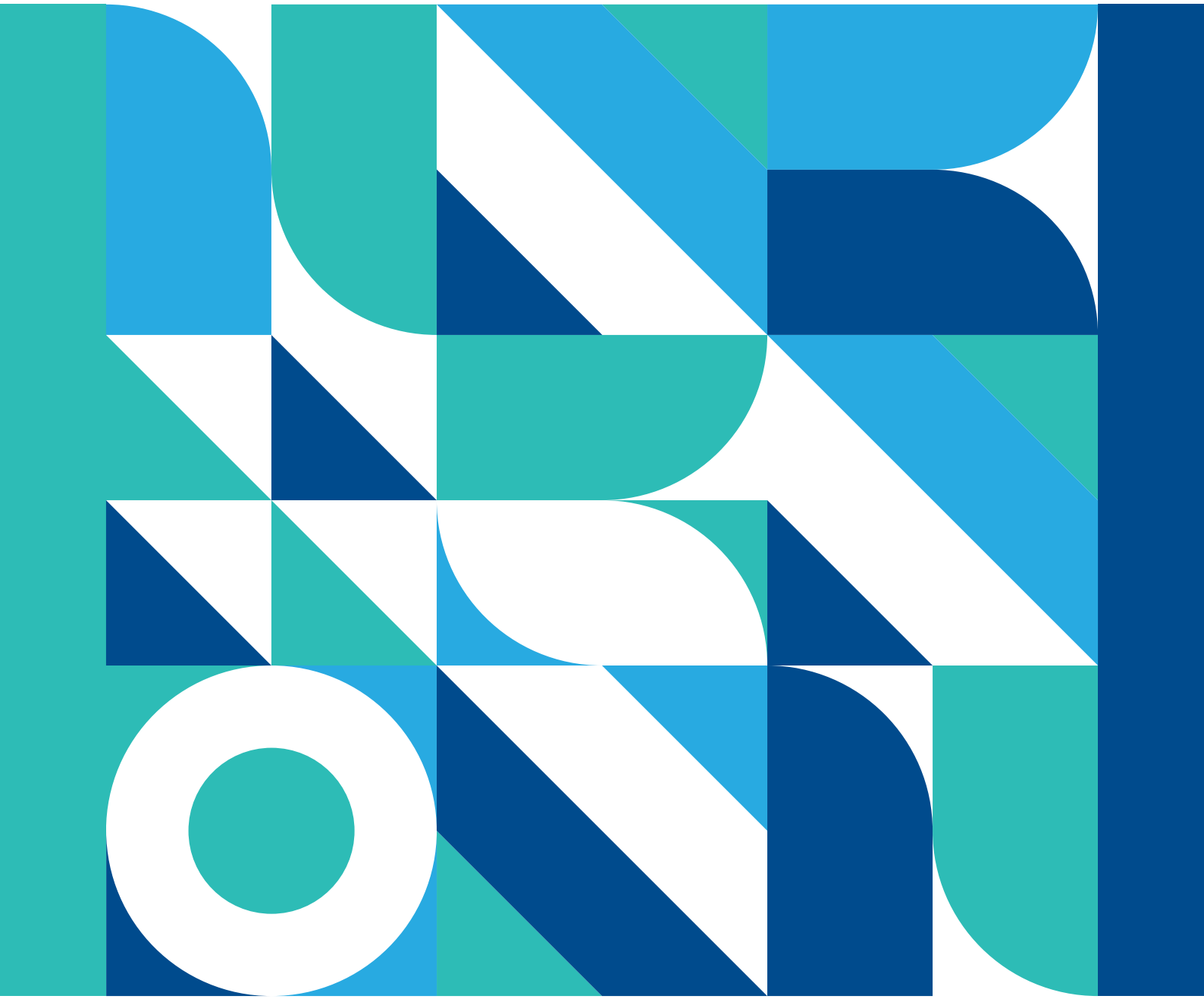
CONSTITUTION-BUILDING AND DISRUPTION

Addressing Changing Conflict Patterns



CONSTITUTION-BUILDING AND DISRUPTION

Addressing Changing Conflict Patterns

Eighth Edinburgh Dialogue on Post-Con lict Constitution-Building, 2021

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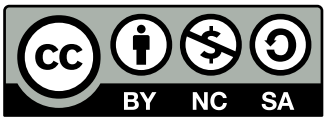

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Chapter 1

BACKGROUND

The Post-Conflict Constitution-Building Dialogues take the form of an invited workshop, bringing together high-level experts and practitioners from the fields of constitution-building, peacebuilding and conflict mediation for discussions on issues relating to the role of constitution-building in conflict-to-peace transitions. The Edinburgh Dialogues are designed to assist participants and, through publications, a wider audience in:

- exploring the relationship between peacemakers and constitution-makers and the processes of peace- and constitution-building;
- building an epistemic community of people engaged at the interface between peace- and constitution-building;
- addressing critical process design issues in conflict-affected settings seeking to emerge from violent conflict, particularly where these processes involve 'novel' forms of constitutional law, such as interim constitutions or other interim arrangements; and
- addressing critical gaps in the comparative constitutional law and peacebuilding literatures, especially as these gaps relate to the interconnection between constitution- and peacebuilding.

The workshops are jointly hosted by International IDEA's Constitution-Building Programme, the Edinburgh Centre for Constitutional Law (ECCL) at Edinburgh Law School, and the Peace and Conflict Evidence Research Platform (PeaceRep) through which ECCL and International IDEA collaborate.

This partnership provides a meeting point for theory and practice as well as for academics and field experts from the Global North and South. Premised on the mutual benefits of regular and structured engagement between scholars and practitioners of constitution-building and peace mediation, the initiative represents a conceptual and practical response to the need for an organized and systematic approach to post-conflict constitution-building. The workshops are designed to engender rigorous but constructive debate, knowledge sharing and opportunities for networking.

Previous years' Dialogues have thematically focused on interim constitutions as peacebuilding tools, sequencing peace agreements and constitutions, sub-state constitutions, (s)electing constitution-making bodies, the intersection of constitution-building and transitional justice processes, interim governance arrangements and emergency law responses to Covid-19 in conflict-affected states. These produced both workshop and longer thematic reports and an overview of key findings. The series is designed to draw out the benefits of informed constitutional comparison and an interdisciplinary approach to constitutional substance and processes.

1.1. THE CHANGING INTERNATIONAL ORDER AND ITS IMPACT ON CONSTITUTION-BUILDING SUPPORT

The theme for the 2021 Edinburgh Dialogue was 'The Changing International Order and Its Impact on Constitution Building Support'. The discussions took place over 9 and 10 December 2021. The first day was dedicated to exploring how a changing international order impacts on the peace- and constitution-building fields and practice. Discussion focused on how global shifts in power may also affect underpinning legal and political norms of the post-World War II and post-Cold War international order, particularly concerning intrastate conflict. The second day looked at use of data in the field, and the ways in which partners' databases can help practitioners find answers to new questions around building peace and democratic constitutions. This discussion focused on how current digital capacity of the partners could be used to better respond to the current context and how collaborative data capacity could add value to existing data creation efforts relating to peace- and constitution-making processes. The discussion also focused on how better data platforms could help break down barriers to practitioners and policymakers using such data.

While each of the two days could clearly comprise the theme of a full two-day dialogue in its own right, the intention of combining them was to enable a core group of mediation and constitution-building practitioners to consider both the current context and how data might be better connected across different providers, to help comparative constitutional policy support capable of responding to the new context.

The discussion was premised on an increasing sense that the post-Cold War global order for dealing with intrastate conflict has been fundamentally disrupted.

The discussion was premised on an increasing sense within the social science academy and among practitioners that the post-Cold War global order for dealing with intrastate conflict has been fundamentally disrupted. Debates within comparative politics, international relations and international law—to a much greater extent than in comparative constitutional law—are dealing with the shift in the geopolitical balance of power—even if this shift has not yet reached the institutional architecture of the international order. [1]

[1] For example, see Chandler (2018) on the ways in which modernist assumptions are changing generally; also see Carothers and Samet-Marram (2015), de Coning (2018), Ikenberry (2018) and Richmond (2022, forthcoming).

Most recently, international withdrawal from Afghanistan in 2021 appeared to symbolize the end of an era for a particular understanding of international order, where commitments to democratization and human rights had been the cornerstone of its own legitimacy. Well before that symbolic moment, however, the model had already been challenged from multiple sources—from China's rise as a global power to the rise of populism generally—including in established constitutional democracies.

A second and related basic premise of the Dialogue was that the nature of intrastate conflict is also currently changing, partly as a consequence and partly as a cause of the changing international order. The ebb and flow of comparative constitutional law has always been determined by the tides of global history, so if there is a new political moment in which intrastate conflict is changing, this raises questions for how models of constitutional law are evolving and adapting to the changing context.

A second premise of the Dialogue was that the nature of intrastate conflict is also currently changing.

In the wider PeaceRep programme, the partners have identified the following changing dynamics in transitions from conflict to peace:

1. Conflict dynamics are changing in conflict-affected settings, with an escalation in the fragmentation, proliferation and diversification of conflict parties, which often move transnationally within regions and broker directly with other states.

2. The intractability of conflict is compounded by increased intertwining of political and economic goals. The expansion of organized crime has become a way for armed groups to finance themselves by tapping into global illicit networks and markets. This may lead not only to these armed groups being less committed to negotiating or agreeing new political settlements but also to further splintering of groups as interests and benefits fall differently across the groups.

3. Institutionalizing the central state has been the focus of internationalized state-building and stabilization. In practice, this effort has often resulted in imperfectly 'constituted' states—or fragile states—with limited reach in terms of legitimacy, authority, and capacity and commitment to deliver public services. In practice, conflict often continues and mutates.

4. Beyond the fragility of the central state, these institutionalization efforts have often led to the formalization of highly fragile 'political unsettlements', in which conflict dynamics—rather than being solved—have been directly translated into the political and legal institutions (Bell and Pospisil 2017; Pospisil 2019). This dynamic can formalize power asymmetries and the exclusion of certain key groups from the negotiations and/or the resulting institutional framework in ways that lead to pressures to amend and expand over time.

5. As a result, politics remains unsettled, 'indefinitely transitional' and characterized by the need for ongoing brokerage, including by

internationalized mediation, outside of the political and legal institutions established by the constitution. This would be in contrast to the settled operation of political and legal institutions in more consolidated and peaceful democracies.

6. The internationalization of intrastate conflicts sees a growing number of international actors beyond traditional 'liberal democratic states' increasingly seeking to ally with particular conflict parties and/or using the conflict resolution space as a vehicle for their own foreign policy ambitions. Neighbouring state or non-state armed groups are often as, or more, influential than other actors.

7. All international actors are often directly involved in local conflicts, underwriting them or local peace processes, and engaged with local actors that may also be transnational in reach and activity. While peace initiatives may shield some areas from the fallout of the broader conflict, they may also further fragment the landscape of politics and law and compound the problems of creating a viable institutional structure for the central state.

8. A broader degradation of the international human rights norms that underpin constitutionalism's normative dimension is now in evidence, as a combined effect of global power shifts, the rise in populism, new information challenges, counter-terrorism strategies, austerity and the Covid-19-related fallout. Collectively, these pressures are challenging a set of ideas of the state and the social order that have underpinned the contemporary understanding of constitutions, particularly in the West.

Acknowledging the changing conflict dynamics, some of the 'models' with which international actors attempt to assist stakeholders' exit from conflict are (or should be) changing.

Acknowledging these changing conflict dynamics, some of the 'models' with which international actors attempt to assist stakeholders' exit from conflict—including by constitutionalizing political and legal institutions—are (or should be) changing. While debates are life in the context of peacebuilding, the impact of changes in the world order on constitution-building has been much less examined. In the academy of constitutional scholars, comparative constitutional engagement with changing global dynamics has focused on the relationship between structural populism, autocracy and democratic regression, and the role of courts (see, for example, Berman 2019; Daly 2017; Diamond et al. 2016; Landau 2017; Scheppele 2018). However, there has been less consideration of whether and how the practices of constitution-building have changed or should change.

Yet, if attempts to resolve conflict by renegotiating political settlements and revising the state architecture are changing, then this can be expected to raise new challenges for constitution-building. The workshop was an attempt to open up and frame the possible consequences for post-conflict constitution-building, and connect peace- and constitution-building debates around the question of the changing dynamics of conflict at national and geopolitical level.

This Eighth Edinburgh Dialogue thereby sought to contribute new thinking on the 'constitutional implications' likely to be triggered by changes to both the

international order and the nature of conflict in the past decade, in particular given their impact on the peacebuilding field, which attempts to revise the underlying political settlement. This workshop report title is framed around 'disruption' because in a sense the substantive and digital themes are both about disruption—of the practice and modes of understanding the impact on constitutional drafting—of traditional ways of conducting constitution-building and research related to it.

1.2. **DISRUPTION: FRAMING THE DISCUSSION**

The first day of the Eighth Edinburgh Dialogue sought to take stock of and map peacebuilding and 'transition management' changes, and consider whether and how they are impacting on the constitution-building field as understood so far. The day was structured into three sessions, looking at two main questions:

1. How are peace and conflict practices changing, and how are they situated in a changing global order?

2. How do processes of peace- and constitution-building need to adapt to the new conflict dynamics, including the internationalization of conflict and the fragmentation/diversification of conflict stakeholders?

The first session focused on peace-mediator perspectives, and the second on constitution-maker perspectives. The second day focused on data provision in the constitutional field and the ways in which this could enable more informed responses to the changing context. The first of these sessions focused on data in a changing environment. It considered what types of data and comparative information stakeholders on the ground may need, and in particular whether the databases that the partners have been developing are able to offer answers to the new questions arising regarding constitution-building in a new world order. The final sessions focused on conclusions and next steps. This report considers these themes in turn.

Chapter 2

MAPPING THE CHANGING GLOBAL ORDER AND ITS IMPACT ON CONSTITUTION-MAKING

The Eighth Edinburgh Dialogue considered the following critical questions:

- How has the peacebuilding field evolved with the changing nature of conflict, and what impacts are likely regarding constitution-building and particularly the linkages between peace- and constitution-building?
- How can the peace- and constitution-building fields react to the increasing fragmentation of conflict stakeholders and the lack of legitimacy of existing state institutions and/or the main negotiating parties vis-à-vis other conflict stakeholders or the broader public?
- Are there particular process-design strategies that could help incorporate key conflict stakeholders in peace and constitutional negotiations? What are the red lines for inclusion/exclusion and have the latter moved? For example, is the international community more or less likely to engage with armed groups involved with criminal networks?
- Are there interesting innovations in how constitutions approach pluralism and inclusion and territorial fragmentation?
- How are these 'changing conflict' pressures interacting with authoritarian pressures to revise or undo constitutions?
- To what extent are relatively recent international or regional norms on constitutionalism exerting traction or being undermined by abusive amendments or coups?
- What countries and contexts are facing particular constitutional challenges post-conflict or during their transition? And what other countries can they potentially learn from?
- In what ways are non-traditional external actors now engaged in constitution-building processes, and why? What does this portend for the nature of the constitutions that emerge?

2.1. **REFLECTIONS: A NEW ENVIRONMENT FOR PEACEBUILDING AND CONSTITUTION-MAKING**

Today there are more ongoing conflicts (56) than 10 years ago (33). In 1991 only 4 per cent of civil wars were internationalized; in 2015 40 per cent were internationalized (von Einsiedel 2017). Within conflicts, a larger number of armed groups tend to be active—over the last seven years there were as many new armed groups created as had formed in the whole of the previous 70 years (ICRC 2020). This is evidence of the fragmentation of conflict stakeholders, and is reflected in a decline in the number of peace agreements dealing with the substantive issues of the conflict; see Figure 1, where these agreements are reflected in orange sections (national and local).

Beyond this, the threat of extremism and the links of many armed groups to organized crime networks place a renewed emphasis on short-term ceasefires and addressing immediate violence rather than establishing and implementing broader strategies that would help address the root causes of conflict. This tension between short- and long-term peacebuilding efforts—what was once called 'negative versus positive peace'—leads to the fact that normative underpinnings of peace- and constitution-building no longer have the traction they once had.

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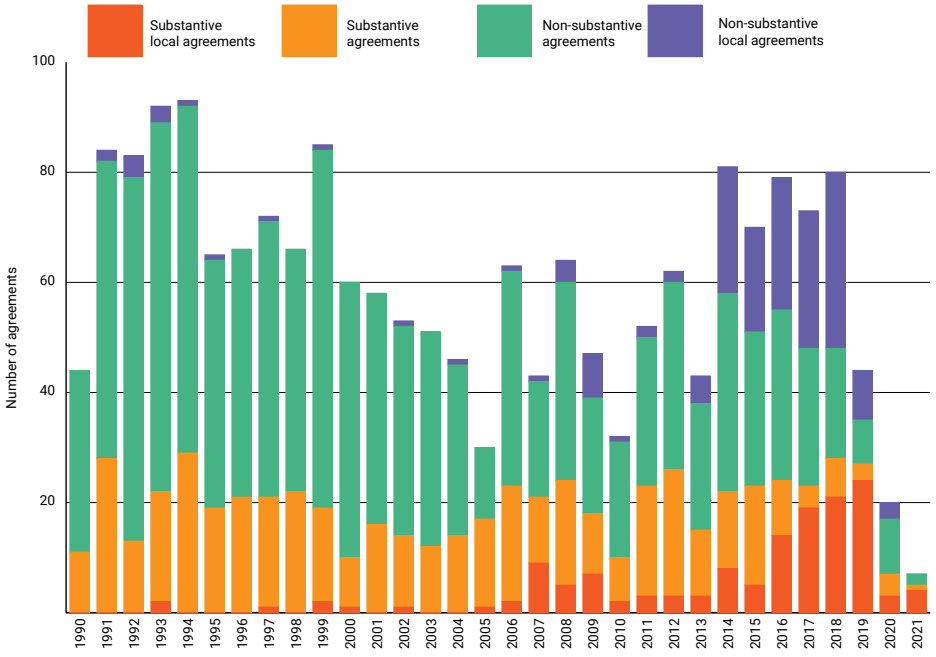
Figure 1. **Peace agreements, by type, 1990–2021**



Source: University of Edinburgh, PA-X peace agreements database, <https://www.peaceagreements.org>, accessed 27 April 2022.

Many individual states have now established government-led peacebuilding and mediation units to respond to global conflicts. International/regional organizations such as the United Nations, the Association of Southeast Asian Nations (ASEAN) and the African Union also regularly deploy diplomatic mediators to conflicts to help draw up deals between conflicting parties. However, the increasing number of stakeholders does not relate to effectiveness, as mediators often lack the necessary leverage to ensure compliance and implementation of any agreement, and indeed mediator competition can itself be unhelpful (Lanz 2021). In addition, counter-terrorism frameworks often undermine attempts to move towards mediated settlements.

The internationalization of both conflict and attempts to mediate it has played a role in the proliferation of armed groups due to the ease with which they can find patrons.

Mediation strategies also often hinge on fluctuating foreign policy positions where the cessation of violence may only be one of several strategic objectives, and sometimes not the most prominent one. In some cases, foreign policy positions are performative and constructed along narrative lines deemed useful for the maintenance of power. This internationalization of both conflict and attempts to mediate it has played a role in the proliferation of armed groups due to the ease with which they can find patrons. Private, informal diplomacy is also taking place at multiple levels by various groups with minimal overarching coordination.

The international peacemaking infrastructure was mostly built and developed in the context of a stable, post-World War II period in which one ideology—liberal democracy—had predominance. The international political and legal framework reflected in the United Nations Charter, which underpins peacemaking and building, only became fully operational after the end of the Cold War. Since the 1990s, however, international peacebuilding has increasingly failed to keep up with the evolving nature of conflict and violence and other structural conditions that challenge it. In particular, international peacebuilding has failed to provide solutions to novel problems such as climate change, socio-economic and cultural rights, and the globalizing political economy. In response, oppositional frameworks to the existing international peacemaking architecture have emerged and call for the development of better, more nuanced and perhaps less normative strategies in response. Richmond (2022, forthcoming) has termed these pushback initiatives as 'counter-peace' strategies; that is, strategies that seek to dismantle peace efforts and operate at national level but are also underpinned by geopolitical interests and intervention. These strategies include populism, exclusion of key groups, and religious or ideological extremism.

Many suggest these outcomes stem, in part at least, from a rejection of what are understood as western-driven agendas and the perceived hypocrisy of the human rights agenda and discourse, whereby developed countries selectively excuse allies when they are at fault while using human rights arguments as a weapon against their enemies. International intervention by liberal peacemakers has contributed to a sense of disillusionment with liberal peacebuilding. Richmond (2022, forthcoming) argues that 'counter-peace' efforts have also been responsible for producing outcomes as varied as frozen conflict, such as in Cyprus, and conflict escalation in places such

as Syria, where conflict grows more protracted despite the best efforts of the international community. He calls for better understanding of the ways in which mediation and peacebuilding, which have attempted to force a balance of power between conflict stakeholders, have been subverted by use of oppositional tools and strategies.

2.2. REFLECTION: CONSTITUTION-MAKING AND CURRENT CONTEXT

While the crisis in peacemaking and mediation is increasingly being debated, often post-conflict constitution-building has been slower in adapting to new circumstances on the ground but also in developing a 'counter-constitutional' narrative. There are perhaps several reasons for this. First, constitutions are by their nature documents focused on restraining power, and the process of constitution-building has been more focused on the establishment of a constitutional text than its implementation. Second, while liberal peacemaking appears to be generally under attack, constitutions and constitutionalism are still perceived as potential tools for progressive change. For example, the concept of constitutionalism is owned in parts of the Global South, in part due to historic use as a tool that assisted independence movements in their struggle against colonialism. Furthermore, the African Union has developed some of the strongest international norms focused on protecting constitutions with respect to preventing unconstitutional regime change (Bell 2015). Third, as the result of supremely national processes, constitution-building often emphasizes public participation and the need to move beyond elite deals, meaning that a much broader range of influences shape constitutions than peace agreements. International actors increasingly understand that they have to support concepts of 'local ownership' and can only play a facilitative role—that is, sharing comparative experiences and lessons learnt—in terms of design. Finally, consideration of the role of constitution-building as part of the peacebuilding architecture is still relatively recent (Bell and Zulueta-Fülscher 2016; Berghof Foundation and UN DPPA 2020), and the sense that it is still being established as part of the mediation toolkit has perhaps also meant that it is not yet subject to the same critique as more established practices.

International actors increasingly understand that they have to support concepts of 'local ownership' and can only play a facilitative role in terms of design.

Nonetheless, the contemporary context has put pressure on post-conflict constitution-building. Traditionally, constitution-building tied to peacebuilding fell into two distinct categories—post-conflict reconciliation and the transition from authoritarianism to democracy. The contemporary context, however, sees alternative constitutional impulses that to some extent parallel the disruption of the peacebuilding field. For example, authoritarian constitution-making now also takes place, with constitutional reform aimed at the unilateral assertion of power (where once authoritarians perhaps abrogated or ignored constitutions). Authoritarian borrowing can be seen as a feature of authoritarian constitutional revision (Lawrence 2021; Dixon and Landau 2021). 'Counter-constitutionalism' probably materializes in different ways along a spectrum. Counter-constitutional dynamics are seen in cases where

there is a reframing of the constitutional project as a unilateral assertion of power—for example, extending term limits to use the constitution to bypass peaceful transfer of power—as well as more recently by a return to more straightforward constitutional rupture through a coup d'état or 'popular revolution'. Interestingly, a sense that constitutions are in crisis has been felt also in the Global North. In the same way that the mediation field has become a field of international competition between actors with different normative aims, there is some limited evidence that constitution-building is also a site of interest, best evidenced by the Russian move to shift the frame of the Syrian peace negotiations to the establishment of a Russian-backed (and UN-facilitated) constitutional committee meant to negotiate the reform of the Syrian constitutional framework.

In considering whether and how post-conflict constitution-building may need to more overtly respond to these counter-constitutional moves or pressures, there are at least three distinct dynamics that may signify a shift in when and how people engage with constitutionalism in ways that divide and cause conflict rather than stabilize. These are:

1. *Polarization of the public sphere*. Contemporary societies have seen an increase in polarization that has split the idea of a unified public sphere governed by public political choice and subject to change through periodic elections. These dynamics are putting pressure on democratic constitutionalism.

2. *Semantic decay*. Constitution-making supported by international toolkits often struggles to be understood in the life of the everyday. Yet constitutions depend on rootedness in local context for their effectiveness. Interestingly, some apparent attacks on conventional constitutionalism see 'suffering citizen' movements such as anti-vax communities drawing on constitutional sources in hitherto unpredictable ways to articulate their opposition to modernist demands—for example, in the UK, drawing on the Magna Carta to oppose vaccination campaigns. Constitution-building in response needs to build into its toolkit a better way of incorporating the vernacular.

3. *Hackable constitutionalism*. Constitution-making has also faced the difficulties of citizens having their own versions of reality, and now needs to adapt to understand what security technologist Bruce Schneier (2020) has called 'the hackable society'. This may call for what Chandler (2018) suggests are new techniques of 'mapping, sensing and hacking', which accept that traditional ways of 'settling' politics no longer work and require new approaches that draw on data. Schneier suggests that, as we move into a world where all social, economic and political systems are to some extent technological, it is necessary to extend adaptive ways of thinking to how we refashion and protect the types of institution that constitutions enshrine.

Chapter 3

DATA ON CONSTITUTIONS AND CONSTITUTION-BUILDING PROCESSES

Another basic change in the operating environment, from a very different perspective, is the availability of data and the capacity to analyse it. Data availability and analytics hold both potential opportunities and new risks, which are also in a sense disruptive of existing ways of doing business. The Dialogue was also interested in exploring the potential to better 'disrupt the disruption'—that is, use comparative constitution and peace process data to better support responding to some of the above trends—as some of the partners involved in the Edinburgh Dialogues have been collecting both qualitative and quantitative data regarding constitutions and peacebuilding and constitutional processes. In particular, the Constitute project provides a basis for both comparing constitutional texts at a textual level and interrogating constitutional content quantitatively. The University of Edinburgh PA-X peace agreement database does the same for peace agreements, capturing also 'peace agreement constitutions' in ways that overlap with the Constitute project. PA-X also accounts for different phases around the peace negotiation process, from the prenegotiation stage through to the implementation stage, and any commitment to do with constitutional reform or replacement. International IDEA's Constitution-Building Programme has developed a sophisticated qualitative database of post-conflict constitution-building processes (PCCBP) (to be launched in 2022) that looks at a relatively large set of constitution-building processes after or during conflict. This database builds on an earlier dataset on constitution writing and conflict resolution (1975–2003) developed by Professor Jennifer Widner of Princeton University. The informal discussions around the edges of the Dialogues have seen interchange and support from one project to another, which has resulted in similar ways of building those databases, as well as complementarity of approach.

These efforts are surrounded by similar data collection efforts in connected fields. As regards peace processes, for example, the Peace Accords Matrix of the University of Notre Dame, the United Nations Peacemaker/Language of Peace and Uppsala Conflict Data Programme all have overlapping peace agreement and conflict databases. Quantitative research into political

institutions and processes, and their constitutional implications, is benefiting from new data collections, such as the Varieties of Democracy V-Dem set of democracy indicators, National Elections Across Democracy and Autocracy (NELDA) data on elections, and the Electoral Contention and Violence (ECAV) dataset. Yet, as these resources are developed within and for the benefit of particular projects, there have been few opportunities to put forward a shared vision for 'constitutional data science' or 'constitutional data analytics'. The production of data is itself an intensive research exercise, leaving little room sometimes to create interfaces or joint research between data or to consider what types of pressing questions in the field the data might be able to answer.

Against this backdrop, the Edinburgh Dialogue sought to combine the discussion about 'where the field is going' with questions as to whether researchers, policymakers and practitioners can make better use of the collective data, by finding ways to combine it and by developing research designs that rely on triangulation from a variety of data sources to respond to some of the challenges of contemporary peace- and constitution-building. Critical to this enterprise is the need to understand better what questions in the field might or might not be usefully informed by a stronger qualitative and quantitative data component, and whether or not the available databases are able to respond to new questions posed.

Key questions for discussion included:

- What empirical data has been gathered on constitutions or constitution-building processes (with a show-and-tell of the partner resources of Constitute, PA-X, International IDEA and PCCBP)?
- What other discursive resources also include a focus on issues that the above three databases deal with? It is worth noting here, in particular, UN Peacemaker, Melbourne University DEM-DEC (Democratic Decay) resources and International IDEA's ConstitutionNet.
- What data and comparative information do people in the field need, what types of questions do they need answers to, and how and when does data support the process of constitution-building and more specific constitutional negotiation processes?
- Are there practical ways in which a common data interface could present the 'constitutional data' in ways that could be useful as well as user-friendly?
- Does the combined data offer new research insights into the questions arising at the start of this Edinburgh Dialogue?

Data relating to constitutions exists to inform constitutional conversations.

3.1. REFLECTIONS ON CONSTITUTION-MAKING DATA

Fundamentally, data relating to constitutions exists to inform constitutional conversations. However, there lies a distinct difference between information, data and knowledge. As a form of organizing information, data is invaluable but does not eliminate the additional need for analysis to convert data into practical knowledge. At the current stage, data relating to peace processes

and constitution-making/building is being used in a wide variety of ways. For example, while the Constitute project sets out national constitutions, the texts by themselves do not tell us how constitutions operate, what type of politics exists outside the constitution, how good the institutional capacity of the institutions created in the constitution is or what overall impact the constitution is having. In response, Constitute has, for example, included an attempt to contextualize constitutions over time and space, and research from the data has sought to marry qualitative and quantitative approaches. Collectively, data and analysis from the partners has supported the following constitutional functions:

1. *Constitutional drafting*. Data can provide a useful precedent for drafting constitutional text, supporting informed drafting by providing comparative information. For example, the International IDEA Primers on constitutional design issues, which have been informed by comparative data, also indicate the interrelation between constitutional design choices and contexts. Primers set out what constitutions say, the advantages and disadvantages of constitutionalizing particular issues, what the provisions are meant to do and how to approach drafting.

2. *Stimulating and supporting public debate on constitutional priorities.* Data on constitutions and peace agreements also supports informed public debate, by indicating to the public and policymakers how constitutional commitments work and what the consequences and options for drafting are. Data can connect public consultation to constitution-drafting. For example, data has enabled policymakers to make evidence-based references to public opinion as opposed to rhetorical references. This approach has been taken in Chile to study topics of interest to Chilean citizens as it relates to the constitution, with regard to the country's new constitutional convention, which was set up in 2020 to draft the new constitution.

3. *Tracing pathways of change*. Data is also useful when it comes to tracking agreements and their institutionalization, whether it be ceasefire pacts or subnational agreements. Research emanating from the University of Edinburgh has also enabled natural language processing to begin to trace how concepts move from peace agreements to constitutions, to better understand processes of drafting and change over time.

4. *Early warning*. In some contexts data can be analysed to provide early warning of breakdown of processes of change and the risks of reverting to conflict.

3.2. **DIFFICULTIES WITH USING DATA**

Setting aside its undeniable utility, there are a number of issues with using data in any field, which play out with regard to its use to support constitution-building. These are:

1. *Retrospectivity and conservativism*. Data is inherently retrospective. There is a danger that an over-reliance on data, particularly when used to support processes such as constitutional drafting, may simply reinforce the status quo by limiting perspectives to options that have already been tried in the past. In a similar vein, comparative data can also hamper creativity by distracting decision-makers from context-specific solutions that are hiding in plain sight.

2. *Lack of digital skills or data engagement by constitution-makers*. A second issue is the question of which groups are actually using the data, aside from the (mostly academic) 'geeks' who possess a thorough understanding of it and the (mostly politically active) 'addicts' who apply it to everything. In many countries undergoing constitutional reform or drafting constitutions, elites possess no natural instinct to use data unless it is thrust upon them by outsiders such as constitutional advisors or lobby/activist groups. Often, when political elites decide to rely on data, it is to buttress rather than to inform their decisions.

3. *Emotion over data*. There is the question of what triumphs when data clashes with the weight of raw emotion and human psychology, factors often overlooked in constitutional discussions. In many countries, reformers operate within a narrative debate, a competition of competing stories. Such contexts have trouble integrating charts and statistics into the discourse and exert very little influence on the mainstream debate over issues considered to connect to questions of national identity. While data stories, or data within stories, can be used creatively for engagement, often those engaged in constitutional design will be involved in pathways of activity and activism, with data perceived as boring and irrelevant.

4. *Data accuracy and sustainability.* Maintaining and updating data requires fairly intensive resources and efforts. This is further compounded by the need to make data interoperable and adaptable, allowing for data merging, combining and expansion. Additionally, the technical dimensions of making that data available in user-friendly forms keep evolving, requiring continuous engagement in ensuring that sufficient policymakers are well versed in the tools, and ensuring that processes have advocates for evidence-based approaches to constitutional design.

Chapter 4

FINDINGS: HOW SHOULD PEACEBUILDING/ CONSTITUTION-BUILDING RESPOND TO DISRUPTION?

There is a clear sense that conventional approaches to peacebuilding—mediators bring together both parties of the conflict to sign a peace agreement before eventually drawing up a constitution that ushers in the new political order—no longer sit easily with fragmented conflict contexts found in the contemporary environment. The question is, how should constitution-makers respond? The following is an attempt at systematizing some of the lessons shared throughout the workshop.

4.1. A CLEAR UNDERSTANDING OF THE CONFLICT

Any serious attempt at constitution-making must be founded on a solid understanding of the internal politics that drive the conflict, many of which shape key constitutional design decisions in ways that the technocracy of constitution-building often fails to acknowledge. Mediators and constitution-builders must invest in detailed mapping that depicts the history of the conflict, the actors involved and their relationship with each other. Without a clear grounding in the cleavages that exist in society and their historical roots, mediation towards a sustainable outcome will prove impossible. Here lies a much stronger role for regional organizations such as the Intergovernmental Authority on Development (IGAD) and Economic Community of West African States (ECOWAS), which are already deeply familiar with the dynamics that fuel potential conflict in their subregions. Such proximity to the conflict means the need for balance and impartiality on the part of regional organizations must be underscored. On the other hand, data on processes, which cuts across the existing constitution-related databases, can also play a role in setting out basic information about key 'institutional moves' and changes in the institutional framework that have taken place over time.

Any serious attempt at constitution-making must be founded on a solid understanding of the internal politics that drive the conflict.

4.2. **A MORE LOCALIZED APPROACH**

Constitutions are often talked about as the 'soul of the nation' but for many people the concept of constitutionalism is something very remote. For example, while the Gambian constitution-making process was domestically driven, many Gambians considered the process to be an exclusively middle-class project, intended to share power and resources among the elite. While conducting public participation during the constitution-writing process, one farmer raised the issue of hippos destroying crops and the illegality of shooting them. This sentiment was sneered at by urban elites, but for those in rural areas institutional reform, such as the introduction of term limits, was less of a priority than ensuring their harvest. This disconnect was confirmed when the existing President blocked the approval of the new draft Constitution in the National Assembly but was subsequently elected for another term by an overwhelming majority of Gambians. Constitution-makers must strive to be far more inclusive when it comes to participation and significantly more diverse when it comes to solutions.

The same ethos is increasingly recognized to be central to conflict resolution. Currently, conflict resolution theory emphasizes the importance of state-building and focuses its attention at the national level. Although slowly changing, in the recent past minimal dialogue was directed at the peripheries, which often tend to be the areas where the violence is rooted. In the African context, for example, elites soak up most of the resources while the wide-ranging interests of the rest of the country are ignored. This dynamic must be further reconfigured to accommodate decentralized dialogue and inclusion.

The fragmentation of conflict makes matters significantly more complex from the perspective of peacebuilding/ constitution-making.

The fragmentation of conflict makes matters significantly more complex from the perspective of peacebuilding/constitution-making. Consensus can be very difficult to achieve when communicating with such a wide range of parties, especially when the demands of many peripheral communities are local in nature. Such groups often lack any national vision, and indeed, rather than seeking to build 'the national', they are instead focused on achieving forms of self-rule. International actors should adjust their perception in terms of their role and capabilities in such contexts. First, there must be a shift towards localized as opposed to top-down mediation, while maintaining the embeddedness of these local efforts within broader projects of transition out of conflict. This approach is slowly gaining traction among the international community. Second, international actors must accept that in most cases they alone cannot facilitate a full-scale resolution of conflict. Efforts must evolve to be more modest, pragmatic, focused and diverse in terms of their long-term goals. In the peacebuilding context, the priority should be the prevention, stabilization and containment of violence. Attempts should also be made to facilitate communication between warring parties.

In the constitution-building context, actors should move away from merely attempting to replicate a liberal constitution and focus on articulating the demands of both sides in constitutional terms and advising parties on how particular actions could play out in constitutional terms (e.g. Ukraine).

In terms of existing data, there could be merit in constitution-builders examining the PA-X repository of local agreements to understand local forms of peacebuilding that could have implications for constitution-building, particularly if it seeks to address periphery concerns. There is also scope to build on previous Edinburgh Dialogues' work on sub-state constitutionalism to look also at very localized forms of political settlement, how they are constituted and what the implications are for governance structures that the national constitution needs to accommodate.

4.3. **A BETTER APPRECIATION OF CULTURE IN CONSTITUTION-BUILDING**

Historically, international support to constitution-making has at times underestimated the necessity of allowing nations to go through their own state-building experience. Moulding a constitutional framework around one's own culture and history is critical for subsequent ownership and long-term sustainability of the project. External actors cannot simply impose peace, security and nationhood via a fancy liberal constitution. Instead, they must endeavour to support a more organic, context-specific effort led by internal actors if it is to have any resonance beyond international mediators.

External actors cannot simply impose peace, security and nationhood via a fancy liberal constitution.

There is room in the constitution-building field to think about culture in a transformative way. Traditionally, the liberal-infused idea of constitutionalism as a form of 'model' that can operate 'anywhere' risks subordinating culture to abstract values (although many actual liberal constitutions do not). Culture is rejected and constrained on the basis that it is not conducive to traditional liberal democratic notions of constitutionalism. However, it is important to recognize that liberal constitutionalism itself is indeed culture-specific and thus utterly foreign to many throughout the world. It is necessary to think strategically and ask how specific cultures can be harnessed in a way that supports constitutionalism by binding cultures together and acting as a constraint against the worst manifestations of culture in many contexts.

For example, rather than focusing an overwhelming amount of attention on the separation of powers between the three branches of government, a culture-specific approach could concentrate more effort also on resolving the relationship between the military, population and government—a question that has plagued South East Asian states for generations. On the same note, religion, while often divisive and/or oppressive, can also offer a foundation to establish order in society and can offer a common language of greater good, capable of uniting countries, including the peripheries. More thought could be given to what forms of compromise over embedding religions and their values have been achieved in constitutions globally. In other words, there is merit—as well as risks—in understanding alternative constitutional framings to liberal constitutionalism and the ways that these could bridge to contexts in which constitutions are difficult to establish.

The peacebuilding world must learn to remain progressive and continue to push on the value-driven issues it deems important while simultaneously engaging in an impartial, non-judgemental manner to create an open space for dialogue. A failure to find an appropriate equilibrium between these interests will risk undermining the relevance of peacebuilding and constitution-building in the modern world as authoritarian constitutionalism continues to become a growing trend.

4.4. AN EXPANSION OF THE CONSTITUTIONAL IMAGINATION

There are a number of issues that constitutions have been slow to acknowledge but truly should if they intend to remain relevant in the context of a changing world. For example, as a long-term commitment device, experts and practitioners should explore ways in which constitutions and innovative constitutional design could play a central role in the management of climate change over the next few decades. Constitutions might also prove useful in dealing with the seemingly inevitable job losses that will result from automation as technology grows more advanced. In the local context, constitutions might be able to resolve issues related to resources and the regulation of pastoral seasons as well as linking local issues to the national context. Again, comparative constitutional data can play a role in enabling any prior examples of interesting practice to be unearthed.

The increasing difficulties of political and constitutional settlement point to the value of better understanding the dynamics of failure.

4.5. UNDERSTANDING PROCESSES OF CONSTITUTIONAL FAILURE BETTER

Constitution-building, and the comparative research that underpins it, by its nature focuses on prior successful examples of constitution-building. However, the increasing difficulties of political and constitutional settlement point to the value of better understanding the dynamics of failure. What types of conditions have impacted on whether constitutions have been able to be agreed upon? How might this be factored into the data? Are there comparative lessons to be learnt from failure, and studying failure and success in parallel, which could inform peace- and constitution-making processes in the future? Data can help to identify and examine failed constitution-making processes.

4.6. SUPPORTING BETTER CONSTITUTION-MAKING DATA AND UNDERSTANDING ITS CONSTRAINTS

Innovative constitutional data now exists that is capable of supporting better insights into post-conflict peace agreement and constitution-making sequencing, pathways of success and failure, better constitution-making process design and innovative constitutional drafting. The partners and

other data projects have considerable capacity to extend and connect their data to support new approaches to constitution-building and will continue to collaborate. However, challenges to the use of data as a tool for constitution-building remain. Data can only succeed when the information it generates informs key decision-makers, who need to be aware of the various databases and how to use them. A second challenge lies in getting the data in front of those in power and allowing reformers to draw on demands from the public to effect deliberations at the elite level. It is also worth exploring what other forms of data are useful. For example, what is the role of artificial intelligence (AI) in constitution-building and how can this technology be married with social media data?

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Annex A. Agenda

Day 1. **9 December 2021**

Time (CET)	Session
10:00–10:15	(Online) Registration and (virtual) coffee
10:15–10:30	Welcome and Introduction
10:30–12:00	**Session I: How is the world changing? And how do changes in the global order reflect in changes in the nature of conflict?** *The main speaker should reflect on some of the key conflict dynamics that may currently be changing, and that the peace- and constitution-building practitioners need to be aware of and adapt to.* **Presenters**: **Cedric de Coning**, Norwegian Institute of International Affairs (online) **Oliver Richmond**, University of Manchester (online) **Moderator**: Christine Bell, University of Edinburgh
12:00–13:00	Lunch
13:00–15:00	**Session II: How, or how should, processes of peace- and constitution-building be adapting to new conflict dynamics, including the internationalization of conflict and the fragmentation/ diversification of conflict stakeholders? The perspective from the peace mediator** *This panel is to reflect on ways in which particularly the peace-mediation field is reacting to changing circumstances on the ground, but also to cross-country changes in conflict dynamics; panellists should also explore whether the interaction between peace-mediation and constitution-building is changing, and in what ways.* **Moderator**: Tom Ginsburg, University of Chicago **Panellists**: **Jonathan Cohen**, Conciliation Resources (online) **David Lanz**, swisspeace (online) **Miriam Coronel Ferrer**, University of the Philippines, former member of the UN Standby Mediation Team (online)
15:00–15:30	Break
15:30–17:00	**Session III: How, or how should, processes of peace- and constitution-building be adapting to new conflict dynamics, including the internationalization of conflict and the fragmentation/ diversification of conflict stakeholders? The perspective from the constitution-building practitioner** *This panel is to reflect on ways in which particularly the constitution-building field is reacting to changing circumstances on the ground but also to cross-country changes in conflict dynamics, with reflections on the constitution-building process as well as constitutional design innovations; panellists should also explore whether the interaction between peace-mediation and constitution-building is changing, and in what ways.* **Moderator**: David Lanz, swisspeace (online) **Panellists:** **Sumit Bisarya**, UN DPPA **Zaid Al Ali**, International IDEA **Marie Joelle Zahar**, University of Montreal (online)

Day 2. **10 December 2021**

Time (CET)	Session
09:00–10:00	**Session IV: Databases in comparison** *In this panel the three main databases will be presented and discussed, exploring how they could be used collectively to produce comparative research capable of responding to some of the questions posed on Day 1 of the Edinburgh Dialogue.* **Moderator**: Sumit Bisarya, UN DPPA/International IDEA **Case studies**: Constitute project (Tom Ginsburg/Roy Gardner) P-AX Database (Sanja Badanjak) PCCBP (Erin Houlihan/Kimana Zulueta-Fülscher)
10:00–11:15	**Session V: Data in a changing environment** *Given the changing international environment, particularly as relates to the nature of conflict, and the peace- and constitution-building field, this panel will discuss the type of data and comparative information that stakeholders on the ground may need, i.e. whether the databases that some of the partners have been developing are able to offer answers to some of the new arising questions.* **Moderator**: Kimana Zulueta-Fülscher, International IDEA **Panellists**: **Jason Gluck**, UNDP (online) **Steve Ainsworth**, UK FCDO **Sanjana Hattotuwa**, ICT4Peace (online)
11:15–11:30	Break
11:30–12:30	**Session VI: Conclusion and next steps** *The final session will focus on what recommendations might emerge from the discussions. Selected panellists will reflect on some of the key issues raised throughout the two days, and how this may affect not only the field of peace- and constitution-building but also our day-to-day work as practitioners.* **Moderator**: Christine Bell, Edinburgh University/PeaceRep **Panellists**: **Sumit Bisarya**, UN DPPA/International IDEA **Tom Ginsburg**, University of Chicago
12:30–14:00	**Work lunch: Evolving and adapting databases: Does the combination of databases give any more or better insights to new questions? Exploring possibilities** (Physical)

Annex B. List of participants

Adem Abebe, Programme Officer, Constitution-Building Programme, International IDEA

Steve Ainsworth, Head of the Mediation and Reconciliation Hub, Mediation and Peace Process Support Team, Foreign, Commonwealth & Development Office (FCDO), UK

Zaid Al-Ali, Senior Advisor, Constitution-Building, Africa and West Asia Regional Office, International IDEA

Sanja Badanjak, Postdoctoral Research Fellow, Data Manager of PA-X Peace Agreements Database, University of Edinburgh

Christine Bell, Director of the Peace and Conflict Resolution Evidence Platform (PeaceRep), and Professor of Constitutional Law and Assistant Principal (Global Justice), University of Edinburgh School of Law

Eva Maria Belser, Professor of Constitutional and Administrative Law, University of Fribourg; UNESCO Chair in Human Rights and Democracy

Sumit Bisarya, Constitutions Advisor, UN Department for Peacebuilding and Political Affairs; (former/future) Head of Constitution-Building Programme, International IDEA

Jonathan Cohen, Executive Director, Conciliation Resources

Cedric de Coning, Research Professor in the Research Group on Peace, Conflict and Development at the Norwegian Institute of International Affairs (NUPI)

Miriam Coronel Ferrer, Professor at the Department of Political Science, University of the Philippines; peace negotiator and former chair of the peace panel of the Government of the Philippines; former member of the United Nations Mediation Support Unit

Roy Gardner, Expert on Data Analysis and Natural Language Processing, Ontonomics

Tom Ginsburg, Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar and Professor of Political Science, University of Chicago

Jason Gluck, Policy Specialist, United Nations Development Programme (UNDP)

Sanjana Hattotuwa, Research Fellow, Te Pūnaha Matatini, New Zealand; Special Advisor, ICT4Peace

Sharon Pia Hickey, Associate Programme Officer, Constitution-Building Programme, International IDEA

Yasmine Kergoat, Centre for Humanitarian Dialogue

David Lanz, Co-Head, Mediation Support Project, swisspeace

Thibaut Noel, Associate Programme Officer, Constitution-Building Programme, International IDEA

Oliver Richmond, Research Professor of IR, Peace and Conflict Studies at the Humanitarian and Conflict Response Institute & Department of Politics, University of Manchester

Asanga Welikala, Lecturer in Public Law at the School of Law, University of Edinburgh; Director of the Edinburgh Centre for Constitutional Law

Marie-Joelle Zahar, Professor of Political Science, Director of the Research Network on Peace Operations and Fellow at the Centre for International Research and Studies at the University of Montreal

Kimana Zulueta-Fülscher, Acting Head of Constitution-Building Programme, International IDEA

About the authors

Christine Bell is Assistant Principal (Global Justice), Professor of Constitutional Law. She is Director of the Peace and Conflict Resolution Evidence Platform and former Director of the Political Settlement Research Programme, both large-scale programmes on peace and transition design. She is a Fellow of the British Society and the Royal Society of Edinburgh. She read law at Selwyn College, Cambridge (1988) and gained an LL.M in Law from Harvard Law School (1990), supported by a Harkness Fellowship. She is a former Director of the Human Rights Centre, Queens University of Belfast, and a founder of the Transitional Justice Institute, University of Ulster. She was also Chair of the Committee on the Administration of Justice, and a founding member of the Northern Ireland Human Rights Commission established under the Belfast Agreement. In 2007 she won the American Society of International Law's Francis Deake Prize for her article 'Peace Agreements: Their Nature and Legal Status', first published in the *American Journal of International Law*. She has authored two books: *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008) which won the Hart Socio-Legal Book Prize, awarded by the Socio-legal Studies Association (UK), and *Peace Agreements and Human Rights* (Oxford University Press, 2000).

Rhys Ainsworth was a Research Assistant at the Edinburgh Centre for Constitutional Law and the Peace and Conflict Resolution Platform and is now working in strategic communications. He holds a Law LLB from the University of Edinburgh.

About the partners

INTERNATIONAL IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

What we do

In our work we focus on three main impact areas: electoral processes; constitution-building processes; and political participation and representation. The themes of gender and inclusion, conflict sensitivity and sustainable development are mainstreamed across all our areas of work.

International IDEA provides analyses of global and regional democratic trends; produces comparative knowledge on democratic practices; offers technical assistance and capacity building on reform to actors engaged in democratic processes; and convenes dialogue on issues relevant to the public debate on democracy and democracy building.

Where we work

Our headquarters are located in Stockholm, and we have regional and country offices in Africa, Asia and the Pacific, Europe, and Latin America and the Caribbean. International IDEA is a Permanent Observer to the United Nations and is accredited to European Union institutions.

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PEACEREP

PeaceRep, more fully the Peace and Conflict Resolution Evidence Platform, is a research consortium based at Edinburgh Law School. Our research is rethinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes. PeaceRep is funded by the Foreign, Commonwealth & Development Office (FCDO), UK.

Consortium members include: Austrian Study Centre for Peace and Conflict Resolution, Conciliation Resources, Edinburgh Centre for Constitutional Law, International IDEA, Keele University, LSE IDEAS, LSE Middle EastCentre, Queens University Belfast, University of St Andrews and the University of Glasgow.

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THE EDINBURGH CENTRE FOR CONSTITUTIONAL LAW

The Edinburgh Centre for Constitutional Law (ECCL) provides a focal point for staff and postgraduate research students working in all areas of Scots and UK public law, Commonwealth and comparative constitutional law, human rights law, environmental law and climate change law, democratisation and transitional constitutionalism, and constitutional theory. Our members undertake research and teaching in all these areas, as well as providing expertise to institutions outside academia in the UK and beyond.

Website: <https://www.law.ed.ac.uk/research/research-centres-and-networks/edinburgh-centre-constitutional-law>

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The theme for the 2021 Edinburgh Dialogue was 'The Changing International Order and Its Impact on Constitution Building Support'. This Dialogue sought to contribute new thinking on the constitutional implications likely to be triggered by changes to both the international order and the nature of conflict in the past decade, in particular given their impact on the peacebuilding field, which attempts to revise the underlying political settlement.

The discussion was premised on an increasing sense within the social science academy and among practitioners that the post-Cold War global order for dealing with intrastate conflict has been fundamentally disrupted. Debates within comparative politics, international relations and international law—to a much greater extent than in comparative constitutional law—are dealing with the shift in the geopolitical balance of power—even if this shift has not yet reached the institutional architecture of the international order.

Acknowledging these changing conflict dynamics, some of the 'models' with which international actors attempt to assist stakeholders' exit from conflict—including by constitutionalizing political and legal institutions—are (or should be) changing.

The Dialogue was jointly organized by International IDEA and the Edinburgh Centre for Constitutional Law, as part of the Peace and Conflict Resolution Evidence Platform (PeaceRep) of the University of Edinburgh.

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