



Summary

The inclusion and participation of combatants in constitution-building processes raises a number of distinctive issues. Constitutional *INSIGHTS* No. 5 examines the rationales for including combatants in constitution-building, the challenges this presents and some of the mechanisms that might be used to support their participation in constitution-building processes.

About this series

The Melbourne Forum on Constitution-Building in Asia and the Pacific is a platform co-organized by the Constitution Transformation Network and International IDEA. It brings together scholars and practitioners of constitution-building from across the region to share their perspectives on critical issues as a contribution to enhancing global understanding of the field. This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

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About the Authors

This issue of Constitutional *INSIGHTS* was written by Anna Dziejczak and Sebastián Machado Ramírez. It draws on discussions at the Fourth Melbourne Forum on Constitution-Building in Asia and the Pacific, held in Yangon, Myanmar, on 21–22 October 2019.

Inclusion of Combatants in Constitution-Building

Introduction

Where constitution-building occurs in a conflict-affected context, the inclusion and participation of combatants in constitution-building processes raises challenging and distinctive issues. In such contexts, constitution-building is likely to overlap with a wider peace process that comprises the negotiation of peace agreements, and disarmament, demobilization and reintegration (DDR) programmes.

This issue of Constitutional *INSIGHTS* focuses on combatants and former combatants who either are or were members of an organized armed group within a state that has engaged in sustained and organized violence against the state. The category includes those who fight, as well as political leaders and others who provide logistical, financial or other forms of support to armed struggles. It therefore does not consider members of the armed forces of the state, for whom different issues of inclusion and participation arise.

This issue draws on discussions and analysis from the Fourth Melbourne Forum on Constitution-Building in Asia and the Pacific, which discussed inclusion and participation in constitution-building. The Forum discussed the experiences of Aceh in Indonesia, Bougainville in Papua New Guinea and Mindanao in the Philippines, as well as those from Afghanistan, Colombia, Nepal and Sri Lanka. It is organized around four questions:

1. What is distinctive about the role of combatants in constitution-building?
2. Why should combatants be included in constitution-building processes?
3. What are the challenges to including combatants in constitution-building processes?
4. How might combatants participate in constitution-building processes?

Combatants have distinctive attributes and interests which affect how they engage in constitution-building processes.

1. What is distinctive about the role of combatants in constitution-building?

Combatants have distinctive attributes and interests that distinguish them from other actors and can affect how they engage in constitution-building processes. This section identifies four major points of distinction, while noting that all four are unlikely to apply to all combatants in all cases.

1.1. Combatants may claim to have a legitimate cause

Some organized armed groups understand themselves to be part of a resistance or liberation movement against the state, and so claim to be fighting for a legitimate cause. They may regard an incumbent government as illegitimate because, for example, it excludes or persecutes certain parts of the community or claims territory without respecting the values of self-determination. Where intra-state conflict is related to a wider political struggle, combatants may have the support of significant parts of the local community, which consider them legitimate representatives of their interests (Dudouet et al. 2012: 8). This dynamic can have a number of implications. Where constitution-building is intended to tackle the root causes of conflict, combatants may be seen as representatives of a marginalized group or ideology. If constitution-building is not successful in tackling the causes of conflict, they may be motivated to take up arms again.

1.2. Combatants have almost certainly engaged in criminal conduct

Irrespective of the legitimacy of their cause, combatants are likely to have engaged in violence against the state and in criminal conduct that may well have caused harm to people or to property. In egregious cases, combatants may have engaged in conduct prohibited by international criminal law, such as war crimes and crimes against humanity.

Non-state combatants, as opposed to members of the armed forces of a state, may be liable for offences under domestic law, such as illegal possession of weapons, sedition and rebellion, and for offences of harm against the person, such as homicide, assault, kidnapping or disappearances. Members of the armed forces of a state are assumed to be exercising the legitimate authority of the state and are often protected—to the extent limited by domestic law and international humanitarian law—from the legal consequences of their actions. In these respects, non-state combatants are in a different position. This results in asymmetrical legal treatment of the parties to an intra-state conflict, which can also cause resentment in parts of the community.

Unless steps are taken to overcome this difficulty during the peace process, records of behaviour that is characterized as criminal under domestic law may present legal obstacles to the inclusion of combatants in constitution-building processes. Segments of the community that have suffered from combatants' actions may also oppose their inclusion, which will have to be taken into account when designing peace and constitution-building processes.

Including combatants in constitution-building from the outset can support the move from conflict towards sustainable peace.

1.3. Combatants will be affected by the conflict

While some intra-state conflicts are relatively short, many are protracted and can last several decades. Combatants are themselves affected by conflict in particular ways. In some cases, they may have lived most of their lives in conditions of conflict, so that they lack both the experience of peaceful civil life and the skills required to enter it. As members of tightly knit groups fighting for a cause in life-threatening situations, combatants may also have a deeper loyalty to each other than to the wider public interest, and may be deeply distrustful of the state against which they have been fighting. These characteristics make it desirable to take deliberate steps to reintegrate combatants into the social, economic and political life of the state through peace- and constitution-building processes in ways that overcome, as far as possible, the challenges that arise.

1.4. Combatants may be embedded in the local economy

In some conflicts, combatant groups exercise control over territory within the state. In such cases, in addition to military activities, they may assume responsibility for local economies and the delivery of social services. In so doing, combatants can attract the loyalty of citizens and even replace the state as the primary provider of governance and essential services. This experience can leave combatants with administrative skills in governance and political skills as representatives of the people that might be helpful in relation to constitution-building and political reintegration. Equally, however, it may encourage a return to conflict if the demands of the group are not met.

2. Why should combatants be included in constitution-building processes?

Constitution-building in conflict-affected contexts takes on particular features that are linked to the need to establish and consolidate peace. These include:

- Supporting the move from conflict to peace by establishing a more inclusive state and addressing the underlying causes of conflict.
- Using the constitution-building process as a continuing opportunity to engage in dialogue and build trust between parties that were formerly in conflict.
- Embedding agreed new institutions and governance arrangements in constitutional form.

Each of these aims requires the inclusion of combatants.

2.1. Moving from conflict to sustainable peace

Combatants are sometimes characterized as potential ‘spoilers’ of a constitutional process (UNDP 2014: 9). For the reasons discussed above, combatants may retain both the inclination and the capacity to take up arms, which makes any form of peace fragile.

The spoiler label should be used with caution, however, as all participants in a constitution-building process are potential ‘spoilers’, particularly

if there is disagreement about key aspects of the political settlement. A better approach is to understand combatants as one of several critical stakeholders in a constitution-building process with the capacity to impede or promote change. In some cases, exclusion can be a catalyst for continuing conflict. Afghanistan provides an example, where the exclusion of the Taliban from the constitution-making process in 2002–2004 had devastating consequences when a resurgent Taliban later challenged the legitimacy of the Constitution and ‘refused to play by the rules set down in a constitution in which they had no role’ (Parsalay 2019).

If a new constitution is to address the underlying causes of conflict and facilitate political rather than violent means of conflict resolution, the inclusion of all groups, including combatants, will be important in order to create a sense of ownership of and commitment to the new constitution.

2.2. Continuing dialogue and building trust

The process of constitution-building itself can be part of the transformation from conflict to peace. Depending on how it is structured and designed, the process of developing and debating new constitutional provisions can offer a forum for formerly conflicting parties to negotiate solutions to the root causes of conflict (Hart 2001: 153). In this way, constitution-building might provide a *process* that can be trusted even if the parties do not trust each other. The inclusion of combatants in constitution-building may therefore extend the process of building working relationships and trust that the peace negotiations began.

2.3. Designing new and workable constitutional provisions

In a peace-building context, constitutional change may seek to address the root causes of conflict, such as inequality, exclusion or discrimination. Constitutional inclusion mechanisms of this kind can include, for example, changes to the composition and procedures of government institutions to give all substantial groups within the state a say in the decisions of government; special protections for the rights of minority groups; or decentralization to give communities within the state greater autonomy over and responsibility for their own affairs.

Substantive constitutional change in a post-conflict context is likely to be a response to the cause for which combatants were fighting. It makes sense in such circumstances to involve these combatants in constitutional design not only to ensure that their views are taken into account, but to give them a sense of ownership of the changes and as a necessary foundation for effective implementation of the new arrangements.

3. What are the challenges to including combatants in constitution-building processes?

3.1. Inclusion at the cost of exclusion of other groups

One potential challenge that arises from a focus on combatants in constitution-building is that it might, directly or indirectly, result in the exclusion of others. This can occur in several ways.

Challenges for including combatants arise from the potential exclusion of other groups, perceptions about the legitimacy of the resulting constitution, and the self-exclusion of combatants from the process.

If constitution-making is solely in the hands of representatives of parties to the conflict, other groups not directly involved in the conflict may be left out. In these circumstances, the foundations of the constitution as a form of social contract that draws its legitimacy from the people will be undermined, and the process could become little more than a division of the spoils between warring factions (Hart 2001: 154). New arrangements that are put in place may be motivated not by the wider public interest, but by the need to avert a renewal of violence (Easterday 2014: 399).

In addition, both the combatants and the elites within the state against which they were fighting are likely to be predominately male. Although women are involved in non-state armed groups, as both combatants and non-combatants, such groups tend to be led and represented by men. The inclusion of combatants in constitution-building processes can therefore result in the further marginalization of women, to the detriment of both peace and an effective constitutional settlement (see United Nations Security Council Resolution 1325 on Women, Peace and Security of 31 October 2000).

These challenges do not represent arguments against the inclusion of combatants. They need to be understood, however, so that they can be taken into account in the constitution-building process and offset by the inclusion of all affected groups.

3.2. Legitimacy

The inclusion of combatants in a constitution-building process may confer legitimacy on them and on the groups they represent. While state institutions have an interest in negotiating with armed groups on their territory, they might be concerned that direct contact will grant them a measure of political or legal legitimacy that affects the way in which they will be able to deal with the combatants in the future. These issues arise first in peace negotiations, but there may be a concern that the further inclusion of combatants in constitution-building processes will legitimize their cause and conduct, and appear to bestow privileges on those who have engaged in conflict.

Perceptions of legitimacy will be affected by the characterization of the conflict and the combatants themselves. An armed insurgency by a criminal or terrorist organization has very different connotations to armed resistance by a political liberation movement. Parties to peace negotiations need to develop language to describe the conflict and the actors that satisfies the other parties as well as their own constituencies. This is a difficult rhetorical task that must be sensitive to context. A recurrent issue in the negotiations between the Colombian Government and the various combatant groups, for example, was the characterization of the civil war as an ‘armed conflict’—the government’s preferred term—or a ‘political conflict’, as it was understood by the Revolutionary Armed Forces of Colombia (Farc, after the initials in Spanish) and the National Liberation Army of Colombia (Ejército de Liberación Nacional, ELN) combatants.

In any event, combatants may lack legitimacy in the eyes of the public or the international community. In such cases, there is a risk that the inclusion of combatants in a constitution-building process might

undermine the legitimacy of the resulting constitution. This risk will need to be tackled directly, which might be done by explaining the benefits of inclusion for the making of a sustainable and effective constitution. It might also be useful to emphasize that the legitimacy of a new constitution rests on a range of factors, such as its effectiveness in practice and acceptance by the people, and not only on who was present or not present during the constitution-building process.

3.3. Risk of refusal

The inclusion of combatants requires agreement by the combatants themselves. In some contexts, combatants may refuse to be involved in constitutional or peace negotiations for ideological reasons, due to trust issues or just through a general lack of engagement. There may be several different armed groups, or divisions within armed groups, that cause some combatants to be included and others excluded either during the course of the process or through their own decisions.

Self-exclusion can present problems for constitution-building. It will mean that the benefits of inclusion outlined above will not be fully realized. It also potentially gives at least one group grounds to reject the authority of the new constitutional arrangements. In Bougainville, for example, the leader of the Bougainville Revolutionary Army (BRA), Francis Ona, refused to participate in the peace process and in subsequent constitution-making. Ona declared his own government and controlled a 'no-go zone' around Panguna, the location of the mine at the centre of the conflict. Other members of the BRA leadership did participate in the processes, however, which were largely successful. Over time, some, but not all, of the self-excluded groups began to participate in the constitutional government of Bougainville as government services gradually extended into the no-go areas in the region.

Considerable effort by the state might be required to persuade combatants to get involved in a constitution-building process. This might include guarantees such as amnesties, as well as agreements about specific constitutional changes that realize legitimate aspirations in the future constitutional order. Bringing combatants on board might require that some combatant groups are treated differently, thereby further complicating both the peace negotiations and constitution-building. The example of Bougainville, however, suggests that even where some groups refuse to become involved, inclusion can be fostered in later phases of constitution-building, including through implementation of the new constitutional arrangements.

4. How might combatants participate in constitution-building processes?

Post-conflict constitution-building processes may occur at the state level, the substate level or both at the same time. In all cases constitution-building is likely to go through several phases, notably:

- laying the groundwork for constitutional change, often through a peace agreement, sometimes coupled with an interim constitution;

Combatants may participate in all phases of constitution-building. The most direct involvement is likely to be during peace negotiations.

- negotiating, designing, drafting and ratifying a new constitution or changes to an existing constitution; and
- implementation of the new arrangements in practice, both in the immediate aftermath of ratification and over time.

Combatants can be included in each of these phases to a greater or lesser extent.

4.1. Inclusion in peace processes

Constitution-building in conflict-affected contexts is usually preceded by one or more peace agreements. Peace agreements take a variety of forms, ranging from agreements on ceasefires to agreements that set out the process and/or the substantive principles for future peace talks. Comprehensive peace agreements, which are signed by all the major parties to a conflict and seek to resolve the substantive issues of that conflict, often include commitments to constitutional change. Nepal's 1996 Comprehensive Peace Accord and the 2001 Bougainville Peace Agreement are examples of such agreements.

As parties to the conflict, combatant groups will be involved in negotiating peace agreements. At this point, they can directly participate in setting an agenda for future constitutional change by entrenching it in the peace agreement. There is a trade-off to be made at this point. The prescription of particular changes in a peace agreement may satisfy combatants but preclude genuine choice at the later, more inclusive, stages of constitution-building. More general commitments in the peace agreement to, for example, the goals of a new constitutional settlement or the principles on which it will be built leave more room for an effective constitution-building process. At the same time, however, if commitments are too general, this may give rise to questions about how combatant groups can trust that their views will be respected in future constitution-building processes, and whether or how they should be more fully involved at later stages of the process.

4.2. Inclusion and participation in constitution-making and ratification

There are many different procedures for making a constitution. These include the use of existing legislatures, often with additional requirements for special majorities in order to make important decisions, or through an elected or appointed constituent assembly. There may also be a requirement for approval by the people in a referendum. Increasingly, constitution-making is expected to include public participation in some form. The choice of procedure may have implications for the inclusion of combatants.

Options for participation

One way to ensure the participation of combatants is to reserve a space for them in the constitution-making process. This can be done, for example, by reserving places on the drafting commission or constituent assembly for representatives of former armed groups, as was done in Bougainville. Where public consultations are part of the constitution-making process, special efforts may be required to consult separately with combatants to ensure that their interests are taken into account in the

new constitution. This might be done by creating a dedicated committee to consider the interests of combatants or by seeking submissions from combatant groups. Other mechanisms for participation are less direct. Where the parliament or an elected body is responsible for constitution-making and there are no reserved seats, combatants may seek to enter politics in order to obtain the necessary public support to engage directly in the process. This might be more likely in circumstances where an armed group has the support of the people of a region or of a particular ethnic or religious group.

Barriers to participation

Even if no special steps are taken to include combatants in constitution-building as a specific group, steps may be needed to ensure that combatants are not precluded from engaging in the constitution-making process by reason of their status. One barrier to participation that might need attention is the classification of combatants as criminals and therefore ineligible to hold public office. Some peace agreements seek to remove at least some such barriers. For example, peace agreements in Aceh, Colombia and Nepal expressly note the right of combatants to form political parties. Amnesties sometimes form part of a peace agreement and, where compatible with human rights norms, can also assist with the removal of criminal records in order to permit participation.

The complexities of representation

Non-state armed groups are not necessarily united and monolithic. There may be several different armed groups within a state, each with their own membership, structures and political aspirations. While each armed group requires a certain degree of organizational sophistication to carry out military campaigns against the state, different factions within a single group may have different interests and even different levels of credibility within the organization. An armed group might splinter into different movements over the course of a conflict or during a peace-building process. In the case of Colombia, for example, two separate but parallel negotiations were undertaken with two different groups on the ground that, while part of the same conflict, had different agendas and different capacities to engage in hostilities against the state.

Where combatants have a separate and designated position within a constitution-making body or process, it is important to understand who or what the person is representing and the nature and limits of that representation. Allowances can then be made for this in the constitution-making process. Among the alternatives are:

- a combatant who is considered a delegate of an armed group, and is therefore subject to a level of control;
- a combatant who is associated with a particular people or cause, who may act as a kind of ‘trustee’ for particular interests;
- a combatant who, in effect, is representing other combatants and therefore might be inclined to focus on transitional justice or reintegration.

4.3. Inclusion in the practical operation of new constitutional arrangements

Former combatants may also be included in constitution-building by assuming public roles in governments, the legislatures or other institutions at the national or subnational level.

Aceh provides an example. The conflict centred around whether it would remain part of Indonesia and the peace agreement provided for Aceh to remain part of Indonesia but do so with a significant degree of autonomy. Peace and constitutional negotiations were hindered by the characterization of the Free Aceh Movement (Gerakan Aceh Merdeka, GAM) as a terrorist organization, meaning that it could not be negotiated with. GAM's strategy was for its members to enter the provincial parliament, to become city mayors and to use the local law to pursue its goals. Following the peace agreement, GAM transformed itself into a political party and by 2009 held the majority of seats in the local legislature (Zainal 2019).

The transition from combatant to public official or political leader is not straightforward. It requires a move away from the skills and discipline of armed combat and resistance against the state to responsive political leadership and effective public administration as a part of the state. Democratic representation requires former combatants to appeal to the broader public and to act in the public interest (Dudouet et al. 2012: 38–40). It may be difficult for combatants to move away from the hierarchical structures and the intense loyalty they may have felt for each other in order to work with others in a democratic process. Including combatants in civil society may well have advantages in terms of consolidating peace. At the same time, however, inclusion needs to be carried out in a way that promotes effective civil government and avoids militarization.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.
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About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation.
<<http://law.unimelb.edu.au/constitutional-transformations>>

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