



The normative framework and the international legal basis of peace mediation

Peace Mediation and Mediation Support Fact Sheet

This fact sheet provides the various normative frameworks that mediating third parties and surrounding actors should bear in mind. The aim of the fact sheet is to offer sound and clear guidance pertaining to which norms are relevant to peace mediation, the extent to which each of them is binding, and the actual and potential implications of whether or not mediators observe them, as well as on parties and the sustainability of mediated agreements. One area of priority is listing the provisions of international law that relate to the mediation process. These have not been available in this kind of format before, despite their great practical relevance to processes and outcomes. After a brief contextualisation of the role and categories of norms in the realm of peace mediation, the fact sheet will present answers to the following focus questions:

- I. Which (process-related) norms are relevant to the design of a peace mediation process?
- II. Which content-related norms of substantive law must be paid attention to?
- III. How relevant is the constellation of actors to the normative framework?
- IV. What normative tensions exist within frameworks of transitional justice?
- V. What is the normative relevance of courts or tribunals to peace mediation?

With the aid of examples, the final section outlines how actors in the field of mediation can deal constructively with normative restrictions, conflicts between aims and dilemmas that arise, and thus ultimately reach good and well-thought-out decisions.

Norms for peace mediation: straitjacket or backbone?

Norms describe collectively established assumptions concerning “correct” behaviour in a given situation. Since numerous decisions regarding behaviour must be made according to procedure and to the negotiation agenda in the context of peace mediation, norms naturally play a major role in mediators’ practical work. Mediation processes are informed by diverse normative reference systems, including **methodological** guidelines for successful mediation procedures, **ethical** principles that raise acceptance levels and prevent harm, rules governing the third party’s specific **political** mandate and, of course, national and international **legal** frameworks.

This fact sheet is part of a series of fact sheets on peace mediation that provides policymakers in the Federal Foreign Office and German Embassies with a structured overview of the approaches, stakeholders, challenges and possibilities for action in the field of peace mediation. Further fact sheets from the series are available on Division S 03’s intranet page.

The role of norms in peace mediation has expanded in recent years, with regard to both procedure and negotiation topics. The aforementioned normative frameworks have been more precisely defined and delineated, even if there are still no uniformly consolidated norms for peace mediation. This trend has coincided with an intensification of the fundamental debate on the nature of the role that norms in general and international legal aspects in particular should or must play in peace mediation processes and the agreements that result from them. In order to be able to successfully mediate in conflicts comprising political and military power struggles, must mediators be free to act without normative constraints, or must they, even or indeed particularly in such conflicts, strive to actively ensure compliance with certain norms? Are there norms (and, if so, what are they?) that require mediators to restrict their flexibility, as the consequences of disregarding them would be intolerable for the parties and for those affected by the conflict? At the same time, the normative regulatory framework for peace mediation presented here is by no means to be understood – or misunderstood – as a “straightjacket” in which mediation activities must fit. On the contrary, individual norms or, as the case may be, a well-balanced combination of norms, can be used as a framework for normatively sound decisions on the procedural and substantive structure of mediation processes and agreements. There are no simple formulas for such decisions. In order to describe the impact of norms in specific cases and to be able to analyse the norms relevant to a given case responsibly and pragmatically, it is necessary to begin with an overview of the various dimensions of norms and the tensions surrounding them.

The inclusion of norms in mediation is less about trade-offs and more about careful navigation within a specific context.²

Mediation-related dimensions of norms

It is important to distinguish between **general norms** that are relevant to mediation, such as **methodological, ethical or political norms**, on the one hand, and **legal norms** on the other. They differ in their binding effect, their binding intent, and the consequences of them being observed or not. While **general norms** always describe behavioural *expectations*, the category of **legal norms** encompasses behavioural *rules*, whose intent regarding the extent to which they are binding may include legally binding force. There are various consequences when norms are not observed, which can range from mere irritation to criminal penalties. The acceptance, implementation and sustainability of peace agreements may be impaired in many respects if relevant norms have been disregarded.

For a thorough understanding and practical contextualisation of the contents of this fact sheet, it is useful to clearly distinguish between the **procedural norms** of peace mediation (norms *for* peace mediation) and **substantive norms**, which affect the core content of negotiations and peace agreements (norms *in* peace mediation). Peace agreements themselves may be perceived as norms that are an **outcome of peace mediation** – one that influences and is influenced by norms – and which may reshape the context of the relevant conflict. Sometimes, however, the boundaries are not as clear-cut as they are in the national context. Substantive law frameworks also influence mediation processes, and procedural norms may be an integral part of the substantive negotiations in peace mediation. Consideration must also be given to the special features that find their way into peace mediation (see focus question III) as a result of norms **specific to particular actors** or legal requirements that apply only to individual actors (see below). One model encompassing various categories grades norms according to their respective **positions in the mediation context**.³

How can norms be categorised?

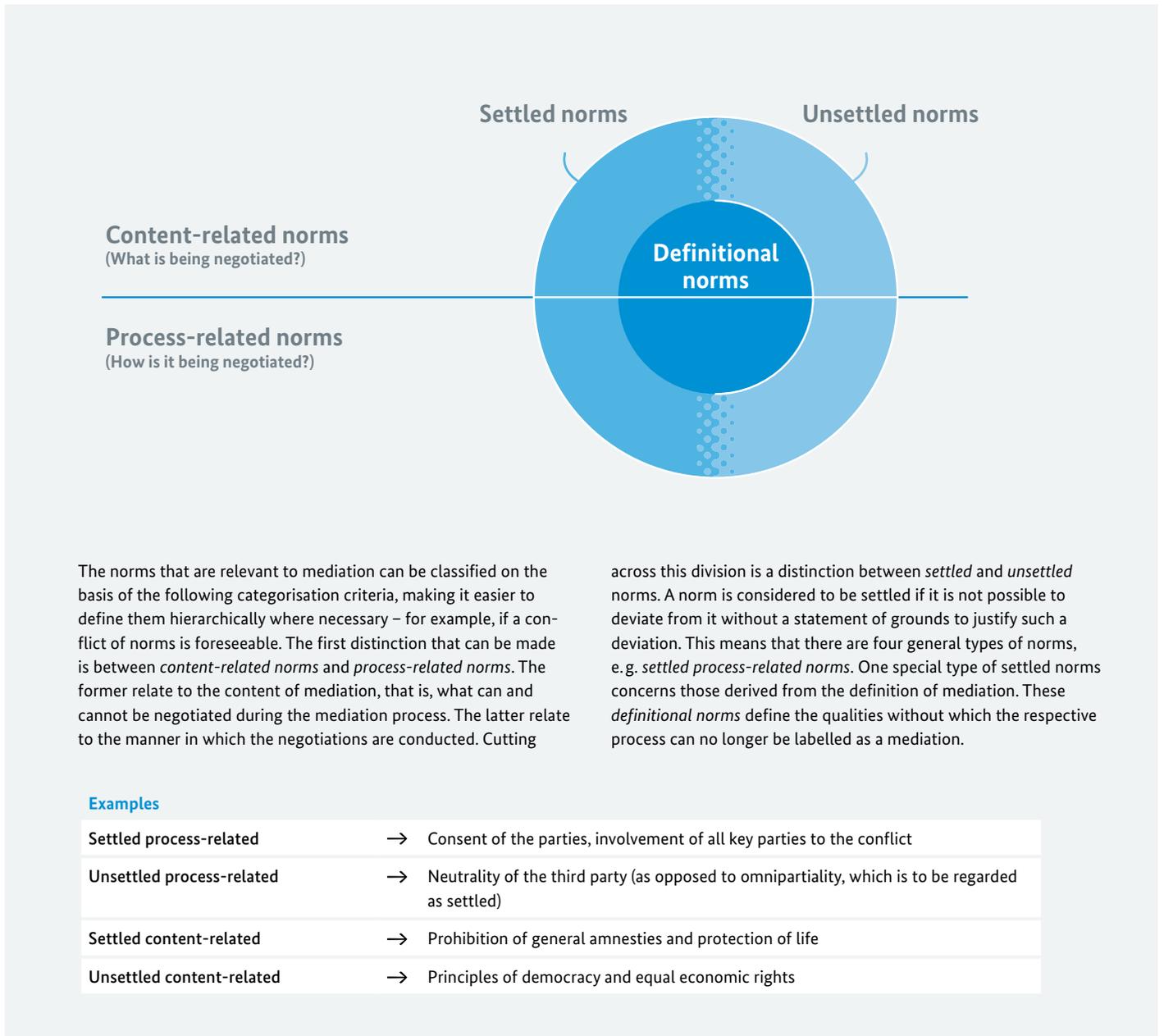


Figure 1: Categories of norms (based on Hellmüller et al., 2015)

As a result, the regulatory framework that applies to peace mediation is largely characterised by the presence of a considerable number of normative levels: besides international and domestic law and mediation methodology and ethics, norms specific to particular actors, such as the normative dimensions of foreign policy, the internal rules of international organisations and the relevant culturally influenced normative attitudes of the parties to a conflict can also be important. Since the consequence is a shift in the regulatory framework that applies in any given case, depending on the subject matter of the conflict and the situation of the parties and third parties, the notion of a uniform regulatory framework for peace mediation is untenable. Instead, it makes sense to define categories on the basis of the focus questions, which must be drawn upon in practice for each individual case and provide specific calibration processes.

Focus questions:⁴

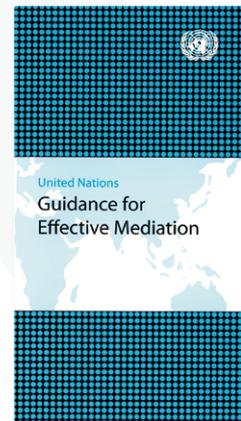
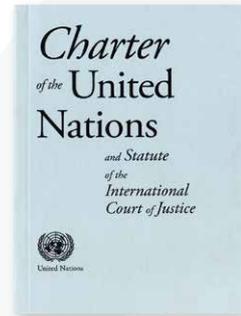
Focus question I: Which (process related) norms are relevant to the design of a peace mediation process?

Many norms that are relevant to mediation relate to procedure, such as rules governing the conduct of mediation and the role of the mediator or dealings with non-state armed actors.

The **Charter of the United Nations** of 1945 contains statements that are not particularly specific, but highly relevant in political terms. In Article 33(1), mediation is listed as one of several means for settling disputes peacefully. As for key criteria for demarcating procedures, UN commentators agree that mediation, like resort to good offices, requires the consent of the parties at the outset and conclusion of the process if it is to be technically classifiable as a proper mediation procedure in the first place. The Charter does not go into detail regarding the nature of the actual mediation process.

The United Nations Guidance for Effective Mediation, which was published in 2012, provides information on designing mediation processes. This document is the most important and,⁵ in terms of norms, most comprehensive codification of mediation in international peace processes at present. The relatively high degree of normative differentiation in the principles set out in this document leads to a remarkable paradigm shift in the field of peace mediation, with its traditional reliance on flexibility. The *United Nations Guidance for Effective Mediation* contains methodological and ethical guidelines for the peace mediation process based on shared experiences and assumptions regarding professional mediation management. Its content straddles the borderline between instructions regarding the practical formalities of peace mediation and recommendations based on best practices in the realm of mediation support. The *UN Guidance* document is sometimes described as the “procedural soft law” of peace mediation, in that it is not legally binding. While UN mediators are naturally bound by the ethics of the United Nations, other organisations, such as the OSCE, have aligned themselves closely with the *UN Guidance*, fleshing out the content of the document and thus incorporating it into their own normative regulatory framework.⁶ One concession to practical necessity has been the **undefined degree of binding intent and effect** of the various principles. The *UN Guidance* does not prescribe, for example, which of the principles, if any, safeguard constitutive minimum requirements for mediation and must therefore be prioritised when weighing up the applicable norms.⁷

In spite of the UN’s expressed support for these principles, there often seem to be no significant repercussions if they are disregarded, even by UN mediators, let alone governmental and non-governmental mediators. Any visible breach, however, certainly creates a need for justification in practical discourse and public perception and may hamper cooperation. If constitutive principles of a mediation procedure, such as the consent of the parties, are ignored, the “only” consequence is that the procedure being followed does not represent mediation – or at least “state-of-the-art” mediation – but rather a different diplomatic instrument. There may well be good reasons for such procedural adaptations. If, however, the best practices accumulated over decades with regard to these procedural norms are disregarded without good reason, the potential methodological benefits of modern peace mediation are forfeited, as is the ensuing legitimisation of the procedure. This is particularly true if a process is explicitly labelled as mediation, thus supported by the parties to the conflict and members of the international community, and therefore subject to their respective expectations. In the case of the Geneva II talks, for instance, observers carefully analysed the extent to which civil society’s envisaged participation actually materialised. The “good reasons” that may prompt compromises on procedural norms should not, in other words, be hastily pressed into service as justification simply because a non-consensual or non-inclusive approach seems more promising in the short term against a backdrop of time pressure and continuing violence.



United Nations Guidance for Effective Mediation in brief

Preparedness, which is listed as the first principle, refers to the thorough preparation of a mediation process as regards the individual, collective and structural resources of the mediator, mediation team and active stakeholders as the prerequisite for responsible intervention. **Consent** means that the parties must agree to the implementation of the mediation process, including its ground rules and intended format. **Impartiality** relates to the absence of partiality of the mediator, but the guidance document explicitly states that impartiality is not synonymous with neutrality. The norm of **inclusivity** defines the objective of the participation and representation of all relevant actors in the mediation process and overlaps with

the requirement of **national ownership**. On the one hand, this principle relates to an inclusive process, involving all stakeholders in the conflict-ridden country and extending to the implementation of a peace agreement. On the other hand, it raises the substantive issue of the relevance of legal systems affiliated with particular parties. Under the heading of **international law and normative frameworks**, the guidance document provides information on the core subject of this fact sheet. The inclusion of information on procedural and substantive law is regarded as evidence that the realm of peace mediation is gradually developing towards positioning itself within the (international) legal system. In addition, media-

tors are expressly urged to make their guiding norms clear to the parties to the conflict. The principle of **coherence, coordination and complementarity of the mediation effort** entails formulating requirements that are conducive to better exchanges between the stakeholders in the field, and has prompted numerous countries and organisations to refine their mediation support and cooperation networks. The final principle, **quality peace agreements**, concerns issues relating to the content and implementation of the mediated agreement and must therefore be classed in normative terms within the legal dimension as the outcome of peace mediation.

One of the most frequently discussed procedural issues concerns the **normative limits and scope for conducting talks with terrorists**. **Security Council Resolution 1373 (S/RES/1373 (2001) of 28 September 2001)**, citing chapter VIII of the Charter of the United Nations, prohibits the provision of any form of active or passive support to entities or persons involved in terrorist acts (point 2(a)). The initiation and conduct by governmental entities of mediation with terrorist groups do not constitute support within the meaning of the Resolution, even in its broadest possible interpretation, since the Resolution cites the recruitment of members of terrorist groups and the supply of weapons to terrorists as an example. It should also be noted that neither the Resolution nor any other norms of international law contain a binding definition of terrorism on which consensus might be reached. National anti-terrorist legislation contains highly diverse interpretations, some with a decidedly low threshold, of what may be regarded as support for terrorists. The United States, for instance, possesses a wide range of legal sanctions, and the prohibitions and restrictions set out in the pertinent instruments generally have implications with regard to criminal law, too. While it is therefore conceivable that private entities may face criminal charges under some national legal systems for mediation activities involving groups classed as terrorists, the same does not apply to governmental entities, since national codes of criminal law do not, in principle, apply to state entities. National law, then, is the only means of determining the admissibility of mediation in which terrorist groups are active participants. Such mediation is admissible in international law, and states must therefore reach a political decision based on the current sensitivity and relevance of the issue.

Summary conclusion on focus question I

At first glance, the normative expectations for peace mediation processes seem to be high. The degree to which the relevant norms are binding varies widely and is not infrequently controversial. The requirements set out in the *UN Guidance* are to be understood as methodological and ethical guidelines and condensed best practice that constitute and legitimise the mediation process. Their observance is not compulsory, but as a rule, it is extremely advisable.

Focus question II: Which content-related norms of substantive (international) law must be paid attention to?

Numerous international legal norms become relevant in a peace mediation process. These may be divided into peremptory norms and other (ordinary) law. **Peremptory norms of international law** are the small but, in the context of mediation, significant group of norms that are non-negotiable in principle for all parties and other stakeholders. Their existence is laid out in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) and largely enjoys general acceptance. Peremptory norms of international law are particularly deeply rooted in legal consciousness; in the hierarchy of norms, they take precedence over contractual and customary law. From a political and ethical perspective, peremptory norms of international law are essential to the cohesion of the international community, as they serve as a minimum standard that bridges the global diversity of norms and the multipolar power structure in the world. The **other norms of international law** are those which, though they may well be universally applicable, can be voided of their binding nature by the subsequent emergence of different norms or the termination or suspension of a treaty, at least if they are not norms of customary international law. If in the course of peace mediation legal norms are created for the national legal order, or if their creation is planned, such national norms must not conflict with those of international law. Even constitutional norms must not ultimately be inconsistent with international law.

a) Peremptory norms of international law relevant to mediation

The post-conflict legal and constitutional order

The legal and constitutional order that results or is supposed to result from the mediation process must not on any account permit racial discrimination (Article 4(1) ICCPR),⁸ especially not in the form of apartheid (Article 7(2)(h) Rome Statute). Slavery must be abolished in law and in practice (Article 8(1) and (2) ICCPR), as must torture (Article 7 ICCPR and Article 2 of the UN Convention against Torture).

Amnesty bans and legislative and sentencing obligations

Several agreements require the Contracting Parties to criminalise certain offences in their national legal orders and to ensure that offenders are prosecuted. In addition, the Rome Statute of the International Criminal Court enumerates what it deems the most serious crimes of concern to the international community as a whole, which it states must be prosecuted. These include genocide (Article 6 Rome Statute; see also Article III of the UN Genocide Convention and, on the obligation to enact criminal legislation, Article IV of the same Convention), crimes against humanity (Article 7 Rome Statute), war crimes (Article 8 Rome Statute) and crimes of aggression (Article 8 bis Statute). Torture is also to be made a criminal offence, and perpetrators are to be prosecuted (Articles 4, 5 and 7 of the UN Convention against Torture). Accordingly, a general amnesty can never be the result of a mediation process conducted in the light of international law. Leaders who have committed such crimes must face criminal sanctions. This may be done in cooperation with a truth and reconciliation commission.

Principle of non-refoulement

In the course of a mediated peace process, people must not be expelled to places where they will be exposed to the risk of torture (Article 3 of the UN Convention against Torture) or where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (Article 33(1) of the Convention relating to the Status of Refugees).

b) Other norms of international law potentially relevant to mediation

Political participation

Various provisions of international law guarantee political participation. These norms must therefore be taken into account when political reorganisation, the allocation of public offices, and a possible new or reformed constitution are on the agenda. Article 25 ICCPR guarantees every citizen the right and opportunity to take part in the conduct of public affairs through periodic universal elections based on equal suffrage and to have access, on general terms of equality, to public service in their country. This article does not, however, encompass a wider “human right to democracy” in the sense of liberal multi-party democracies. The UN Convention on Women’s Rights (Convention on the Elimination of all Forms of Discrimination against Women) defines women’s right to participate in political life on equal terms with men in Article 7, while Article 7(c) focuses particularly on participation in non-governmental organisations and Article 8 accords the same rights in the context of international representation. In addition, States Parties pledge in Article 2(e) to take all appropriate measures to eliminate discriminatory practices in their societies.

Rights of prisoners of war

After both internal and international armed conflicts, mediation must take the rights of imprisoned conflict participants, as defined by the Geneva Conventions, into account. Prisoners of war within the meaning of Article 4 of the Third Geneva Convention are guaranteed humane treatment in line with the requirements of the Convention. Imprisoned combatants must not face criminal prosecution for their participation in an armed conflict, provided their actions were not in breach of international humanitarian law. After the cessation of active hostilities, all prisoners of war are to be released (Article 118 of the Third Geneva Convention). Persons actively involved in the conflict should, as far as possible, be exempt from prosecution (Article 6 of Protocol II to the Geneva Conventions). The limits to this immunity are the most serious crimes listed in Article 5 of the Rome Statute (cf. peremptory norms of international law, sentencing obligations and amnesty bans).

Displacement and statelessness

Normative issues relating to managing the consequences of displacement and forced migration have become topical, for example in the negotiations in the EU and with Turkey. Article 12(4) ICCPR guarantees people the right to enter their own country. People who have fled their country in the wake of a conflict therefore have the right to return. This is complemented by the right to leave one’s country (Article 12(2) ICCPR), although that right may be restricted in any of the significant extenuating circumstances listed in Article 12(3). Freedom to choose one’s residence within a state (Article 12(1) ICCPR) is relevant both for internally displaced persons and those who have fled abroad. This may likewise be restricted under Article 12(3). Under Article 22 of the UN Convention on the Rights of the Child, displaced and refugee children and young people are entitled to special protection.

Minority rights

Article 27 ICCPR gives ethnic, religious and linguistic minorities the right to enjoy their own culture, to profess and practise their own religion, and to use their own language – and to do so with the support of the state as far as possible. Accordingly, demands for the prohibition of a particular language, religion or culture, which are often made unilaterally in mediation processes, are precluded.

Judicial rights

Issues of ownership and compensation, which often have to be resolved in the aftermath of armed conflicts, may fall under civil or public law; when they arise in connection with the investigation of past crimes, they regularly also involve criminal proceedings. These issues and the related procedures require judicial clarification. They become even more relevant in cases where the creation of new judicial and quasi-judicial institutions is being negotiated in a mediation process. Emphasis must be placed in this context on the right to proper defence (Article 14(3)(b), (d) and (e) ICCPR), the prohibition of double jeopardy (Article 14(7)), the prohibition of forced self-incrimination (Article 14(3)(g)), the prohibition of retrospective criminal liability (Article 15), the presumption of innocence (Article 14(2)), equality before the law (first sentence of Article 14(1)) and the right of appeal (Article 14(5)). Furthermore, consideration must be given to the right to a fair hearing (second sentence of Article 14(1) ICCPR), as well as to the special rights of children and young people in judicial proceedings (Article 14(4) ICCPR and Articles 37 and 40 of the UN Convention on the Rights of the Child).

Summary conclusion on focus question II

The framework of substantive law will naturally vary from case to case, but the main universally valid sources and frameworks are clearly visible. In the framework of peace mediation, the informed inclusion of peremptory norms of international law is particularly relevant. In practice, these amount to no more than a modest number of norms.

Focus question III: How relevant is the constellation of actors to the normative framework?

In the preceding sections, the norms relating to international law were presented on their own, without reference to the actors involved. At any stage of a peace mediation process, however, one relevant practical question may arise: namely, which norms are binding to which actor – and to which extent they are binding. **States** are fundamentally bound to any treaty they have ratified, as well as to the norms of customary international law. Regardless of its origins, some of which are to be found in specific treaties, the body of law defined above as peremptory norms of international law, also known as *ius cogens*, possesses the characteristics of customary law and is binding on all states. Substantive legal norms from a **party's** norm system may set clear limits on the jointly negotiable subject matter and thus become part of the regulatory framework that applies to the mediation process. If, for instance, a State Party has committed itself, within the framework of an international treaty, to greater protection of particular human rights, it must not fall short of that level of protection in the mediation process and the intended peace agreement if it wishes to avoid violating international law.

Mediation can be challenging in normative terms if it involves **non-state armed actors**. There is broad consensus that violent actors are also bound by the fundamental norms of international humanitarian law, that is, the Hague and Geneva Conventions. Peremptory norms of international law also apply to these actors. Moreover, some violent non-state actors unilaterally observe certain norms, which also makes these norms part of the regulatory framework of the mediation process. Commitments to human rights and international obligations in other spheres do not bind violent non-state actors *per se*, although international law is showing clear signs of moving in that direction.

Where non-governmental organisations (**NGOs**) are involved in peace mediation processes, an extremely relevant practical question arises as to whether and to which extent they are bound by norms of international law and as to the part they play in the dissemination and application of norms. Whether, considering their increasing rights to participation in the international arena, NGOs may be accorded the status of partial subjects of international law is a question that has yet to be answered. As in the case of violent non-state actors, it stands to reason that the minimum standard set by peremptory norms of international law must also apply to NGOs.

Furthermore, NGOs are always additionally bound by the national legal norms of the country in which they are headquartered. The **third party** also brings, at the very least, procedural legal norms, as well as substantive norms into the process. In other words, it certainly makes a difference whether the mediators are working for the UN, the EU or another intergovernmental organisation, or for a state or an NGO. UN mediators, for example, operate within the legal framework of the Charter of the United Nations, the resolutions of the Security Council and General Assembly, and the UN's internal rules. State mediators, for their part, are bound by the Charter of the United Nations and Security Council resolutions, as well as the entire set of obligations under international law described above and the applicable norms of their national legal systems. Finally, **all participants**, be they individuals at the negotiating table or the groups and societies they represent, come with their own culturally influenced normative ideas of what is fair and proper in conflict resolution processes and agreements. For these cultural reasons, but also for political reasons, some protagonists cannot identify with the international system of norms and reject its claim to be universally binding.

How is the regulatory framework of a mediation process composed?

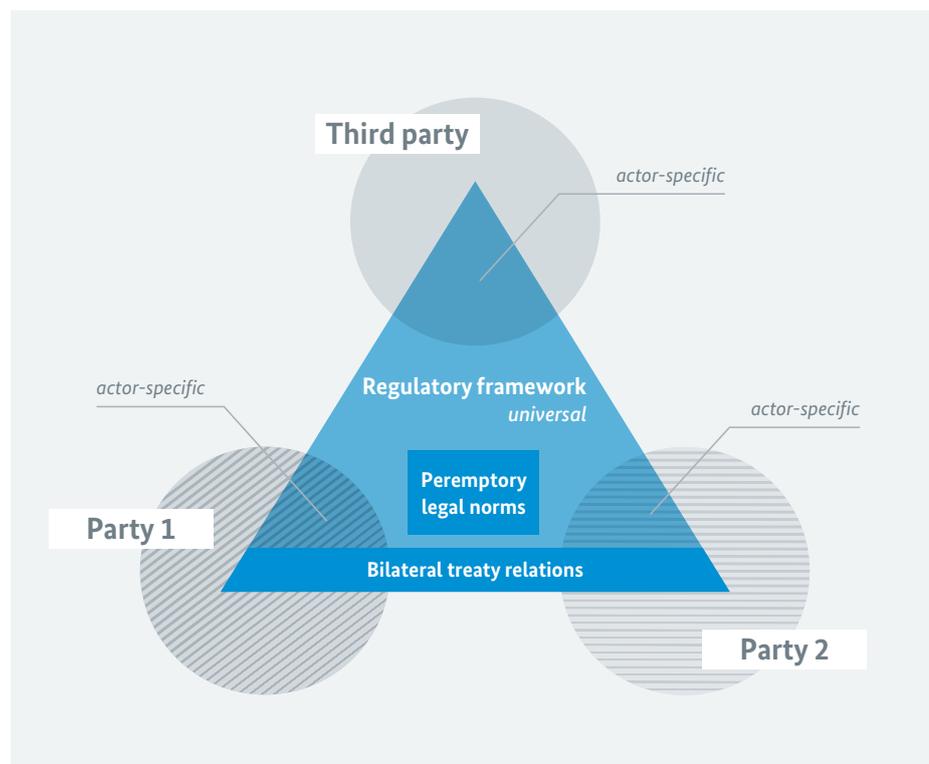


Figure 2: Elements of the regulatory framework (based on Leffmann, 2016)⁹

The interaction between these diverse participants in peace mediation depicted in the above diagram not only occurs within the described regulatory framework but also influences this framework for future peace processes. In conflicts and mediation processes in particular, state practice and legal convictions, which form the fundamental building blocks of customary international law, manifest themselves on a regular basis. Whether and to what extent non-governmental organisations and violent non-state actors are bound by international law or, to put it another way, to what extent violations of international law have consequences, is one of the questions that are answered in these very scenarios; in that respect, mediators also act as developers of norms. The developments regarding the protection of women in armed conflicts and their participation in peace processes that were initiated through Security Council Resolution 1325 can be seen as one illustration of this phenomenon.

Summary conclusion on focus question III

Which of the relevant norms are binding on which actor – and to what extent – is a question that requires careful examination in each individual case. Besides the parties to the conflict, the third party itself brings a significant normative momentum into play, one that is often underestimated but can be relevant in the early stages of designing the process.

Focus question IV: What normative tensions exist within frameworks of transitional justice?

„...the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition.“¹⁰

The role of the law in peace mediation has not yet been exhausted in the functions described above. Legal norms not only limit the shape of the peace process but are themselves a means and a subject in the structuring of societies that occurs in the course and aftermath of a peace process. The term “transitional justice” is an attempt to convey this transformative function of the law. Transitional justice is one of the key concepts of peace consolidation in post-war societies that have been developed by the international community and global civil society since the mid-1990s with a view to ensuring lasting peace in post-conflict societies.¹¹ The term encompasses all of the measures with which violations of the law, human rights abuses and acts of violence are to be punished and addressed by society. These measures may comprise international and national criminal trials, but also non-judicial strategies for reconciling the perpetrators and victims of conflicts, reparations such as restitution and compensation, the demobilisation of perpetrators, and the quest for truth and fact-finding. The norms that apply in the realm of transitional justice are exerting a growing influence on peace negotiations, and peace agreements are ever more frequently and visibly laying down benchmarks for their application.¹² The objective of many peace processes, and hence of the mediation that takes place as part of those processes, is to establish stable societies based on an assured minimum level of legal certainty and the rule of law. In each of these processes, the law must re-establish its legitimacy as an instrument for guiding and shaping society.

In such cases, transitional justice is regularly reduced to a conflict of aims between peace and justice, yet on closer inspection these are not competing but rather interdependent aims, for unless there is an end to violence (peace), individuals cannot benefit from measures to address the past, compensation and human rights (justice), and *vice versa*. In this context, transitional justice must address normatively complex phenomena such as formally legal injustices, including those committed by the state, and individual victims’ compensation entitlements. The key normative principles in the realm of transitional justice are based on the principles developed by Louis Joinet for the UN Commission on Human Rights. The purpose of these principles was to combat impunity in cases of massive violations of human rights and international humanitarian law. The four focal points are the right to justice, the right to reparations, the right to know and the guarantee of non-recurrence. These four principles recognise victims’ rights and define the state’s obligations. The UN and EU¹³ expressly strive for adherence to the increasingly refined principles of transitional justice in the peace mediation efforts they conduct or support; some other stakeholders involved in mediation regard this as normative overloading of the mediation process and lament a further loss of mediators’ substantive freedom of action and flexibility as regards outcomes. There is therefore a need to avoid artificial antitheses in peace mediation practice, and the complementary approach of “peace in justice and justice in peace” can meet that need.

Summary conclusion on focus question IV

Norms have been situated within the field of transitional justice in a careful and practical manner. The extent to which these norms are actually taken into account in a peace mediation process ultimately proves to be a political decision; developments in the UN and EU, however, clearly indicate a trend towards an increasing relevance of normative requirements from this field.

Focus question V: What is the normative relevance of courts or tribunals to peace mediation?

In spite of its nature as an extrajudicial dispute resolution mechanism, peace mediation has close ties with international, hybrid and national courts and tribunals. Particular attention has been placed in this context on the **International Criminal Court (ICC)**. One pertinent example of its relevance is to be found in the Colombian peace process, in which the ICC was closely involved through preliminary investigations, when its prosecutor determined whether there were grounds for initiating investigations under Article 15 of the Rome Statute that might ultimately lead to arrest warrants being issued. In principle, however, the ICC has no jurisdiction during a peace process as long as the state concerned is willing and able to conduct scrupulous investigations and criminal proceedings. One of the purposes of preliminary investigations and subsequent reports issued by the state in question is to verify this willingness and capability. During the peace process in Colombia, this approach helped to keep the focus on the certainty of prosecution for the most serious crimes. The ICC was thus instrumental in the creation of an autonomous mechanism in Colombia for dealing with the past that includes criminal prosecution. On the one hand, the recent example of Colombia illustrates the beneficial influence of independent international criminal prosecution as a constant within a peace process. On the other hand, there may be a need for restraint at sensitive stages in the process, such as the postponement of normatively appropriate sanctions. One means to this end is the deferral, under Article 16 of the Rome Statute, of investigation or prosecution, although this requires a Security Council Chapter VII resolution. In view of this significant obstacle, the more promising option is Article 53(1) (c) and (2)(c) of the Rome Statute, which allow the prosecutor to refrain from investigation or prosecution if such action “would not serve the interests of justice”. In this case too, determining whether there are any reasonable grounds for proceeding is the sole responsibility of the prosecutor, whose decision cannot therefore be influenced by any participants in the mediation process.

Hybrid criminal tribunals are based both on an international and national legal act. They are often created in cooperation with a state in the wake of internal conflicts or following the commission of serious crimes in that state. Examples include the Khmer Rouge Tribunal in Cambodia, the Special Panels for Serious Crimes in East Timor and the Special Tribunal for Lebanon. The importance of hybrid criminal tribunals may be illustrated by the example of the Special Court for Sierra Leone, which ruled that the amnesty clause that had previously been enshrined in the Lomé Peace Agreement was not an obstacle to criminal prosecution. A peace agreement concluded within an internal armed conflict, the court held, did not constitute an international agreement and therefore could not bind a hybrid tribunal, which was outside the national legal system; granting an amnesty for the most serious crimes was, in fact, a violation of international law.

The normative regulatory framework of peace mediation is also regularly influenced by the **case law of regional courts of human rights**. The Inter-American Court of Human Rights, for instance, declared early on that blanket amnesties were irreconcilable with the rights of victims and their relatives, thus paving the way for criminal investigation of past wrongdoings in Latin American dictatorships. This wide-ranging ruling strongly influenced the peace process in Colombia, and all parties took detailed note of it. Besides the amnesty issue, the case of *Sejdić and Finci v. Bosnia and Herzegovina* before the European Court of Human Rights (ECtHR) showed how close interaction can be between practical peace mediation and the normative dimension of its outcome. In this case, the ECtHR held that constitutional norms in Bosnia and Herzegovina, which provided for proportional representation of the main ethnic groups in political posts and entirely excluded minorities from political office, were illegal. As the Constitution of Bosnia and Herzegovina had resulted from the Dayton Peace Agreement of 1995, this example shows that even peace agreements are open to judicial review.

Finally, the role of **national courts** in the normative fabric of peace mediation can scarcely be overstated. National courts influence the process of dealing with the past and can likewise subject the foundations of a peace or transition process to judicial review. The Constitutional Court of South Africa, for example, ruled that the amnesties granted by the Truth and Reconciliation Commission were constitutional. For its part, the Federal Constitutional Court in Germany upheld the judgments in the *Mauerschützen* trials that had convicted those responsible for issuing and following shoot-to-kill orders at the Berlin Wall, rejecting the argument that the orders were legal under the law of the German Democratic Republic.

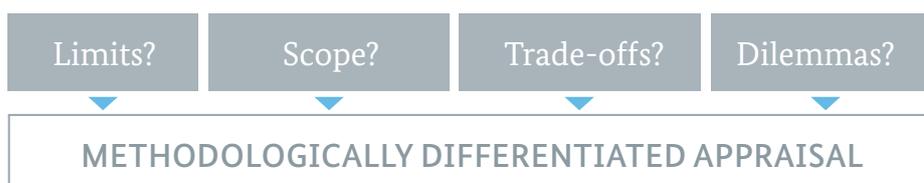
Summing-up: methodological considerations in conflicts of normative aims

It is neither possible nor necessary to take into account all of the norms that are relevant in the context of a peace process. Nevertheless, in order to make peace processes tenable in normative terms, it is necessary to undertake a **feasibility and tenability assessment** and to gauge what is useful in the given case. This is the best way to include the most relevant norms and their functions, such as ensuring procedural efficiency or safeguarding the rights of those affected by a conflict. The objective will often be a pragmatic appraisal of which divergences from normative requirements are acceptable and justifiable in light of their expected consequences.

Such an appraisal is most easily made if mediators begin by clarifying where the normative limits lie and where latitude is available, in other words which norms *must* be respected and where flexibility can be exercised because the adverse effects would be minimal or tolerable. The important thing is to examine the consequences for *all* stakeholders who will potentially be affected by the decision, namely the conflicting parties, the populations affected by the conflict, the mediators and those who give them their mandate, and possibly also the national and international community. With regard to the methodological and ethical procedural principles, for example, the genuine – that is to say unforced – consent of the parties to the process and agreement are a normative limit in terms of a minimum requirement if mediators want to ensure that the parties to the conflict will not scupper the negotiation and implementation of agreements. A different approach is needed **if conflicts of normative aims escalate into a dilemma** in which mediators are compelled to take simultaneous account of diverse norms and practical or political imperatives, for example inclusivity and efficiency, which – at least to all appearances – are mutually exclusive.

Summary conclusion on focus question V

The interaction between international, hybrid, regional and national courts is every bit as complex as it is crucial to the conduct of normatively sound peace mediation processes. The mere fact that peace agreements are open to judicial review alters and defines the process of negotiation between the parties and the mediator and implies first and foremost that the third party must possess accurate and normatively robust knowledge – particularly, but not only, as regards issues relating to criminal law.



Example: conflicts of norms in mediation practice as illustrated by the cases of Uganda and Sudan

One controversial example of the potential for conflict between norms of methodological strategy and legal norms of peace mediation are the warrants issued by the International Criminal Court (ICC) for the arrest of the President of Sudan, Omar al-Bashir, and leading members of the Ugandan rebel group, the Lord's Resistance Army (LRA). The arrest warrants issued in 2005 against leading LRA members made the group less willing to negotiate, as its leaders were insisting on impunity.

The Ugandan Government, which had previously referred the conflict with the LRA to the ICC, subsequently tried to have the arrest warrants suspended, but in vain. As in 2009 and again in 2010 in the case of the warrants issued for the arrest of Omar al-Bashir, the conflict of norms manifested itself in the fruitlessness of the arrest warrants for want of sufficient cooperation and enforcement mechanisms and in the jeopardising of the relevant parties' willingness to negotiate on a peaceful settlement to the conflict when confronted with the issue of the arrest warrants.

Prioritisation, sequencing and compartmentalisation: methods for dealing with dilemmas

Prioritisation means graded compliance with norms, so that the norm accorded the highest priority is applied in full, the norm ranking second is partially applied, but another norm, perhaps priority number three, is not applied. In the example referred to above, that

might mean exceptionally subordinating prosecution, in view of the slim prospects of enforcement, to the strategic imperative of maintaining the parties' willingness to negotiate.

This could also take the form of **sequencing**, in which norms that cannot be applied simultaneously are considered in order, although that order must be established in advance. It might, for example, be incremental sequencing ("easy to hard"), in which the simpler demands are addressed first, followed by those that are more difficult to meet, or else "agreement in principle" sequencing, in which an overarching agreement is sought at an early stage in the process, for instance by including "dealing with war crimes" as an item on the agenda, while the negotiation of details is left until a later, more strategically favourable time. Other options are to follow a "hard-to-easy" sequence, in which the most difficult hurdle is tackled first so that lesser challenges can then be more easily surmounted, or a committee sequence, in which parties to the conflict are put to work simultaneously in separate groups on normative requirements until their proposals have been adopted by the whole body ("nothing is agreed until everything is agreed").

Following an approach of **compartmentalisation**, roles and measures that cannot be performed and implemented simultaneously by a single actor without giving rise to conflict are distributed among various actors.

Trade-offs or conflicts between aims that pose dilemmas may be divided into **collisions within the same normative sphere**, such as competing international and national legal norms, and **collisions between norms from different spheres**, for example when ethical methods clash with legal or political priorities. So what methodological approach should one adopt when such conflicts occur? When dealing with the **first category**, that is, collisions within the same sphere, it is best to spell out and weigh up the implications of infringing each of the pertinent norms; the chosen path should simply be the behavioural variant with the lowest compliance costs. These compliance costs must be examined within the relevant sphere – the legal system, for example – but also beyond that sphere, where consideration must be given to factors such as the burdens on stakeholders and stakeholder groups and the political cost of a conscious breach of legal provisions. As for the **second category**, a conflict of norms from different spheres, the following two case studies are presented by way of illustration.

Case study 1: Collision of norms in talks with actors classified as terrorists

Core issue of the conflict of aims	Can or should a non-governmental organisation funded by the Federal Foreign Office provide a listed organisation with mediation support, such as negotiation training, in order to better qualify its leaders to take part in ceasefire talks?
Relevant norms	<p>Pro (methodological-ethical): The mediation principles of inclusivity, ownership and sustainability</p> <p>Contra (legal-ethical): The principle of not supporting “terrorist” organisations</p>
Aspects to be taken into account: implications, cost/harm and benefits of applying norms as opposed to overriding them	<p>Inclusivity and ownership</p> <ul style="list-style-type: none"> ○ Enhancement (v. stagnation) of negotiating skills, integration (v. continued exclusion) of the interests of a conflict party with great disruptive potential, minimisation of hostilities (v. risk of escalation) ○ Enhancing the status of the listed organisation (v. leaving it without any status) ○ Third-party focus on (v. distancing itself from) sensitive areas of criminal responsibility <p>Anti-terrorism laws</p> <ul style="list-style-type: none"> ○ Avoidance (v. risk) of criminal liability of the third party ○ Exclusion (v. risk) of enhancement of the group’s standing and instrumentalisation of the mediation process by the group ○ Dynamics: the more innocuous the support provided, the more ineffectual it is
Possible action (examples)	<ul style="list-style-type: none"> ○ Transparent provision of advice and guidance on measures by legal experts with a view to continuously examining and dispelling any accusations of aiding and abetting ○ Ensuring that potentially sensitive measures in terms of criminal law, such as funding, are implemented by cooperation partners to which the relevant legal provision does not apply ○ Ensuring maximum confidentiality and privacy of the talks ○ Support for mandating and training a non-listed person closely associated with the listed actor as a chief negotiator
Approaches to the balance of norms (examples)	<ul style="list-style-type: none"> » The principles of inclusivity and ownership may be taken into account as long as the risk of participants in the mediation process being involved in criminal activities is minimised by means of continuous legal advice and prudent risk-sharing (prioritisation) » Roles and action steps may be broadly spread out with transparent procedural stages (compartmentalisation) » The emphasis may be placed on the benefit to public morale derived from keeping talks going

As this first example shows, if a third party is aware that conflicts between legal, ethical and methodological aims are part and parcel of mediation at many stages in the process, it can tailor its approach accordingly.

The second case study extends this balancing matrix to include the (foreign) policy dimension and illustrates how sequencing and separation of roles may be an effective response to normative trade-offs and dilemmas.

Case study 2: Collision between political and legal norms in the case of an illegal annexation

Core issue of the conflict of aims	Can or should a mediator exclude a conflict party's violation of a fundamental principle of international law, such as territorial integrity, from the agenda of peace negotiations in order to preserve that party's willingness to negotiate?
Relevant norms	Pro (methodological, strategic and political): preserving willingness to negotiate Contra (legal-ethical): respect for international law and sovereignty; possibly omnipartiality
Aspects to be taken into account: implications, cost/harm and benefits of applying norms as opposed to overriding them	<p>Preservation of willingness to negotiate</p> <ul style="list-style-type: none"> ○ Ensuring (v. jeopardising) the party's willingness to continue negotiating and/or to reach an agreement ○ Impression of weakness (v. normative stringency/strength) on the part of the mediator through implicit unilateral concessions to the conflict party violating international law <p>Territorial integrity of states</p> <ul style="list-style-type: none"> ○ Maintenance (v. loss) of trust in the mediation process on the part of the actor affected by the violation of international law and/or awareness of the validity of legal limits on the part of the violator ○ Reinforcement (v. implicit undermining) of the international legal order
Possible action (examples)	<ul style="list-style-type: none"> ○ Mediation with transparent references to diverging legal positions between both parties to the conflict (this is an explicitly non-judgemental approach to mediation) ○ Exclusion of the issues relating to international law during the first stage (chronological sequencing) ○ Declaring recognition of the violation of international law to be a prerequisite for mediation ○ Delegation of the third-party role to an actor that is not bound by international law
Approaches to the balance of norms (examples)	<ul style="list-style-type: none"> » Engendering respect for both systems of norms, for example, by emphasising to the parties and the public at an early stage that the negotiations are not taking place in a legal vacuum » Allocation to various actors (mediator, ICC, UN) of the roles required for the purpose of penalising the violation of norms and possibly parallel initiation of legal investigation by the International Court of Justice (ICJ) (compartmentalisation) » Inclusion of the matter in interim agreements as an unresolved issue, possibly in the form of a memorandum, to counteract tacit recognition ("agreement in principle" sequencing)

Endnotes

- 1 In the interests of readability, only the masculine form is used in the original German version of this text. This form may, however, refer to both male and female individuals. This endnote relates only to the original German text.
- 2 Quote from an anonymous background interview on Hellmüller et al., *The Role of Norms in International Peace Mediation*, NOREF Policy Brief, May 2015.
- 3 The model forms the basis of a project conducted by swisspeace and ETH Zurich, as well as by the Norwegian Centre for Conflict Resolution (NOREF), and is presented here because relevant aspects of the current international discussion relate to this categorisation; see Hellmüller et al., 2015, p. 2.
- 4 Sources and background material on the focus questions can be found in the research studies conducted by Felix Würkert on the normative dimension of peace mediation; on the overall normative approach presented here, see Kraus, Kirchhoff and Würkert, *European University Viadrina*, 2018.
- 5 The UN Guidance for Effective Mediation, commissioned as an appendix to Resolution A/65/283 (22 June 2011), was adopted unanimously by the General Assembly. The guide was published as an annex to a report of 25 June 2012 by the UN Secretary-General (report A/66/811, entitled *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*).
- 6 OSCE, *Mediation and Dialogue Facilitation, Reference Guide*, which can be downloaded from <http://www.osce.org/secretariat/126646?download=true>.
- 7 The Mediation Support Network, comprising international organisations from the field of peace mediation, produced a commentary on the UN Guidance for Effective Mediation in an attempt to interpret the UN guidance document and to define which principles must be adhered to so that the procedural requirements for mediation are met. The commentary, Mediation Support Network (MSN), *Translating Mediation Guidance into Practice*, 2012, can be downloaded from http://peacemaker.un.org/sites/peacemaker.un.org/files/TranslatingMediationGuidanceIntoPractice_MSN_2012.pdf.
- 8 The following abbreviations are used in this section: ICCPR = International Covenant on Civil and Political Rights and ICESCR = International Covenant on Economic Social and Cultural Rights (1966).
- 9 The original version of the graphics, along with a commentary, can be found in Keno Leffmann, *Der völkerrechtliche Ordnungsrahmen der Mediation in internationalen Friedensprozessen* (European University Viadrina, 2016).
- 10 Teitel, *Transitional Justice*, 2009, p. 6.
- 11 <https://www.uni-marburg.de/icwc/forschung/transitionaljustice>; for an examination of the direct links between transitional justice and mediation, see Kirchhoff, 2008.
- 12 See also, for example, European Union External Action Service, "Transitional Justice in the Context of Peace Mediation", in *Factsheet – EEAS Mediation Support Project – Knowledge Product* (European Union, 2012).
- 13 See, for instance, Council of the European Union, *Concept on Strengthening EU Mediation and Dialogue Capacities*, 2009.

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