknowledge, understand and mitigate those risks.

# 1. Introduction

This Policy Paper focuses on issues of sequencing in political settlement processes where there is violent conflict. Negotiated transitions from conflict typically involve a formal peace deal and a new or significantly revised constitutional arrangement. These arrangements attempt to establish an agreed power map between elites that (a) details how the political and legal institutions will hold and exercise power and (b) serves as a new social contract to underpin the state. The aim of this power map is to enable the parties to the conflict to move away from violent conflict by reaching a new political settlement.

It is often assumed that there is a specific sequence involved in reaching a political settlement and constitutionalizing new arrangements. An ideal sequence would involve antagonistic elites coming together to negotiate a basic framework of cooperation that might lead to a ceasefire or peace agreement, including perhaps an interim governing arrangement, and eventually some form of longer-term constitutional arrangement, reflecting a certain level of popular consultation or a less ‘elite-driven’ set of arrangements (Darby and MacGinty 2000).

For example, the Geneva process for Syria initiated in 2012 set out the following proposed sequence:

1. a ceasefire (to allow for humanitarian intervention), followed by a transitional governing body with full executive powers, formed on the basis of mutual consent, which would *establish* a neutral environment;
2. a National Dialogue process and constitutional and legislative review subject to popular approval; and
3. free and fair multiparty elections for the new institutions and offices, once the new constitutional order had been established (Geneva Communiqué 2012; Carter Center 2015).

The process set out by the Gulf Cooperation Council for Yemen in 2011 was to follow a similar trajectory, with an agreed transitional governing body, a national dialogue process and a new constitutional order (see Chapter 4).

This ideal-type sequence is logical, and seems to stage the process in ways that are appropriate to the nature and type of agreement being sought: a peace agreement to end the conflict, with a subsequent broader, more participatory, constitution-making process that would widen the elite pact into a fully-fledged social contract.

In practice, however, the sequencing of processes often becomes more complicated. Even if the ideal-type sequence formally holds, the degree to which the peace agreement or the new constitutional framework reflects a new political settlement between warring elites can vary significantly. In some processes the peace agreement is simply a tentative and partial move towards a political settlement; the burden of creating and institutionalizing the new political settlement is left to the constitution-building process. Yet peace agreements can limit the options for a broader participative constitutional process, because they may set the parameters within which specific issues are to be negotiated and drafted, or constrain the way in which the public will be involved in the process.



Moreover, even when a process produces an ultimate constitution, whether it reflects a political settlement may remain contested and require both further negotiations and further constitutional iterations brokered through more peace agreements or constitutional revisions if the constitution is to help resolve the conflict (see the Nepal example in Chapter 3).

To add to these complications, peace agreements and constitutional arrangements can overlap in different ways. An interim or final constitution may itself represent a form of negotiated peace agreement, shaped by negotiations between former foes as much as (or more than) public participation—such as South Africa’s interim ‘peace agreement constitution’ (Easterday 2014). Alternatively, a peace agreement may include interim government arrangements (e.g. the 2015 Agreement on the Resolution of the Conflict in South Sudan) or even an interim or final constitution—such as Bosnia and Herzegovina’s ‘constitutional peace agreement’, which included the Constitution as an annex to the Dayton Peace Agreement (Bell 2008). These difficulties mean that sequencing often deviates from the linear prototype, and, as the case studies suggest, often involves multiple peace agreements and constitutional iterations as part of a complicated attempt to reach a political settlement.

This paper aims to address the gap in the constitution-making and peacebuilding literatures regarding descriptive and normative accounts of the relationship between peace agreements and constitutional arrangements in political settlement processes. It explores the sequencing of peace deals and constitutional arrangements in order to better understand when (and why) sequencing does not follow the logical model, and the implications for any coherent and workable constitutional framework. This report is an initial exploration of these issues, intended to provide initial recommendations and trigger further deliberation. In doing so, it draws on deliberations at a December 2015 workshop entitled ‘Constitution Building in Political Settlement Processes: The Quest for Inclusion’ (International IDEA 2016).

The paper is structured as follows. Chapter 2 describes the existing literature on sequencing to frame the key research questions, and presents working definitions for peace agreements and different constitutional arrangements. In Chapter 3, these definitions are used to explore varieties of sequencing patterns, using empirical data drawn from a review of peace agreements and constitution-making processes globally. This work draws on a number of existing and new data sources, such as the Constitute database developed by the Comparative Constitutions Project at the University of Texas at Austin; data on interim constitutions collected by International IDEA (Zulueta-Fülscher 2015); and the University of Edinburgh’s peace agreements database, PA-X.<sup>1</sup>

Chapter 4 examines three complex case studies in more detail: Libya, Somalia and Yemen. These countries initially pursued the ideal-type sequence, which either broke down or did not come to fruition; the peace and constitution-making processes then came apart in different ways. These case studies call into question whether (and how)

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<sup>1</sup> Access the Constitute database at <<http://www.constituteproject.org>>. Access the current iteration of the PA-X database at <<http://www.peaceagreements.org>>. The final iteration is due online in 2017.



constitution-building processes can be successful where there is no underlying political settlement. Chapter 5 concludes by distilling initial lessons for future policymakers in conflict-affected states.

## 2. Sequencing peace agreements and constitutions in political settlement processes: a conceptual framework

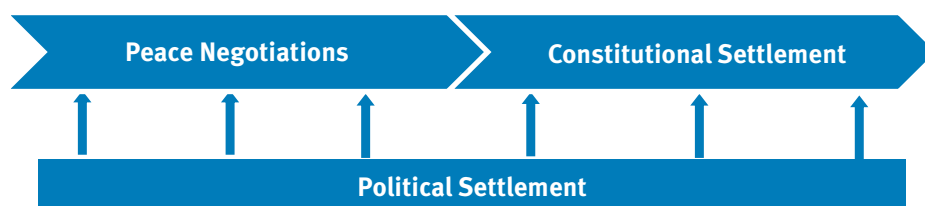
In situations of violent conflict, negotiated agreements—including ceasefire or peace agreements and documents detailing constitutional arrangements—attempt to reach a new political settlement between the warring protagonists, which is ideally supported by the broader society. Such political settlements aim to move the country or region from conflict to a situation characterized by constitutional commitments to good governance and the rule of law.

The sequencing—and the success or failure—of these negotiated agreements depends on a number of factors, including the diverse processes through which a political settlement is reached; when (and how) peace agreements and constitutions reach a political settlement; when (and why) constitution-making separates from the political settlement process; and the consequences of such a separation.

The first contribution of this paper is to suggest that the underlying political settlement—an agreed understanding of how power is to be held and exercised—should be understood as distinct from the peace agreement and constitution. These three elements represent closely related pieces of the same puzzle, which may be arranged in different ways depending on the process and context (see Figure 2.1). From this perspective, the process is unlikely to be linear.

The second contribution of the paper is its attempt to further examine how these different pieces of the jigsaw fit together; it describes several sequencing patterns and considers the ways in which these patterns are affected by stakeholders' underlying agreements or disagreements about the political settlement.

**Figure 2.1. Interactions between political settlements, peace negotiations and constitutional settlements**



The political settlement literature says little about sequencing within political settlement processes, from peace negotiations to the constitutional settlement. Until recently, the literatures on political settlements and governance viewed the constitution as a singular 'event', 'document' or even 'institution' within a broader set of legal, political and social arrangements (Laws 2012). Similarly, the literature on peacebuilding has often viewed peace agreements and constitutions as separate endeavours within a peace process (Samuels 2009; Paris and Sisk 2009).

Increasingly, however, practitioners and academics understand both peace agreements and constitutional arrangements to be part of a more complex process of achieving a

political settlement (see Hart 2001; also Darby and MacGinty 2000: 8; Bell 2008: 63; Choudry 2010). In one of the earliest contributions, Hart usefully pointed out that a post-conflict constitution should be understood more as ‘a process, a continuing conversation, or a forum for negotiation amid conflict and division’ rather than as a document which codifies the resolution of the conflict (2001: 154). Others suggest that peace agreements and constitutions are not clearly distinguishable, as they may merge in the form of ‘constitutional peace agreements’ or ‘peace agreement constitutions’ (Bell 2008; Easterday 2014). For example, an interim constitution can also be a form of negotiated peace agreement (as in South Africa) or a peace agreement constitution; a peace agreement may also contain a constitution (as in Bosnia and Herzegovina) or set out a constitutional blueprint (as in Northern Ireland). A consensus is therefore emerging on the close relationship between peace and constitution-making processes (Widner 2005; Bell 2000, 2008; Samuels 2005; Brandt et al. 2011; Easterday 2014).

Still, the way in which sequencing patterns affect constitution-building has not been thoroughly addressed. This paper explores sequencing issues, crucially focusing on the following questions: to what extent should a new constitutional framework be based on some prior agreement on the nature of the state, and to what extent can the constitution be a vehicle for reaching such an agreement? Can constitution-making be successful in contexts where there is no prior agreement, especially when conflict is ongoing? What is to be done where the circumstances for both peace and constitutionalism are unfavourable, and would more attention to sequencing help? Where the peace agreement and an interim constitutional framework contain a rudimentary agreement between political/military actors on ending the conflict, under what circumstances do broader social processes of constitutional development undermine or support that agreement? What is the best way to keep the process of elite agreement and broader constitutional development on track?

## Understanding the key components of sequencing

To understand sequencing it is useful to define the types of events that occur during political settlement processes—and in the production of ceasefire or peace agreements, and interim or final constitutional arrangements—and how they attempt to contribute to a new political settlement.

### What is a ‘political settlement’?

Development actors have increasingly used the term ‘political settlement’ to refer to the formal and informal political agreements that indicate how power is exercised within the state. The term can be defined in a number of ways, but a useful working definition is: ‘the forging of a common understanding usually between political elites that their best interests or beliefs are served through acquiescence to a framework for administering political power’ (di John and Putzel 2009: 4; see also Whaites 2008: 4; OECD 2011: 31; Fritz and Menocal 2007: 27; DFID 2010: 22; Kahn 2005, 2010; Parks and Cole 2010: 6; Barnes 2009: 9).

While most definitions of political settlements emphasize the central role of political elites, the literature has also recognized that sustainable settlements and good development outcomes depend on broader social contracts that are inclusive of all (or most) major social groups (Barnes 2009: 18). Recent contributions suggest that broader societal forces can sometimes influence elites, and that broad forms of social inclusion can therefore assist in developing and sustaining the settlement (Castillejo 2014; Laws 2012; Menocal 2015).

The concept of political settlements has several different roots and meanings—and is indeed criticized for its lack of clarity as a result. In particular, it has been noted that the term is often used interchangeably with ‘peace settlement’ (Bell 2015; Ingram 2014). This paper suggests that the term political settlement usefully highlights the somewhat invisible agreement between elites, and often between elites and society more broadly, on how power should be constrained and exercised. The more political economy-driven definitions suggest that political settlements are distinct from, although related to, peace settlements or constitutional settlements. While a political settlement may be closely aligned with a country’s peace settlement terms or constitution, it comprises the underlying political understandings on which those documents are based. A central focus of this paper is situations in which peace agreements and new constitutions are produced without a clear commitment to a new political settlement.

## What are peace processes and agreements?

A peace process (or peace negotiations) can be defined as an attempt to bring political and/or military elites involved in a conflict to some sort of mutual agreement on ending the conflict.<sup>2</sup> Peace agreements can be defined as formal documents that are publicly produced after discussion with all (or some of) the conflict’s protagonists. They reflect a degree of agreement between those actors, primarily regarding the need to address and end physical violence.

Peace processes increasingly produce complex peace agreement pathways, from (a) ceasefire or other pre-negotiation agreements, in which warring parties attempt to agree to enter formal negotiations, to (b) framework peace agreements that address the core issues in the conflict, in a series of agreements or a comprehensive agreement, to (c) implementation agreements that aim to ensure that past agreements are implemented, or that extend the agreement to new issues or parties (Bell 2006, 2008). Transitional political arrangements, interim constitutions and final constitutions will often be intermingled in complex sequences that are rarely linear, but often involve moves away from, and towards, conflict.

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2 A ‘conflict’ is defined as having caused more than 25 conflict-related deaths in one calendar year (Uppsala Conflict Data Program n. d.). A similar definition of peace process and negotiations is as follows: ‘by **negotiation** we mean the process through which two or more clashing parties (either countries or internal actors within the same country) agree to discuss their differences in an agreed-upon setting to find a solution that will meet their demands. . . . By **peace process** we mean the consolidation of a negotiation scheme once the thematic agenda and the procedures to follow have been defined, along with the calendar and the facilitators. Therefore, negotiation is just one stage in a peace process’ (Fisas 2015: 5–6).

## What are transitional political arrangements, interim constitutions and final constitutions?

As set out in the data in Chapter 3, constitution-making in conflict-affected settings is often incremental. Different forms of interim constitutional arrangements may attempt to pave the way towards a final constitution and/or elections.<sup>3</sup> The trajectory towards a ‘final’ constitution can evolve, for example, from a fairly basic transitional political arrangement in a peace agreement (or a separate transitional political charter) to an interim constitution that operates during the transition period, which sketches out the process of drafting and adopting a final constitution.

Transitional political arrangements, interim constitutions and ‘final’ constitutions all represent a ‘power map’ for the country and provide a legal basis for government. However, they do so for different lengths of time, in different degrees of detail and/or for different purposes. Before examining the 23 cases in the next chapter, it is useful to explain the distinctions between these arrangements.

A *transitional (or interim) political arrangement* is a mini power map that defines how power will be held and exercised during a transitional period; this arrangement involves replacing at least some of the institutions upheld by the country’s prior constitution. Transitional political arrangements can—but do not need to—be part of peace agreements, as they set out new governance structures for the transition. Interim arrangements differ slightly from interim constitutions, as they are not designed to form a full constitutional arrangement, but to provide an attenuated legal framework to serve as a basis for government during a short transition period. Unlike interim constitutions, they do not provide a new form of legal supremacy for the arrangements as a whole, and either work outside the former legal structures or within the arrangements of the existing formal constitution.

An *interim constitution* can be defined as ‘a constituent instrument that asserts its legal supremacy for a limited period of time pending the enactment of a contemplated final constitution. An interim constitution therefore, (a) constitutes (transitional) government structures; (b) asserts legal supremacy, formally established in the document; (c) is limited temporally; and (d) provides for a future constitutional process’ (Zulueta-Fülscher 2015: 9). The origin and role of interim constitutions can vary greatly. Sometimes they may in effect be the peace agreement: they may be the result of a negotiated agreement between the main protagonists to the conflict, and reflect political/military negotiated compromises about the future nature of the state (e.g. the South African 1994 Interim Constitution). Alternatively, interim constitutions may be the outcome of a peace agreement compromise (such as the Sudanese 2005 Interim Constitution). Indeed, it may be unclear whether an interim constitution is a peace agreement or a distinctive constitutional product of a peace process.

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3 This paper focuses on political settlement processes that conclude with a new constitutional arrangement rather than on those which end with the holding of elections.

*Final constitutions* do not last forever, since they are subject to amendment and revision, but their duration is intended to be indefinite.<sup>4</sup> Thus, the term ‘final’ is used here to distinguish them from interim constitutions that are explicitly transitional and temporary. Final constitutions normally contain provisions for their own amendment and even replacement.

The next chapter examines the ways in which peace processes can be sequenced regarding timing, but more importantly in terms of the degree to which stakeholders reach a political settlement during the negotiation process, and the consequences of this settlement for sustaining peace.

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<sup>4</sup> According to Ginsburg, Elkins and Blount (2009), the average duration of a constitution is 19 years.

### 3. Sequencing of peace agreements and constitutions in the political settlement process: patterns and issues

An empirical review of political settlement processes enables a more systematic analysis of the variety of ways to sequence the path between peace processes and constitution-making processes. Since 1990, there have been 23 political settlement processes in fragile and conflict-affected settings that have culminated in a new or revised constitutional framework (although some remain under pressure to further revise).<sup>5</sup> Analysing these cases reveals that political settlement processes can start with a peace agreement, transitional political arrangement or interim constitution, and potentially include a number of other stages before reaching a final (or fundamentally amended) constitution. The 23 processes are more or less evenly distributed among four possible sequencing patterns:

1. Partial peace (or ceasefire) agreements (not including transitional political arrangements) lead to a final constitution or a fundamental review of the old constitution;
2. Transitional political arrangements (either in a peace agreement or a stand-alone document) lead to a final constitution;
3. An interim constitution, sometimes preceded by a peace (or ceasefire) agreement, fulfils the role of a peace agreement and sets the stage for a final constitution.
4. A combination of (2) and (3), whereby transitional political arrangements are followed by an interim constitution, which moves to a final constitutional drafting stage.

#### The models explained

1. Partial peace (or ceasefire) agreements lead to a final constitution or a fundamental review of the old constitution



Sometimes peace agreements pave the way for a final constitution without other interim constitutional stages. Four political settlement processes in the sample analysed—

<sup>5</sup> The 23 cases are: Afghanistan, Bosnia and Herzegovina, Burundi, Cambodia, Central African Republic, Chad, Colombia, Comoros, Democratic Republic of Congo, El Salvador, East Timor, Egypt, Guinea, Iraq, Kenya, Kosovo, Madagascar, Mozambique, Nepal, Bougainville (Papua New Guinea), Rwanda, South Africa and Zimbabwe. This sample excludes countries that at the time of writing have not yet completed the political settlement process by adopting a final constitution: Eritrea (which is still implementing its 1992 interim constitution), Libya, Somalia, South Sudan, Sudan and Yemen. Three of these unfinished political settlement processes—Libya, Somalia and Yemen—are analysed in Chapter 4.

Colombia, El Salvador, Mozambique, and Bosnia and Herzegovina—broadly followed this pattern. This sequencing has tended to involve (a) peace agreements focused on reaching a ceasefire; (b) demobilizing non-state actors, and integrating them into the state's political and legal structures; and (c) commitments to broader democratization, social inclusion and constitutional reform.

With the exception of Bosnia and Herzegovina, the countries that followed this model signed peace agreements in the 1990s between the government and armed opposition groups, which became linked to constitutional reform and development processes. The processes tended to involve multiple (often single-issue) peace agreements that culminated in a comprehensive peace agreement (or, in the case of Colombia, a new 'peace agreement constitution' in 1991). This direct move from peace agreement to constitution was enabled by the detail of the peace agreement provisions, the existence of an institutional infrastructure to govern in the interim, and the dynamic of the conflicts in which the state sought accommodation with armed opponents (and often broader progressive social movements as well). Constitutional revisions then attempted to develop and institutionalize the arrangements, either soon after the agreement or, in some cases, many years later.

The advantage of the 'peace agreement to final constitution' trajectory is that state and non-state armed actors agree on how to end the conflict prior to the constitution-making process, which means that the constitutional reform process is underpinned by some sort of political/military deal. The disadvantages entail two opposite risks. The first is the risk that powerful military actors negotiating the political settlement will in essence pre-determine the shape of the constitution, denying any broader social process a chance to deepen or develop the constitutional commitments. For example, Bosnia and Herzegovina's one-stage 'peace agreement to constitution' process involved only the key politico-military actors. While the 1995 Dayton Peace Agreement and the 1995 Constitution (which was an annex to the agreement) successfully ended the conflict, the country has found it impossible to move beyond this initial elite pact into broader constitutionalism. Indeed, the peace agreement institutionalized the divisions at the heart of the conflict because the elite 'power-sharing' pact was fashioned as a permanent constitutional settlement (ICG 2014b).

The second risk of the 'peace agreement to final constitution' trajectory relates to the opposite situation: where the political settlement only contains a broad commitment to constitutional reform, and leaves this issue to be worked out as part of a complex 'implementation' phase of the peace process. In contexts that primarily involve the demobilization and integration of armed groups, an existing government may benefit from the peace negotiations (e.g. demobilizing threats to its power) without delivering a transformed, more inclusive constitution, as happened in Guatemala (Brett and Delgado 2005).



## 2. Transitional political arrangements lead to a final constitution



Peace processes often include either a peace agreement with some form of transitional political arrangement to govern during a transitional period, or transitional arrangements agreed separately, usually following ceasefire agreements. Transitional political arrangements—whether separate or part of a peace agreement—provide a temporary, very limited, set of transitional institutions to govern during a certain period of time, with the purpose of establishing a new constitution (and/or electoral system).<sup>6</sup> Such arrangements outline the next steps for the political settlement process, and sometimes define the process for producing the final constitution. Seven political settlement processes in the sample—Bougainville, Cambodia, Comoros, Guinea, Kenya, Timor Leste and Zimbabwe—broadly followed this pattern. This sequencing involves (a) decisions by parties—sometimes after numerous attempts to agree ceasefires—to negotiate a new political settlement, using the international community as a mediator and guarantor of the final agreement; (b) a comprehensive peace agreement that includes provisions for transitional political arrangements focused on power sharing; and (c) a final constitution.

Kenya and Zimbabwe used this sequence to deal with post-election violence. In **Kenya**, a failed constitution-making process involving broad participation resulted in the government proposing its own draft constitution that failed in a 2005 referendum. Disputed election results in December 2007 provoked widespread violence across the country, and international mediation led to the signing of the 2008 power-sharing arrangement, as well as the National Accord and Reconciliation Act—a transitional political agreement that created a Government of National Unity between the two contending parties—and a series of additional agreements that addressed long-term issues that had contributed to the violence.<sup>7</sup> These agreements also detailed a constitutional review process that commenced in February 2009. A Committee of Experts (CoE) prepared a draft constitution and reviewed it several times after receiving comments from the public and a 27-member Parliamentary Select Committee, which was crucial in deciding on key contentious issues and ensured that the constitution was connected to the ongoing political settlement. It took the CoE the stipulated 12 months to finalize the draft constitution and submit it to the National Assembly, which unanimously approved the constitution on 2 April 2010. The proposed constitution was accepted in a national referendum, and was promulgated on 27 August 2010.

<sup>6</sup> Political settlement processes that achieved elections, rather than a new constitutional settlement (although often with ongoing attempts at major constitutional revision), occurred in Côte d'Ivoire, Gabon, Lebanon, Liberia, Mali and Sierra Leone but are excluded from this analysis.

<sup>7</sup> For further information on, and full texts of, peace agreements see the United Nations' Peacemaker database, <<http://peacemaker.un.org>>. A full list of agreements referred to in this Policy Paper can be found in Annex A.

**Zimbabwe** followed a similar process. Post-electoral violence in the 2008 presidential elections resulted in a transitional political arrangement that mandated the formation of a power-sharing government between the Zimbabwe African National Union-Patriotic Front (ZANU-PF)—the political party of long-time President Robert Mugabe—and the two Movement for Democratic Change (MDC) Formations, which represented the opposition to Mugabe. The arrangement managed to stop the violence, and established a process for constitutional change that started in April 2008 and culminated with the promulgation of the new Constitution in May 2013 after it was accepted in a referendum. In this case, however, the dominance of President Mugabe and his governing party resulted in the partial disregard of the highly participatory constitutional process, with some of the Constitution's clauses designed not to come into effect for 10 years (Allison 2013).

**Cambodia** in 1991 (Marks 2010: 210), **Comoros** in 2001 (although this case has been less researched) and **Guinea** in 2010 also followed this trajectory from agreed transitional arrangements to a final constitution. Furthermore, the sequencing has been used in cases where a new sub-state territory has achieved independence, in the form of new state or an autonomous sub-state region (often based on a peace process). The establishment of a new state or autonomous region gives rise to the need to broker agreements within the emerging state or state-like territory, in particular where disagreements exist between local stakeholders, or where divisions emerge or become more acute after break-away from the main state. In post-independence **Timor Leste**, for example, the transitional arrangements established by the United Nations created space for a constitution-building process and a new constitution (Regulation no. 2001/2). The rushed process, however, did not allow stakeholders to build an underlying political settlement; hence, the 2002 Constitution was not able to prevent or resolve future violence (Aucoin and Brandt 2010: 271).

In **Bougainville** (an autonomous province of Papua New Guinea) the 1994 Charter of Mirigini for a New Bougainville addressed the relationship between the island of Bougainville and the state of Papua New Guinea, paving the way towards autonomy arrangements that were akin to statehood. However, the charter also included elements of internal brokerage between parties and groups within Bougainville, establishing a transitional governing body to act as a Constituent Assembly. The ultimate 2001 Bougainville Peace Agreement with Papua New Guinea settled the conflict, and stipulated that a referendum on secession should be held not before 10 years from the agreement or after a maximum of 15 years from the election of the autonomous Bougainville Government; the referendum is scheduled for 15 June 2019. In the intervening period, a constitution for Bougainville was developed and promulgated in 2004, which reflected an attempt to reach a broad-based internal political settlement (amendments to the Papua New Guinea Constitution also took place as a result of the peace agreement).

The advantage of this sequencing is that it enables an immediate temporary government, where one does not exist or where an election outcome is disputed, until the constitution can be changed. For that reason, this approach is often used in cases of post-election conflict to attempt to transition from 'democratic deadlock' following

disputed elections by establishing a form of temporary power sharing, new elections and constitutional reform. It has also been used where former parts of the state have achieved significant autonomy or self-government, or even independence, to fill an immediate power vacuum during the constitution-building process. The disadvantage in both settings is that the quick ‘fix’ of the transitional political arrangement has little traditional democratic legitimacy, and creates pressure to hold elections quickly, despite the need for constitutional deliberation and consensus-building, as was arguably the case in Cambodia, Comoros and Timor Leste.

### 3. An interim constitution serves as a peace agreement and sets the stage for a final constitution



In this model, in the absence of a legitimate constitutional framework, an interim constitution plays the central role in the political settlement process, leading to the adoption of a final constitution. This means that even though there might be peace or ceasefire agreements preceding the interim constitution, these do not include transitional political arrangements, although they may well agree principles, as well as define and shape the transitional process. Six political settlement processes—in Chad, Democratic Republic of Congo, Egypt, Madagascar, Nepal and South Africa—broadly followed this pattern.

**South Africa** is perhaps the best-known example of this sequence. Often hailed as a model constitution-building process, when examined in more depth the process appears more complex than is usually assumed. A peace process between the African National Congress (ANC) and the South African Government resulted in several initial agreements, most notably the National Peace Accord—signed on 14 September 1991 by, among others, over 40 civil society and political groups—which aimed to prevent violence rather than change the government structures (Spies 2002). The constitution-building process remained contentious, and several attempts at multiparty transition negotiations failed until April 1993, when the Multi-Party Negotiating Process (MPNP) started (Barnes and De Klerk 2003). The assassination of Chris Hani—leader of the South African Communist Party and key figure in the armed wing of the ANC—the same month was the crucial turning point, as it underlined the fragility of the peace process and forced the parties to produce results under threat of a return to armed conflict.

The MPNP—in essence a process focused on reaching an ANC–South African Government pact—negotiated and agreed to an interim constitution that included 34 key principles including a governmental framework based on a power-sharing arrangement, a new Constitutional Court, and procedures for writing and adopting a new constitution. These 34 principles enabled a political settlement between the ANC

and the governing National Party of South Africa, because they provided guarantees to the outgoing government that its core interests would be protected in the new constitution, even once power was handed over to a post-election broad consultative process in which it would have little influence. Hence both the interim constitution and the elections permitted the emergence of a political settlement between key elites, but did not prevent a future participative constitution-building process (Spies 2002). The interim constitution was adopted in January 1994, and elections were held in April 1994. Political parties that had previously been spoilers to the process—the Inkatha Freedom Party and several right-wing Afrikaaner groups—threatened to withdraw from the process, but after some last-minute constitutional amendments addressing their core concerns, they participated in the elections and in part of the constitution-building process (Ebrahim and Miller 2010, 141–42). After the election, a Constitutional Assembly (CA) delivered a final constitution after a broad participative process. The interim constitution had specified that compliance of the Final Constitution with the Constitutional Principles had to be approved by the newly established Constitutional Court, in a form of guarantee. The court initially struck down the draft constitution, but certified it after it was amended and adopted by the CA on 11 October 1996; the final version was adopted on 4 February 1997.

While other processes have used a similar sequence, they have often done so without the type of underlying political agreement at the interim constitution stage that ultimately made the constitution-building process in South Africa relatively successful (Bilchitz et al. 2016), as our next examples illustrate.

In **Nepal**, a decade-long civil conflict was partly directed against the 1990 constitution for its political and legal exclusion of the multi-ethnic, multilingual and religiously diverse Nepali society. A ceasefire agreement and a Comprehensive Peace Accord committing to a political settlement based on inclusion were agreed in 2006, followed by an interim constitution in 2007. The interim constitution was drafted by a 15-member commission with limited representation of women and minorities, and with no public consultation. It took forward the principles agreed in talks, developing them into a constitutional text, but did not resolve critical issues about the shape of the political settlement, such as the federal nature of the state, which was left to the constituent process. The interim constitution called for a 601-member CA to be elected using a highly inclusive electoral system, and set a two-year deadline for the CA to draft a final constitution. Despite extending the deadline four times, the CA failed to produce a final constitution, and was finally dissolved in July 2012. The country then elected a second CA in November 2013.

Only after the April 2015 earthquake, in June 2015, did the leaders of the four largest political parties represented in the CA sign a 16-point agreement that first provided for a federation of eight provinces—an issue of great controversy throughout the constitutional process. The CA endorsed the draft constitution in July 2015, thereby shortening the participatory process, and the final constitution was promulgated on 20 September 2015, with no referendum. The adoption of the new Constitution was marked with violence and widespread protests from minority groups, on the basis that it inadequately reflected the inclusive governance structure outlined in the interim

constitution (article 138). By January 2016 two amendments to the constitution had been adopted dealing with these issues, with more amendments likely.

In the **Democratic Republic of the Congo**, the first transitional period lasted from 1994 until 1997, when General Joseph Kabila seized power in a coup and decree law superseded the 1994 interim constitution. A number of ceasefire/peace agreements followed, with a new Transition Constitution (another interim constitution) adopted in 2003, setting the stage for a final constitution, which was adopted in 2006. Violence again spiked in 2013.

Other countries have tried to use the ‘concession’ of constitutional change to stave off conflict, only to have to enter negotiations over new interim constitutions. For example, after unconstitutional (violent) overthrows of their respective governments, **Chad** (1990) and **Madagascar** (2009) both produced interim constitutions followed by the adoption of a final constitution. In Chad, the interim constitution—the Transitional National Charter—was to be replaced by a new constitution within 30 months. In Madagascar, a *Charte de la Transition* acted as an interim constitution to pave the way towards a new constitution. Serious deficiencies in Chad—including a lack of horizontal and vertical inclusion and insufficient capacity of the committee members in charge of drafting—undermined the legitimacy of the constitution, and arguably contributed to the 2005 civil war (Widner n.d.; Zulueta-Fülscher 2015: 22). In Madagascar, the power-sharing elements of the interim constitution were not implemented, and while a new constitution was promulgated in 2010, it continued the pattern of insufficient inclusiveness, and the constitutional referendum was widely criticized for irregularities. The constitution was followed by a Roadmap for Ending the Crisis in Madagascar in 2011, which provided for further transitional arrangements. Progress has remained difficult since (Connolly 2013).

The advantage of this sequencing is that the interim constitution serves as a bridge between two different constitutional frameworks. The sequencing enables a pact between political/military actors on the broad parameters of a political settlement (and often elections) to be reached prior to the constitution-making process, while allowing the final constitutional settlement to be based on a broader participative process. The disadvantage is that many of the critical elements of the political settlement can be left to the constitution-making process, which creates difficulties if the participative process is unable to agree on difficult issues. The move directly from a peace agreement to an interim constitution often enables some form of elections after the adoption of an interim constitution, which eases some of the time pressures during the final sequencing stage.

4. A peace agreement with transitional political arrangements is followed by an interim constitution, which precedes the final constitutional drafting stage



This sequencing pattern involves a peace agreement with transitional political arrangements (often preceded by earlier ceasefire/peace agreements) that are followed by an interim constitution and then a final constitution. Three political settlement processes (Burundi, Central African Republic and Rwanda) have broadly followed this pattern, and similar sequencing has taken place in the distinctive internationalized cases of Kosovo, Afghanistan and Iraq.

The pattern of using both transitional political arrangements and an interim constitution usually occurs in countries (a) that have experienced prolonged internal strife, due to structural grievances and the unmet need for far-reaching reforms among some sectors of society; (b) with a weak or non-existent institutional framework incapable of ending the conflict; and (c) where incremental constitutional processes have been seen as a way to concurrently broker political and constitutional settlements. Transitional political arrangements are put in place to provide some sort of consultative structural administration. The interim constitution is put in place in order to: (a) enable further staging, often towards elections to a constituent body; (b) give the conflicted parties time to negotiate a political settlement to underpin the constitution-building process; and (c) enable stronger ties to be built with the conflicted parties' constituencies and the population at large (Zulueta-Fülscher 2015: 28). However, the case studies illustrate that these constitution-making processes have had varied success.

After the assassination in October 1993 of **Burundi's** first democratically elected Hutu president, Melchior Ndadaye, the country descended into violence (Wolpe 2011). Attempts to bring the country back on track included the adoption of a number of (attempted) ceasefire agreements, peace agreements and transitional political arrangements. A transitional political arrangement was adopted in 1994 (which was invalidated after a coup in 1996) and an interim constitution in 1998, followed by the 2000 Arusha Accord (a peace agreement), a second interim constitution in 2001, and finally the adoption of a new 'interim' constitution in 2004, which was then confirmed in the permanent constitution of 2005. Regional pressure was key to overcoming some parties' lukewarm acceptance (and implementation) of the agreements, and drove the process towards the final constitution. This constitution—consociational in nature—reflected a more or less widely shared political settlement at the time, and seems to have been a key factor in reducing the violence (Reyntjens 2015) until 2015, when it resumed, in part as a consequence of a presidential attempt to amend the constitution to extend term limits (Kabumba 2015).

In the **Central African Republic**, a spike in violence in 2013 forced the parties to conclude a peace agreement with transitional political arrangements (11 January 2013), which was quickly followed by an interim constitution (18 July 2013) and a final constitution (approved by referendum in December 2015)—all drafted by the Transitional National Council. While this process represents a significant achievement in a relatively short period of time, the security situation remains fragile, and there were stark limitations regarding public participation throughout the process.

In **Rwanda**, two protocols on power sharing were made part of the 1993 Arusha Accords, which included an interim constitution. Despite the dramatic failure of the accords and the Rwandan genocide, the security situation was stabilized. The constitution-building process only started in 2000, following a highly participatory process that culminated in the adoption of the final constitution in 2003 (Ankut 2005). However, the constitutional order was dominated by one side to the conflict, and marked by authoritarianism; in 2015 a constitutional revision removed presidential term limits.

Three states—first Kosovo, and later Afghanistan and Iraq—also used this type of sequencing after international conflict and regime change. These processes were ‘rooted in binding UN Security Council resolution, with international constitution brokering as a conflict resolution device’ (Bell 2006: 394). This brokering consisted of an initial international transitional administration (created or supported by a UN Security Council resolution), followed by an internationally led constitution-building process which moved from (initially consultative) transitional political arrangements, to interim constitution, to final constitution, all attempting to broker agreement between competing local groups (Bell 2006: 394).

**Kosovo** started its political settlement process in 1999 after an international conflict between the North Atlantic Treaty Organization (NATO) and Serbia that was focused on ending internal conflict between Albanians and Serbians within Kosovo. The UN established a transitional political arrangement, involving both an international transitional administration and domestic transitional political arrangements, initially as a consultation mechanism. The latter was based on the Rambouillet Peace Accord of 23 February 1999, which the parties ultimately had failed to agree to (see also Weller 1999). These arrangements were followed by an interim constitution, the Framework for Provisional Self-government (2001), which again incorporated elements of the Rambouillet process and UN Security Council Resolution 1244. Following the 2007 (failed) Ahtisaari Plan, which attempted to agree a final Serbian–Albanian political settlement, Kosovar Albanians unilaterally declared independence and adopted a final constitution in 2008 that incorporated elements of the Ahtisaari proposals (International Court of Justice 2010). While violence has significantly receded, the state is still fragile and dependent on international development aid.

International transitional administrations (which were initially consultative, see Bell 2006: 394–95) were also installed in **Afghanistan** and **Iraq** parallel to domestic transitional political arrangements, and interim constitutions were put in place in an attempt to heal internal divisions left in the wake of the deposed regimes and broker future agreements. Key domestic actors associated with the interstate conflict that



preceded the internal reconstruction—including the Taliban in Afghanistan and the Baath party in Iraq—were marginalized or excluded from the peace- and constitution-building process, which had long-term consequences for the process.

The advantage of this sequencing is that it enables the immediate formation of a government where there is none, and an ongoing incremental process that attempts to produce a constitutional text that reflects a political settlement. However, the cases generally reflect the difficulties associated with forging a constitutional settlement and establishing agreed political and legal institutions in deeply divided societies (most often on ethnic grounds) that have suffered large-scale conflict. Due to the nature of the conflicts they seek to resolve, these processes have involved considerable fluctuation back and forth from relative peace into conflict and division. While they have been able to produce a constitutional text, these texts often do not reflect agreement across the country's divisions, and thus struggle to be effective.

## **Countries still differ, and no single model necessarily leads to success**

To some extent, the examples indicate that sequences are not simply 'chosen', but are fashioned to respond to what are understood to be the unique conflict resolution imperatives in each context. However, they also indicate that a critical issue is the relationship between the peace process, the constitution-making process and the underlying process of agreement between key decision-makers—sometimes including armed groups, and society at large—to a new political settlement. The examples also begin to show a set of difficult sequencing choices and trade-offs. We explore these further in three very difficult and stark contexts in the next chapter.



## 4. Case studies: learning from challenging processes

This chapter analyses three highly complex cases—Libya, Somalia and Yemen—which have not yet resulted in a final constitution. These cases point to the difficulty of reaching a final constitution that reflects a broadly shared political settlement in the relative absence of a political settlement between political and military elites who have the capacity to destabilize. They are part of a bigger group of countries (which includes Eritrea, South Sudan and Sudan) that have not yet managed to bring the political settlement process to fruition, partly due to new and/or mutating conflicts, but are still functioning under an interim constitution.

Libya, Somalia and Yemen were chosen for in-depth analysis due to the complexity of the sequencing and their potential comparative value to the ongoing process in Syria. Their political settlement processes also share important intrinsic differences in terms of the armed conflict dynamics, degree and nature of international involvement, and the relationship between the constitution-building and political settlement processes.

### Libya

The sequence of the process in post-Gaddafi Libya was intended to involve an interim constitution that would lead to elections for the General National Congress, followed by a constitution-making process to lead to a final constitution—roughly corresponding to the third sequencing pattern, but with no ceasefire/peace agreement. This process broke down in large part due to the failure to broker such a political settlement while pressing ahead with elections and the constitution-building process. While a comprehensive description of the situation is beyond the scope of this paper, this section highlights some of the sequencing dilemmas or trade-offs that need to be addressed if similar difficult situations are to be better handled in the future.

#### From unstable peace to open conflict: the 2011 revolution and the attempt to reach a new political settlement

On 15 February 2011 the Arab Spring uprising spread to Libya, ultimately attracting an international force and displacing Muammar Gaddafi's authoritarian regime, which had been in place since 1969 (Gartenstein-Ross and Barr 2015). After 42 years of Gaddafi rule, and no history of elections, state institutions were very weak (or non-existent). Hence, a new constitution was a necessary first step towards establishing post-revolution social or legal order. On 3 August 2011, while fighting was still ongoing, a National Transitional Council (NTC) formed as an interim administration of regime opponents comprising dissidents, lawyers and academics, which the international community recognized as the Libyan state authority. It adopted the Draft Constitutional Charter for the Transitional Stage ('Constitutional Declaration'), which established the NTC as the highest authority of the state 'until the election of the General National Congress (GNC)' (article 30). This charter operated as a form of interim constitution but its provisions were very basic, and it did not attempt to regulate the security or judicial sectors.

The Constitutional Declaration directed the NTC to adopt a statute regulating the election of the GNC, appoint the National High Commission on Elections and call for elections before 240 days after the declaration of liberation. The Declaration also stipulated that the GNC should designate a prime minister and choose a constitutive body to draft the constitution (article 30), which would have 60 days to present a draft constitution to the GNC for approval, and then 30 additional days to hold a referendum, which would need to be passed by a two-thirds majority of voters.

### The role of elections within the broader political settlement process

Elections for the GNC were held in July 2012, after which the NTC transferred its authority to the newly elected legislative body. However, rather than let the GNC appoint the members of the Constitutional Drafting Assembly (CDA), the NTC amended the Constitutional Declaration to provide that they should be directly elected by the people. In contrast to the proportional make-up of the GNC, the CDA would include 20 members from each of the three provinces—Cyrenaica (East), Tripolitania (North-West) and Fezzan (South-West). This procedure favoured the smaller populations of Cyrenaica and Fezzan in relation to the larger population of Tripolitania (60 per cent of the total population), enabling negotiation and compromise between their substantially different positions regarding federalism, unitary state and minority rights, respectively (Gluck 2015: 45). The CDA also reserved six seats for women, and two seats for each of the three minority groups (the Tebu, Toureg and Amazigh). These three groups, however, decided to boycott the CDA—arguably because they did not obtain enough seats in the CDA and felt marginalized (*Libya Channel* 2016).

On 20 February 2014 elections were held to constitute the CDA at a time when political and security alliances were extremely fluid. While the CDA was trying to meet its 19 August 2014 deadline for a final constitutional draft, a delegitimized GNC decided to call for early legislative elections to a new House of Representatives (HoR), which were held in June 2014. These elections, not foreseen in the Constitutional Declaration, had a record low turnout but saw key former GNC members lose out (Eljarh 2014a) further exacerbating divisions in the country.

On 6 November 2014 the Supreme Court ruled, in a controversial judgement, that ‘the HoR was illegal and unconstitutional’, as the electoral process and the constitutional amendment that made it possible ‘did not follow the proper protocol’ (Reuters 2014). The HoR—supported as the legitimate government by the international community and faced with a deteriorating security situation—moved to the eastern city of Tobruk, while former members of the GNC established a rival government in Tripoli. So the country had two putative governments, each able to assert a form of legal legitimacy and each allied with different armed actors (Eljarh 2014b; Reuters 2014; Maghur 2014).

## The relationship between new attempts at political settlement and the existing constitutional process

On 24 March 2015 the UN Support Mission in Libya (UNSMIL) proposed a six-point deal including a framework for a government of national unity. This and later attempts to broker a political agreement were not accepted by the parties to the conflict until 17 December 2015. On that day, representatives of the HoR and GNC—as well as important public figures from Libyan political parties, civil society, municipalities and women's groups—signed the Libyan Political Agreement (LPA), which included a framework for a Government of National Accord (GNA) (UN News Centre 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. At the same time, the relationship between the LPA and the Constitutional Declaration is ambiguous, also in terms of legal supremacy (see Annex 4). The LPA affirmed the HoR as the 'legislative authority of the State' during the transitional period despite the Supreme Court ruling, but amended its competencies (article 12). At the same time, the LPA contains 'interim security arrangements', which include ceasefire arrangements and a provision for the GNA to establish a 'Committee for Monitoring the Implementation of the Interim Security Arrangements' (article 37). The process leading to the LPA, however, excluded negotiations with the various armed groups, which are expected to abide by (but have not officially adhered to) the agreement. In other words, while the LPA contains all the elements of a ceasefire agreement, the agreement has not been negotiated with all of the affected parties.

In March 2016, the UN backed the formation of the GNA, but as of September 2016 the GNA still needed to gather broad-based support in order to sustain itself as the legitimate government of Libya. However the 'two regimes' situation has not ended, as the HoR has yet to carry out the vote of confidence to approve the GNA, as mandated in the LPA (Reuters 2016b).

In the meantime, the CDA continued drafting a final constitution (UN Constitutional 2015; see also LPA article 48). However, changes to the process further affected its perceived legitimacy. For example, close to the deadline for a final draft—24 March 2016 (only three months after the LPA was signed)—the UN supported the CDA holding three weeks of consultative meetings in Oman. Some members boycotted these meetings, thus the CDA could not meet its legal quorum when it voted on the draft constitution (*Libya Channel* 2016; *Libya Observer* 2016). Moving ahead anyway, the CDA missed the deadline specified in the LPA, but did not incur the consequences detailed in the agreement. The draft constitution was sent only to the HoR on 26 April 2016, and has not been widely shared or discussed among the general public (*Libyan Gazette* 2016). Although welcomed by UNSMIL, the draft constitution continues to be opposed by the CDA members who boycotted the final drafting process in Oman (*Libya Prospect* 2016). While it is unclear whether the constitutional draft will be able to rally support within and outside the CDA, and among the public at large, the latter appears increasingly unlikely, especially given the very volatile situation on the ground (Gluck 2015: 48).

## Engaging or fighting the spoilers in order to increase the legitimacy of the political settlement process

There are many potential spoilers in this political settlement process, including the myriad of armed groups that decision-makers do not seem to be willing (or able) to negotiate with. The Libyan affiliate of the Islamic State in Iraq and Syria (ISIS, also known as the Islamic State in Iraq and the Levant) has since 2014 and until recently taken advantage of the general chaos emanating from the lack of strong government and security institutions in the country—and the division of the country into rival parliaments, governments and military coalitions—to carve out space and grow (El Amrani 2016). While ISIS has become the one actor against which every other actor could theoretically unite, authorities in the east and west have been more focused on undermining each other, and thereby the political settlement process, than on fighting ISIS.

## Preliminary conclusions

The Libyan context is complex: it was always likely to be extremely challenging to bring about a constitutional democratic order after such a long period of authoritarianism and institutional disintegration. The transition unravelled the relationship between the political settlement and the constitution-making process, which meant that the constitution-making process became a contested battleground in which emergent post-Gaddafi divisions were deepened rather than resolved. This happened for two main reasons. First, not all stakeholders in the process had a voice at the negotiating table, especially when the text of the interim constitution was being discussed, which obstructed the formation of a political settlement between the relevant groups (Al-Ali 2011). Second, the disadvantage associated with this form of sequencing—that too much of the political settlement is left to be resolved in the constitution-making processes—was exacerbated by the creation of a separate constitution-making body, the CDA, under a different representational logic to the politicians and without any formal links to the rest of the political settlement process.

Furthermore, the timescales set out in the initial Constitutional Declaration exacerbated the emergent post-Gaddafi political divisions. Repeated elections also arguably destabilized the situation, as most parties to the conflict perceived them as zero-sum games. The ensuing difficulties point to the need to better understand the trade-offs between the requirement to move fast in order to stabilize a difficult political situation by providing it with functional and legitimate institutions, on the one hand, and the requirement to take time to develop underlying political consent to those institutions, particularly where new conflicts appear to be emerging, on the other hand.

## Somalia

Somalia initially also followed the third sequencing pattern, but its experience indicates the difficulty of fashioning a national political settlement in a context of open conflict

where there are distinct political settlement requirements at the sub-state level to which central state institutions cannot respond.

Within a decade of independence in 1960, Somalia was subjected to a military coup that resulted in the long rule of Major General Siad Barre. Opposition to his rule grew in the 1980s, resulting in his overthrow in 1991, after which Somalia descended into clan-based civil war.<sup>8</sup> Somaliland—in the northwest—declared independence in 1991 and initiated a constitution-building process that culminated in 2000; Puntland—in the northeast—agreed autonomous governance structures in 1998. While the UN negotiated several ceasefire agreements, none of them ended the violence. After the UN withdrew from Somalia in March 1995, there were a number of attempts to negotiate agreements between the factions, but none succeeded (Saalax and Ibrahim 2010).

## Peace agreements and the first interim constitution

From May to August 2000, parties to the Somali National Peace Conference, held in Arta (Djibouti), adopted the Arta Declaration—a peace agreement that included transitional government structures. The declaration established the Transitional National Government, the Transitional National Parliament and the Transitional National Charter—a ‘transitional political agreement’ that provided the legal framework for the emerging government (Atta-Asamoah 2013, 2). Somalia aimed to become a unitary state with a strong government, and 18 administrative regions (Bryden 2013: 20).

While the governing framework agreed at Arta initially contributed to some form of negative peace and was backed by the UN and a loose coalition of Arab and African states, it was opposed by the newly created and Ethiopia-backed Somalia Reconciliation and Restoration Council, which supported a federal structure for Somalia (Saalax and Ibrahim 2010). The conflict resumed.

In October 2002, another reconciliation conference, supported by the Inter-Governmental Authority on Development, resulted in the signing of the Eldoret Declaration—a peace agreement that again included transitional political arrangements, but which stipulated ‘the need to create a federal structure, reversing the unitary structure established at Arta’ (Saalax and Ibrahim 2010). As a result, in August 2004 a 275-member Transitional Federal Parliament and Transitional Federal Government (TFG) replaced the Transitional National Parliament and Transitional National Government and adopted a new Transitional Federal Charter (TFC) as an interim constitution. This was the first time Somalia was officially declared a *federal* republic.

The Arta and Eldoret declarations both attempted to build more inclusive institutions that would be better able to respond to the needs and demands of the public. They provided that the new transitional structures were to be selected using the so-called 4.5-formula of representation, whereby an equal number of places were reserved for

<sup>8</sup> Somalia’s clan-based society features four main clans—Darod, Dir, Hawiye and Rahaweyn—and several minor clans. Clans constitute family lineages that are in turn divided by sub-clans. The latter might build (temporary) alliances for warfare (Schmidt 2015).

the four major clans—Hawiye, Darod, Dir and Rahaweyn—with the remaining 0.5 reserved for smaller clan groups and women. However, the representativeness of this formula was increasingly questioned, as were the resulting governments, which were marred by partisan infighting and a general perception of ineffectiveness (ICG 2008: 2).

## Unrealistic deadlines and attempts to move forward with the political settlement process

The TFG was mandated to federate Somalia (article 11, paragraph 8) and prepare a national federal constitution in 2.5 years (article 71, paragraph 9)—in hindsight at least, an unrealistic deadline. The concept of federalism was still very contentious, and its imposition aggravated pre-existing tensions and contributed to hardening positions between contending groups (Bryden 2013, 21). A new wave of violence erupted between the TFG government and Islamic groups in 2006, and despite the inclusion of some of these groups in government structures, and the extension of the TFG's mandate, new violence broke out in 2009; the constitution-making process remained stalled.

By September 2011, after two years of insurgency war, the TFG was deeply delegitimized and the constitutional process significantly delayed. At the strong urging of the UN and development partners, the TFG adopted the Roadmap to End the Transition—a transitional political agreement that stipulated priority tasks to end the transition before 20 August 2012, including security, a constitution, reconciliation and good governance.

In December 2011 and February 2012, the TFG met with other Somali stakeholders in Garowe (Puntland) to agree on what has been called the Garowe I and Garowe II Principles. These principles were to further systematize the process of federalization, the drafting of the post-transition constitution, the formation of the post-transition federal parliament and the design of the electoral system.<sup>9</sup> Both documents stressed the need to finalize a draft constitution by 20 April 2012, with the transition ending no later than 20 August 2012.

## Competing constitution-drafting processes and the second interim constitution

The TFC created an Independent Federal Constitutional Commission (IFCC) tasked with drafting the constitution, but was slow to advance amid worsening conflict dynamics. After the 2011 roadmap was signed, the TFG set up a new Committee of Experts (CoE) to produce a draft constitution. Despite tensions between the IFCC and CoE, in part because the two bodies had competing views on what the political

<sup>9</sup> In the March 2012 Galkayo Agreement, key stakeholders conceded that the post-transition federal parliament would be selected using the 4.5 formula instead of a new electoral system (Atta-Asamoah 2013: 8; Ainte 2014: 64).

settlement should look like, they eventually produced a single draft text (Ainte 2014). By that stage, however, the minister for constitutional affairs had established a Technical Review Committee, which produced its own competing text. These documents were eventually merged into a single compromise draft constitution, which left key sections incomplete—most notably the division of powers and resources between the federal government and sub-state units.

In June 2012 the TFG established the Somali National Constituent Assembly, an 825-member body (with 30 per cent of the seats reserved for women)—nominated by 135 traditional leaders, again using the 4.5 formula—in charge of reviewing and endorsing the final draft constitution (Atta-Asamoah 2013: 4; Ainte 2014: 62). In record time, the Constituent Assembly endorsed the Provisional Constitution (PC) to replace the TFC in July 2012 as a second interim constitution. The new constitution set a deadline of August 2016 to: (a) negotiate a final document to be approved by referendum (article 132 (10)), (b) hold national elections (article 136); and (c) establish federal states (article 49; see next section) and an upper house of parliament thereafter.

A new parliament was inaugurated in August 2012, and the president was elected in September 2012, replacing the TFG with the Federal Government of Somalia. Since that time, despite attempts to establish principles to move the constitution-building process forward, such as the 2013 New Deal and the Vision 2016 frameworks, the process has remained behind schedule.

## Constitution-building at the sub-state level

Article 48 of the PC establishes that none of the 18 pre-1991 administrative regions is to stand alone; they are required to merge to form Federal Member States (FMS). Realities on the ground, including the late establishment of the Boundaries and Federation Commission in July 2015 (*Goobjoog News* 2015), have forced the federal government to work directly with regional stakeholders on state formation processes. An interesting but unorthodox situation has emerged in which regional states have been created for a federal structure that is not fully delimited or established at the national level. Nevertheless, the results have been relatively positive (Crouch 2016) in that the post-PC period has seen the emergence of three additional Interim Regional Administrations in South and Central Somalia (Hosh 2016). There are only three regions left to merge: two are currently in the process of merging, while the last one, surrounding Mogadishu, might require a constitutional reform to allow it to stand alone as an FMS or a federal district under central administration.

The FMS formation process illustrates that where localized peacebuilding has been more successful than national peacebuilding, sub-state political settlement processes may have a role in contributing to the national-level process by building the state from below.



## Seeking to enhance representation via a new electoral system

The design of the electoral model contemplated in the 2012 PC has also suffered setbacks and delays. In July 2015, the federal government and federal parliament officially recognized that, contrary to what was envisioned in the PC, ‘one-person, one-vote’ elections would not be possible in 2016 (ConstitutionNet 2016). A new model would need to be designed to ensure broader inclusion and representation, short of holding fully fledged elections. Hence a National Consultative Forum was put in place—later named the National Leaders Forum—that decided on a mechanism whereby 135 traditional elders would select 275 Electoral Colleges of 50 members each, which would in turn elect the 275 members of the lower house of parliament.

While this political agreement declared that the federal parliament would have to endorse both the 2016 electoral model and its implementation, on 22 May 2016 the president issued a decree legalizing the electoral proceedings agreed upon by the National Leaders Forum. The decree was allegedly in response to the federal parliament again failing to vote on the political agreement, and was supported by the international community despite criticisms (Ulusio 2016; UN Security Council 2016).

## Spoilers of the political settlement process and their potential representativeness

As the original conflict has mutated, Al-Shabaab has become the main protagonist in the country’s protracted civil conflict. While not a party to the political settlement process, the Al-Shabaab jihadist movement has been the main beneficiary of the process’ lack of credibility. Al-Shabaab was founded in 2004, the year the TFC was adopted. It rose within the Union Islamic Courts, especially when the latter took control of Mogadishu in 2006. From 2007–09 it assisted in the uprising against the Ethiopian intervention fighting Islamist groups, and expanded its territorial control. From 2009 to 2011 the strengthened African Union Mission to Somalia (AMISOM) forced Al-Shabaab to retreat from territory it had gained since 2006, notably from Mogadishu in August 2011 (ICG 2014a: 9). While the continued military campaign against Al-Shabaab has significantly weakened it (Mosley 2015: 15; Bryden and Thomas 2015: 7; LPI 2014: 18), it has managed to regroup in small towns in the south and central parts of Somalia; since late 2015, Al-Shabaab has engaged the AMISOM-led coalition in large-scale attacks, resulting in scores of deaths on both sides. Al-Shabaab’s strength, however, lies in its capacity to claim that it is not only an armed insurgency but also a social movement (ICG 2014a: 1).

## Preliminary conclusions

The Somali process is complex and has unique challenges. In particular, it illustrates the tension between time and legitimacy. While the TFC—as the first interim constitution—represented an elite pact between the major clans, it was incomplete—necessitating a long, drawn-out period of constitutional negotiations. As the process



went on, the elite pact was never expanded to allow for broader-based societal support, which contributed to a rapid delegitimization of the process and the national elites that played into the hands of emerging spoiler groups.

The Somalia case also illustrates how spoiler groups can disrupt political settlement processes, in particular by taking advantage of legitimacy gaps that are sometimes inherent in elite pacts, and carving out an alternative type of legitimacy therein. Al-Shabaab ignited a separate conflict with the government that was not addressed in the ongoing political settlement process, and helped make it impossible to hold elections or undertake a more participatory constitution-building process—thus preventing the process from strengthening its legitimacy.

However, sub-state political settlements have recently developed during the FMS formation processes. The hope is that these settlements may contribute to building the legitimacy of the political settlement in the absence of one-person-one-vote elections or a more participatory constitution-building process.

## Yemen

In Yemen, a transitional political arrangement and the equivalent of an interim constitution were signed on the same day, giving way to a constitution-building process. Ideally, Yemen would have followed the fourth sequencing pattern, but changing conflict dynamics disrupted the political settlement process by adding a peace process to the ongoing constitutional process.

In January 2011, Yemenis began protesting against President Saleh's authoritarian regime. The turning point for Saleh was 18 March 2011, when security forces killed around 50 demonstrators and injured approximately 200. Key members of his government started defecting, and he began to lose the support of long-time allies. The Gulf Cooperation Council (GCC)—a body comprised of a number of countries on the Arab Peninsula except Yemen—started immediately drafting the GCC Agreement, the primary goal of which was 'to end the impasse begun after the Arab Spring protests of 2011 by putting an end to the rule of Yemen's long-time president Ali Abdullah Saleh' (Al-Muslimi 2014). This agreement was adopted together with the Implementation Mechanism for the Transition Process.

### A planned political settlement process in two phases

The Implementation Mechanism for the Transition Process established a transition in two phases. The first phase started with the mechanism's entry into force, and was to end with early presidential elections and the inauguration of a new president. President Saleh resigned from his post 30 days after the agreement (having been granted immunity from prosecution), and Vice President Hadi became interim president. The opposition then nominated the prime minister, Hadi and the opposition created a government of national unity, and early presidential elections were called within 90 days of Saleh signing the GCC Agreement and the Implementation Mechanism. These early

elections confirmed Hadi as president, after which he had to establish a Constitutional Committee ‘to oversee the preparation of the new constitution’ (GCC, quoted in Lackner 2016: 71). The first phase also included the establishment of a Committee on Military Affairs for Achieving Security and Stability, which was supposed to end divisions within the armed forces and conflict with other armed groups, and integrate the latter under a unified national leadership. These goals were never fully realized (Lackner 2016).

The second phase should have lasted two years, starting with the inauguration of President Hadi following early presidential elections, and ending with general elections held under the framework of a new constitution. This new constitution was to be the result of discussions held at the National Dialogue Conference (NDC)—a forum of 565 participants including representatives of political parties as well as representatives of the Southern Movement, the Huthis, women, youth and civil society actors (Implementation Mechanism, article 20; Transfeld 2015). The new constitution was to be drafted within three months by a Constitutional Commission, established within six months after the conclusion of the NDC’s work. The draft constitution would be approved by referendum, followed by parliamentary and (perhaps also) presidential elections within three months of the adoption of the new constitution. These were hugely ambitious (and unrealistic) deadlines.

The NDC started work on 18 March 2013, and was to last until September 2013. It concluded on 25 January 2014 after missing several deadlines (Holzapfel 2014: 6). It was tasked with discussing and establishing working groups for a number of issues, including the question of autonomy for the southern provinces; specific interests and tensions with the Sa’ada (Huthi); national reconciliation and transitional justice; state-building; good governance; military and security issues; the independence of special entities; rights and freedoms; and development issues (Hassan 2014; Gaston 2014). The NDC’s final report included more than 1,800 decisions, but failed to reach agreement on a number of major issues, notably the number of regions to be included in the future federal state, the southern question, transitional justice, military reform and the membership of the Constitutional Drafting Committee (CDC) (Lackner 2016: 45). A Consensus Committee was created to make progress in these areas, but was similarly unsuccessful (Salisbury 2015: 19).

Regarding the country’s future federal structure, the president established an ‘8+8’ or ‘North/South Committee’—with 16 representatives including both Huthis and southerners—which reached consensus on the fact that Yemen would be a federal state with greater autonomy for the regions. However, the committee was unable to agree on the type of financial, administrative and political devolution, or on the number of regions Yemen would be divided into (Gluck 2015: 51; Gaston 2014: 4). President Hadi then appointed a 23-member Regions Committee tasked with determining the number of regions in a federal state, the decisions of which would be (expedient and) final. After less than two weeks, the Regions Committee announced on 10 February 2014 that the country was to be constituted by six regions—four in the north, and two in the south (BBC News 2014). While the committee’s final report included the option to review the borders of each region after at least one electoral cycle, both the Huthis

and the southern separatists rejected the distribution up front (Gaston 2014: 4). The Huthis wanted access to the sea and natural resources, and the southern separatists—or at least those represented in the talks—wanted a single region (Salisbury 2015: 18).

## Constitutional drafting and the resumption of conflict

On 8 March 2014 the Hadi administration established the CDC with Presidential Decree no. 26. This decree notably limited the options available to the CDC by defining the Republic of Yemen as a federal state comprising six regions pursuant to the final report of the Regions Committee (article 2), ignoring both Huthis' and southerners' discontent. The decree once again established a very tight timeline, calling for a referendum on the draft constitution to be held less than a year from the date of the appointment of the members of the commission (article 6), which left insufficient time for a public consultation campaign that should have taken place upon publication of the draft constitution (article 29). A public consultation campaign might have increased the credibility of both the CDC, as an appointed body in charge of drafting the new constitution, and the draft constitution, as at least partially responding to the needs and demands of the broader population.

On 24 April 2014 President Hadi established the National Authority for the Implementation of the Outcomes of the NDC by decree; this body included 82 former NDC members on a voluntary (unpaid) basis (Lackner 2016: 48) and was charged with supervising the CDC. The authority 'soon became part of the increasingly tense struggle between the transitional regime and the Huthis' (Lackner 2016: 48), as the Huthis did not feel their increasing power was properly reflected in their representation in the new organization. In the meantime, conflict escalated: the Huthis, who had supported the uprisings against the Saleh regime in 2011, expanded their territorial control well beyond their home governorate of Sa'ada, in Yemen's northeast, reaching the capital Sana'a in September 2014.

On 21 September 2014 all parties to the conflict signed the Peace and National Partnership Agreement that stipulated the formation of a new government—still headed by President Hadi—as well as the development of a plan to implement the outcomes of some of the NDC's working groups, specifically those dealing with Sa'ada and the Southern issue (Yemen Times 2014). In parallel with the attempted implementation of the Partnership Agreement, the CDC devised a draft constitution that divided Yemen into six federal regions. As expected, the Huthis refused to endorse it, and staged a coup against Hadi's government on 6 February 2015. The Huthis' increased power vis-à-vis the regime then allowed them to dissolve parliament and declare 'that a five-member presidential council would be formed and that a Supreme Revolutionary Committee would temporarily run the country' (UN Department of Political Affairs n.d.).

## Peace talks and attempts to put the political settlement back on track

The original political settlement process and constitutional drafting process have been outpaced by a mutating conflict. Since March 2015 Yemen has suffered an increasingly virulent civil war, primarily between the Huthis (assisted by Saleh's military forces in an unlikely marriage of convenience) and an even more unlikely alliance between a weakened Hadi GNU, Southern separatists, Sunni Islamists and other adversaries to the Huthi/Saleh bloc (ICG 2016a: 12), supported by a Saudi-led international coalition. The civil war soon became a proxy war, in which the rivalry between Saudi Arabia and Iran provided 'the geostrategic context in which Yemeni domestic battles are unfolding [both camps assisted by either of these regional powers], serving to polarize and radicalize an already difficult situation' (ICG 2016a: 26). The civil war also suspended the negotiations, and all international UN staff withdrew from Yemen.

It was not until June 2015 that, under strong international pressure, the first round of peace talks was held in Geneva; only in the second round in December 2015 did the parties start to negotiate on substantive issues, such as humanitarian access, confidence-building, a durable ceasefire and holding a further meeting in early 2016 (ICG 2016b: 28). Between the rounds, UN-facilitated consultations took place in Oman, where both sides to the conflict slowly recognized the need for political talks and an end to violence. On 15 December 2015 the Saudi-led coalition announced a seven-day ceasefire, which was accepted by the Huthis but immediately broken by both sides to the conflict (ICG 2016a); the ceasefire officially ended on 2 January 2016. UN-sponsored peace talks scheduled for 14 January 2016 were postponed; the military stalemate continued between both parties to the conflict, and both IS and al-Qaeda in the Arabian Peninsula further expanded their military operations throughout Yemen (ICG 2016a). Another ceasefire entered into force on 11 April 2016—although fighting continued—and peace talks started in Kuwait on 22 April 2016 after the Huthis confirmed their participation 'following assurances that pro-government forces would respect a ceasefire' (*Al Jazeera* 2016), although they broke down shortly after (Reuters 2016a).

Even if a given ceasefire agreement is respected (which has not been the case up until September 2016), and peace talks lead to a new political settlement process, one of the key questions is what to do with the January 2015 draft constitution. Should it be ignored and replaced, be the subject of a public consultation campaign, amended and/or voted upon via referendum?

## Preliminary conclusions

The Yemen example, like that of Somalia and Libya, illustrates the difficulty of constitution-building in the absence of a commitment to a broadly agreed (if basic) political settlement framework. The NDC was not able to resolve the numerous disagreements on the parameters of the political settlement, and could have been more useful in a consultative role (Lackner 2016). The attempt to proceed with the

constitution-building process without an underlying political agreement shifted the burden to this process, which it could not deliver on, and forced the president to make decisions without broad-based support from all stakeholders, crucially on the country's federal division. Therefore the process was soon outpaced by a new phase of conflict, including proxy war dynamics, that further destabilized the fragile political settlement that had begun to be institutionalized during the first phase of the GCC process (Lackner 2016: 61; Hassan 2014: 51; Carlino 2014), forcing the parties to start the political settlement process all over again.

## Preliminary conclusions from the case studies

Somalia, Yemen and Libya illustrate, in different ways, the complexity of constitution-building as a way of brokering agreement on a new power map for the state where there is virtually none. Constitutions usually rest on a common commitment to: a particular territorial configuration of the state, core values and a political community. However, in these conflict-affected cases, there is often little (or no) underlying agreement about the political settlement or the process leading up to it, and the constitution-making process is likely to be repeatedly superseded by conflict and further peace processes.

These three case studies illustrate how the specific sequencing pattern that should be used in a political settlement process, especially in fragile and conflict-affected settings, is heavily determined by contextual factors, such as:

- the nature and scale of the conflict;
- the types of actors that are involved (or excluded);
- the degree to which the conflict (or previous regime) weakened the institutional framework;
- the types and intensity of international interventions; and
- the emergence of critical junctures that might support or threaten to derail the process completely.

As a result, in the most complex cases a political settlement that emerges through a linear progression from peace agreements to transitional political arrangements to a final constitution is very much the exception rather than the norm. More often, peace and constitution-making processes move through iterative interim stages, and only a few reach a final constitution that reflects a broadly shared political settlement; others fall apart as conflict dynamics change.

The following general dynamics characterize the terrain in the 23 cases analysed in this paper, and particularly the cases of Libya, Somalia and Yemen:

1. The existing consensus from which to develop a constitution is sometimes so incomplete that it leaves out certain key groups that then can destabilize the constitution-building process.

2. The political vacuum resulting from limited political agreement may give rise to new conflicts and political groupings that may undo any agreements reached so far.
3. New political allegiances may start to create a new negotiation process that becomes layered on top of the constitution-making process in ways that undermine or replace it.
4. A robust participative process operating with insufficient buy-in from the political power-holders can create a lot of energy and ideas for the constitution, but be frustrated by the lack of elite buy-in to the end result.
5. The timetables agreed in ceasefires, peace agreements or interim arrangements may constrain the constitution-making process in ways that are not conducive to completing an effective constitutional framework.
6. It may be difficult to find mechanisms to break constitutional logjams, which by virtue of their close relationship to the peace process may require external mediation and pressure to resolve, but internationals may find it hard to assert the legitimacy to intervene.
7. Where international actors play a key role, they may impose their own conditions on the trajectory. These conditions may be driven more by their domestic and ideological interests than by the requirements of effective constitutional practice.
8. Sometimes international actors support local elites when they act unconstitutionally in order to 'save' the constitution-making process, but this undermines the idea of 'playing by the constitutional rules' that internationals are trying to foster.

## 5. Conclusion: Managing the sequencing of peace agreements and constitutions

What, then, determines which sequencing trajectory is chosen, and to what extent do particular choices favour particular outcomes in terms of a stable political settlement and working constitutional order?

It is very difficult to generalize. The four models explained above include transitions from conflict to peace that, while broadly grouped into generic sequencing patterns, also varied in a number of ways, including: (a) the length of the process, (b) the number of agreements attempted or needed, (c) the specific content of the agreements and, perhaps most critically, (d) the relationship between the constitution-making process and the political settlement process.

In South Africa, for instance, the specific sequence and related innovations were possible in part because of the emergence of a broadly accepted political settlement, which was primarily reflected in the interim constitution. In other conflict situations, such as Nepal, the constitution-building process has been used, in essence, to continue an incomplete negotiation, whereby the final constitutional process must continue to forge an agreement regarding the country's government structures and state institutions, rather than merely turning a prior agreement into a good constitutional text. In other contexts, the lack of political agreement produces even more incremental processes of constitution-building, moving through transitional arrangements and interim constitutions to final constitutions.

It is important to recognize from the outset that choices about sequencing are not driven by 'best practice', but more by 'what is possible'. Table 5.1 indicates the types of short- and long-term requirements that determine sequencing and affect the chances of reaching a constitutional text capable of effectively coordinating the government and protecting citizens' rights. The interaction between these requirements can have different implications for the type of political settlement process and sequencing model a country engages in. However, the case studies above indicate that occasionally (local as well as international) decision-makers push for a specific sequencing pattern in spite of the specific contextual factors, which make it unlikely to succeed, with potentially pernicious consequences.

The dual effort to reach two goals—a political settlement between elites that is crucial to ending a conflict, and an effective constitutional order capable of sustaining and developing that settlement—is best thought of not in terms of a 'best practice' choice, but in terms of how it enables the management of a set of dilemmas on those short- and long-term requirements, which can also be understood as trade-offs. These trade-offs arise because agreement between warring parties is necessary for political settlement, but a broader set of more principled commitments is required for constitutional effectiveness and the rule of law; these contrasting requirements are sometimes in tension with each other.

**Table 5.1. Short- and long-term requirements of political settlement**

Short-term requirements	Long-term requirements
Negative peace: ending violence	Positive peace: fair and effective political and legal structures
An initial 'deal' among political elites: a strong and clear initial agreement on access to power, which will enable a transition	Flexible institutional arrangements: a set of arrangements that remain open and responsive to new needs for inclusion over time, and are not beholden to any specific individual or elite group
Speed: a quick commitment to a ceasefire and a new institutional framework	Time: a locally developed and owned set of legal and political institutions with sufficient consent to be effective
Elite inclusion: inclusion of main groups and interests	Societal inclusion: broad-based social participation and commitment to 'the common good'
Clearly planning the inclusion or exclusion of key spoilers	Capacity to revise the inclusion or exclusion of spoilers in the constitutional settlement. Enabling ongoing constitutional development, which may require finding ways to include formerly excluded 'spoilers', or to exclude or limit the capacity of included spoilers to obstruct the process
International guarantees and enforcement: sufficient international commitment and enforcement of the initial deal to overcome reluctance to implement it	Locally owned processes and consent: constitutional orders that are relevant and effective for the people governed by them

The tension between the short-term demands of political settlement and longer-term needs requires carefully managing the trade-offs between the two. The sequencing options have different advantages and disadvantages in this sense, which can be built on (or mitigated against) if better understood.

1. *Creating necessary peace versus building sustainable peace.* Some form of negative peace (Galtung 1969: 183)—or the absence of violence—is necessary before starting to negotiate a final constitutional arrangement. But while armed actors may want constitutional guarantees over access to power before they are prepared to leave the battlefield, for longer-term peace the constitutional order must be capable of being more than a 'dirty deal': it must reflect a broader set of constituencies and interests than armed actors can bring to the table. Staging constitution-making through interim arrangements and/or interim constitutions can enable the balance between sufficient guarantees to armed actors and sufficient



future capacity for the constitutional ‘deal’ to be broadened and deepened. However, it can also force the constitution-making process to bear the heavy burden of forging agreement over the fundamental parameters of the political settlement.

2. *Temporary agreement versus permanent text.* There is also a tension between producing a constitutional agreement that is permanent enough that armed parties are fully committed to it and have sufficient guarantees, and leaving that document open to new processes of change in the future—including ongoing constitutional development. Sequencing approaches, and related timing issues, must try to balance (a) sufficient guarantees to politico-military actors for them to agree to stop fighting with (b) enough openness to enable a participatory constitution-building process over time.
3. *The requirement of speed versus the requirement to take time.* Peace processes and constitutional moments often produce very short windows of time during which change is possible. However, constitutional development and broad constitutional inclusion takes time. The process must balance the speed required to put some transitional structures in place if needed, and the time needed for constitutional development.
4. *Participation versus elite pact.* Political–military buy-in and broad participation are both important for the future implementation of the constitutional framework, and must be secured in different ways at different stages of the process. While elections and broad participation are understood by international actors to be the key guarantors of an inclusive constitution-making process, the success of such a process also depends on its capacity to capture and articulate the political settlement agreed by those at the main negotiating table. It is furthermore important to note the sometimes-tenuous link between political elites and armed groups in some of these settings. Efforts need to be made to ensure that what political elites agree to at the negotiating table also reflects or represents the needs and demands of armed groups, which may become spoilers to the process.
5. *Including and excluding spoilers.* Depending on the nature and virulence of (potential) spoilers, plans might be needed to assess the consequences of including or excluding specific groups at specific points within the process in order to avoid derailment of the project, from within or from the outside. These plans might change as the process evolves, and as opportunities arise to include former spoilers or respond to the demands of their constituencies.
6. *International guarantees versus locally owned process.* Depending on the status of the institutional framework, international guarantors might be needed to ensure compliance with the ceasefire or peace agreement. However, they may impose their own conditions on the process. For such an intervention to be effective, internationals will need to make sure they have legitimacy on the ground—that is, that agreements respond to (reasonable) local needs and demands.

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## Annex A. Peace agreements

### Afghanistan

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In situations of violent conflict, negotiated agreements—including ceasefire or peace agreements and documents detailing constitutional arrangements—attempt to reach a new political settlement between the warring protagonists, which is ideally supported by the broader society. Such political settlements aim to move the country or region from conflict to a situation characterized by constitutional commitments to good governance and the rule of law.

The sequencing—and the success or failure—of these negotiated agreements depends on a number of factors, including the diverse processes through which a political settlement is reached; when (and how) peace agreements and constitutions reach a political settlement; when (and why) constitution-making separates from the political settlement process; and the consequences of such a separation.

This Policy Paper aims to address the gap in the constitution-making and peacebuilding literatures regarding descriptive and normative accounts of the relationship between peace agreements and constitutional arrangements in political settlement processes. It explores the sequencing of peace deals and constitutional arrangements in order to better understand when (and why) sequencing does not follow the logical model, and the implications for any coherent and workable constitutional framework.

