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# Towards a Lasting Peace: Positive Initiatives to Better Protect the Rights of Minorities

Invited Recommendations and Comments  
Submitted by  
Public International Law & Policy Group

UN FORUM ON  
MINORITY ISSUES 2021

Dr. Paul R. Williams  
Isabela Karibjanian



PEACE NEGOTIATIONS  
POST-CONFLICT CONSTITUTIONS  
WAR CRIMES PROSECUTION

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## **About PILPG**

The Public International Law & Policy Group is a global *pro bono* law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution.

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## **About the Authors**

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## **Introduction**

Nearly all contemporary conflicts are driven in part by the marginalization of particular groups. Political marginalization often amplifies the consequences of economic and cultural marginalization. When considering how to forge a durable peace in the aftermath of a conflict, parties to peace negotiations must consider the importance of including protections for minority rights in the final agreement, amended constitutions, or implementing legislation. The international community must not be lulled into adopting mechanisms which create dysfunction as a result of trying to protect minority rights.

This commentary recommends several discrete best practices related to power-sharing, policies of non-discrimination, and independent commissions. These recommendations arise from a comparative state practice analysis for how to forge durable peace, reduce conflict recurrence, and protect the human rights of minority groups following a conflict.

## **Power-Sharing**

Over 80 percent of modern intrastate peace agreements include arrangements to share power among various political constituencies.<sup>1</sup> These arrangements include both horizontal power-sharing and vertical power-sharing. In some instances, the parties to a peace process negotiate a balanced and rational set of arrangements for power-sharing that leads to a durable peace. In other instances, the parties negotiate an array of disconnected or inconsistent arrangements that leads to political dysfunction and gridlock, or a return to conflict.

Power-sharing is often a tempting panacea to some of the most prominent underlying causes of conflict, including unequal access to resources, inadequate political representation, and social marginalization. Indeed, the devolution of power increases the likelihood that the primary parties to the conflict are absorbed into the post-conflict governance structure and thereby generate an interest in the success of those governance structures.<sup>2</sup>

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<sup>1</sup> Anna Jarstad and Desirée Nilsson, *From Words to Deeds: The Implementation of Power-Sharing Pacts in Peace Accords*, 25 CONFLICT MANAGEMENT AND PEACE SCIENCE 206, 215 (2008).

<sup>2</sup> Melani Cammett and Edmund Malesky, *Power Sharing in Postconflict Societies: Implications for Peace and Governance*, 56 JOURNAL OF CONFLICT RESOLUTION 982, 983 (2012).

Yet, a poorly conceived power-sharing arrangement may paralyze the national government, fail to meet the reasonable expectations of the constituents of substate entities, or even embolden substate entities to seek external self-determination. If the interests of negotiating parties are not effectively harmonized, and the agreement not carefully crafted, the hoped-for benefits of a power-sharing arrangement may in fact increase the likelihood of a return to armed conflict.

### *Vertical Power-Sharing*

Vertical power-sharing is intended to empower previously marginalized political constituencies at the local level. The devolution of political power to the local level is expected to build the foundation for a durable peace by shielding local constituencies from the abuse of political power by political constituencies entrenched at the national level.

A well-crafted vertical power-sharing plan enhances the durability of a peace agreement in three primary ways. First, vertical power-sharing increases “opportunities for citizen participation and ownership” of political processes, which is particularly important in post-conflict states.<sup>3</sup> Second, vertical power-sharing minimizes the risks of tension and conflict between groups in ethnically or religiously heterogeneous societies by allowing previously marginalized constituencies to attain internal self-determination and control their political future on matters of direct local importance, such as use of their traditional language, cultural preservation, education, and the exploitation and management of natural resources. Third, vertical power-sharing can also address certain root causes of conflict, such as tensions relating to control over revenue flow or the historic exclusion of certain groups from decision-making positions, thereby quelling calls for external self-determination and secession.

Vertical power-sharing arrangements seek to accomplish these objectives by devolving various powers from the national government to substate levels of government, such as the regional, provincial, or municipal levels.<sup>4</sup> These powers often encompass political, administrative, and/or fiscal powers and may be

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<sup>3</sup> Joseph Siegle and Patrick O’Mahony, *Assessing the Merits of Decentralization as a Conflict Mitigation Strategy*, USAID OFFICE OF DEMOCRACY AND GOVERNANCE, i (2006).

<sup>4</sup> Eghosa E. Osaghae, *A Reassessment of Federalism as a Degree of Decentralization*, 20(1) *PUBLIUS* 83 (1990).



devolved in a symmetrical or asymmetrical fashion. In order to create a system for vertical power-sharing, it is often necessary to redesign some elements of a state's structure, which may even include the complete transformation from a unitary to a federal state.

If not carefully crafted with the aim of forging a durable peace, vertical power-sharing may be used in negotiations as a disingenuous means to retain disproportionate access to political power and economic resources.

Further, post-conflict decentralization often takes a problematic form: an inversion of the process by which many "model" decentralized states were developed. Many of these "model" states did not devolve power from a highly centralized state down to substate entities, such as provinces or regions, but, rather, coalesced pre-existing entities into a federal state. Over-reliance on these "model" case studies can even risk misleading post-conflict states into believing that federalism is an instant remedy for corruption, a lack of democratic norms, inequitable resource allocation, and the abuse of power by entrenched elites.

Additionally, once the negotiating parties achieve agreement on vertical power-sharing arrangements, they may agree to a process or timeline that the state and/or the parties do not have the capacity to implement. If minority representatives at the local level do not have the requisite fiscal and administrative power and resources to execute their duties, decentralization is likely to fail or encounter significant difficulties.<sup>5</sup> Similarly, if decentralization is conducted in a piecemeal fashion, by devolving political authorities without devolving at least a minimum threshold of administrative and fiscal authorities, local governments and minority groups may be unable to effectively exercise the political powers devolved to them. In effect, this can lead to disenfranchisement.

Vertical power-sharing can also be used as a simple bargaining chip to entice the parties to agree to end the violence, which differs from an intentionally sequenced and detailed process. When addressed as part of a peace process, the negotiating parties may be forced to determine complex vertical power-sharing details in a chaotic, politically charged, and unplanned process in an effort to appease certain actors or interests. When implemented in a rushed or unsystematic fashion, vertical power-sharing can generate new problems within the very governing structure it was attempting to reform, or even collapse it entirely.<sup>6</sup>

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<sup>5</sup> James Manor, *The Political Economy of Democratic Decentralization*, THE WORLD BANK, 10 (1999).

<sup>6</sup> See Joseph Siegle and Patrick O'Mahony, *Assessing the Merits of Decentralization as a Conflict Mitigation Strategy*, USAID OFFICE OF DEMOCRACY AND GOVERNANCE (2006).

Macedonia's 2001 Lake Ohrid Agreement created a devolved unitary state structure following the conflict between ethnic Albanians, who fought for greater rights and representation, and Slavic Macedonians. Macedonia's ethnic Albanian population is located primarily in the north and west of Macedonia close to the Albanian border, and concentrated in the areas surrounding the capital of Skopje and in the city of Tetovo.<sup>7</sup> Given the geographic concentration of the population, an Albanian territory within Macedonia would have been a prime candidate for external self-determination. In resolving the conflict, the parties decided that rather than set a path of secession for the Macedonian Albanians, they would instead agree upon substantial devolution of legislative and executive power, and expanding local political, administrative, and fiscal decision-making.<sup>8</sup>

The parties to the Ohrid negotiations adopted a three-pronged approach to modifying the state structure for Macedonia. First, they explicitly reaffirmed the unitary character of the Macedonian state. They then committed to preserving the multiethnic character of Macedonia and further committed to taking steps to better reflect that character in the public life of Macedonia. Finally, they agreed to undertake the enhanced "development of local self-government in order to encourage the participation of citizens in democratic life, and promote the respect for the identity of communities."<sup>9</sup>

The parties coupled this approach with an explicit affirmation of the principle of subsidiarity as applied in the European Union, which essentially provides that decision-making shall occur at the most effective level of government, with a preference for the local level. The parties also agreed to modify municipal boundaries to ensure the fair and equitable political organization and representation of the minority Albanian community, as well as other minority communities. Notably, the parties devolved executive and legislative power, and decision-making authority, directly from the national government to municipal governments.

The parties then coupled the modification of the state structure to a devolved unitary state with the adoption of select horizontal power-sharing mechanisms, designed to further integrate ethnic minorities into the political process. For

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<sup>7</sup> *Census of Population, Households and Dwellings in the Republic of Macedonia, 2002 Final Data*, REPUBLIC OF MACEDONIA STATE STATISTICAL OFFICE, 34, 35 (2005).

<sup>8</sup> Marija Aleksovska, *Trust in Changing Institutions: The Ohrid Framework Agreement and Institutional Trust in Macedonia*, 43(1) EAST EUROPEAN QUARTERLY, 55, 57, 84 (2015).

<sup>9</sup> *Ohrid Framework Agreement* art. 1.5 (Ohrid, 2001).

instance, the agreement stipulated that a double majority was required for votes on certain issue areas, such as education, which gave minority groups the power to block legislation when they would otherwise be outvoted in a simple majoritarian system.<sup>10</sup>

The Ohrid Agreement also provided that one-third of the judges on the constitutional court would be selected by the representatives of those not in the majority, meaning those representing the ethnic Albanian population. The agreement itself reflected this moderate approach to redesigning the state structure. It consisted of a few pages of principles followed by precisely drafted constitutional amendments. The agreement also provided for the future adoption of specific laws to accomplish the agreed principles. These laws were to be adopted using “majority of the minority” voting procedures as an additional form of power-sharing.<sup>11</sup>

The Ohrid Agreement sought to develop innovative ways to share political and administrative authority on sensitive security issues, such as control of the local police forces. For instance, it specified a constitutional amendment empowering municipal councils to select local heads of police, drawn from lists of candidates proposed by the Ministry of Interior.<sup>12</sup> Though the national government would propose the lists, it would ultimately be the municipal-level government that selected its own local police chief. This enabled Macedonia to maintain its unitary state structure, but to provide the municipalities with a level of confidence in the operation of the police.

Another component of vertical power-sharing set forth by the Ohrid was fiscal devolution. Yet, Macedonia experienced a number of unforeseen complications with its approach to fiscal devolution. Since the implementation of the Ohrid Agreement, rural municipalities have struggled to generate enough funding to meet the needs of their citizens, likely due to smaller populations and a broader distribution of financial resources. For instance, in 2012 rural municipalities in Macedonia generated only 13.1 percent of local revenues while urban areas generated the remaining 86.9 percent.<sup>13</sup> As a result of differences in the quantity of revenue collected following decentralization, rural local

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<sup>10</sup> Cvete Koneska, *Veto, Ethnic Bidding, Decentralisation: Post-Conflict Education in Macedonia* 11(4) JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE 28, 33 (2012).

<sup>11</sup> *Ohrid Framework Agreement* Annex B(7), Annex C(6.1) (Ohrid, 2001).

<sup>12</sup> *Ohrid Framework Agreement* § 3, art. 3.1 (Ohrid, 2001).

<sup>13</sup> *Ohrid Framework Agreement: Review on Social Cohesion*, EUROPEAN INSTITUTE OF PEACE, 15 (2015).

governments were able to deliver fewer public services to their constituents than urban local governments.<sup>14</sup>

Similarly, although capital grants were allocated to Macedonia's municipalities to supplement their revenue, the municipalities needed to apply for these resources, and some municipalities, particularly those that are rural, had lesser capacities to develop successful applications.<sup>15</sup> Combined with the limited tax revenue base, this puts the rural units of municipal governance at a disadvantage as it provides them with fewer resources to successfully govern.

The case of Yemen provides additional lessons related to the attempted devolution of power among minority groups to create a durable peace. Following a popular uprising and civil war in Yemen, the Gulf Cooperation Council, comprising Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates, put forward a peace plan which outlined a process for a transitional government and a new constitution for Yemen. This process included several months for a national dialogue conference, followed by a constitution-drafting process, a constitutional referendum, and elections.<sup>16</sup> The process was designed to balance competing desires from southern secessionists; northern Houthi movement rebels, a group comprised of a minority Zaydi Shia population; and a national government wishing to retain a unified state. As a reaction to the highly corrupt and highly centralized state structure of Yemen, the parties engaged in the peace process sought to transform Yemen into a federal state.

There were several key dimensions of the resulting Yemeni plan for a new federal state. First, the parties agreed on the need to create a new level of political entity, the regions, to which most of the legislative and executive power would be devolved. The territorial delineation of the regions was hotly contested by the members of the National Dialogue and they were unable to agree upon either the number of regions, or their territorial scope. The tension was primarily, though not exclusively, driven by the desire of the south to regain much of the political power it had lost when the independent state of South Yemen<sup>17</sup> merged with North Yemen to create the current Republic of Yemen in 1990. Given the inability of the parties to reach agreement during the National Dialogue, they agreed that the president of Yemen, who was also the president of the National Dialogue, would create and

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<sup>14</sup> *Ohrid Framework Agreement: Review on Social Cohesion*, EUROPEAN INSTITUTE OF PEACE, 16 (2015).

<sup>15</sup> *Ohrid Framework Agreement: Review on Social Cohesion*, EUROPEAN INSTITUTE OF PEACE, 15 (2015).

<sup>16</sup> George Anderson, *Yemen's Failed Constitutional Transition: 2011-2015*, 41 FORUM OF FEDERATIONS OCCASIONAL PAPER SERIES, 5-6 (2019).

<sup>17</sup> Officially known as the People's Democratic Republic of Yemen.

chair a committee to make a binding determination as to the number and territorial scope of the regions.

Second, substantial legislative and executive power would be devolved to the regions and *wilayas*, with the federal powers being limited in a significant way to establishing nationwide policies and standards. The regions were also entitled to adopt their own constitutions.

Third, the parties agreed to the creation of a hybrid federal judiciary with a path of district level courts, *wilaya* appellate courts, and newly created regional supreme courts, coupled with a federal supreme court and a national constitutional court. The regional courts' decisions were to be final, unless the matter was specifically within the competence of the Federal Supreme Court. There appeared to be no provision for lower federal courts.

Fourth, in order to create parity between groups in the north and the south, and to appease the interests of the established political and economic elite, the constitution granted the cities of Sana'a and Aden status comparable to the regions. Sana'a would serve as a federal city not subject to any regional authorities. The city of Aden would operate autonomous legislative and executive authorities within, but not subject to the jurisdiction of, the region of Aden.<sup>18</sup>

As the drafting committee continued to work on the constitution, Yemen's economy, as well as its security situation, rapidly deteriorated.<sup>19</sup> Negotiations reached a tipping point when the special committee created by the president to determine the boundaries of the regions released its conclusions. The committee created two regions in the south, which reduced the potential for future secession. The committee also created a region, associated primarily with Houthi territory, that had limited access to important economic assets in the form of oil and coastal resources.<sup>20</sup> The party of former president Saleh also rejected the six-region solution, arguing instead for the creation of more numerous and smaller governorates, which would be less likely to seek self-determination.

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<sup>18</sup> Yemen Draft Constitution Ch. III § IV, arts. 264, 273 (2015).

<sup>19</sup> George Anderson, *Yemen's Failed Constitutional Transition: 2011-2015*, 41 FORUM OF FEDERATIONS OCCASIONAL PAPER SERIES, 18 (2019).

<sup>20</sup> See Paul R. Williams, Tiffany Sommadossi, and Ayat Mujais, *A Legal Perspective on Yemen's Attempted Transition from a Unitary to a Federal System of Government* 33(84) UTRECHT JOURNAL OF INTERNATIONAL AND EUROPEAN LAW, 4-22 (2017).

Two days after the details of the constitution were leaked, the Houthis rejected the proposed federalist structure,<sup>21</sup> and abducted the secretary of the Constitution Drafting Committee, who was on his way to deliver the draft for approval to the interim parliament.<sup>22</sup> Yemen then slipped into a multidimensional armed conflict characterized by deep political dysfunction and humanitarian catastrophe.<sup>23</sup>

In the case of Bosnia-Herzegovina, the parties created an essentially *de facto* confederal state consisting of the two ethno-territorial entities, the Republika Srpska and the Federation of Bosnia-Herzegovina, which itself consisted of ten autonomous cantons, crafted largely along the lines of ethnic identity.<sup>24</sup>

Prior to the Yugoslav conflict, Bosnia-Herzegovina was a multiethnic republic within Yugoslavia. During the course of the conflict, Bosnia became essentially divided into two territories. One of these territories was the Republika Srpska, which, through a campaign of genocide and crimes against humanity, ethnically cleansed Bosniaks and Croats from that territory.<sup>25</sup> The second territory was the Federation of Bosnia-Herzegovina, which consisted primarily, but not exclusively, of Bosniaks and Croats.

During the Dayton peace negotiations, the parties agreed to this bi-entity arrangement under immense pressure. The borders of the two entities essentially reflected the battle lines at the time of the negotiations, and as such ratified the results of ethnic cleansing. The peace agreement delegated substantial powers to the two entities, with very limited powers remaining with the central state.

At Dayton, the Republika Srpska, represented primarily by Slobodan Milošević, the president of neighboring Serbia, argued for this two-entity solution to ensure the ethnic Serbian population would have nearly exclusive political and economic control over what happened within its territory, and that it would preserve the option for that entity to someday separate from Bosnia and join

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<sup>21</sup> Mareike Transfeld, *The Failure of the Transitional Peace Process in Yemen*, GERMAN INSTITUTE FOR INTERNATIONAL AND SECURITY AFFAIRS 1 (2015).

<sup>22</sup> Mohammed Ghobari and Agnus McDowall, *Houthis Abduct Yemeni Official amid Wrangling over Constitution*, THOMSON REUTERS AFRICA, Jan. 17, 2015.

<sup>23</sup> Mareike Transfeld, *The Failure of the Transitional Peace Process in Yemen*, GERMAN INSTITUTE FOR INTERNATIONAL AND SECURITY AFFAIRS 1 (2015).

<sup>24</sup> *The General Framework for Peace in Bosnia and Herzegovina Annex 2* (Dayton, 1995).

<sup>25</sup> See DCI Interagency Balkan Task Force, *Bosnia: Serb Ethnic Cleansing*, CENTRAL INTELLIGENCE AGENCY (Dec. 1994).

Serbia.<sup>26</sup> In fact, the Dayton Accords specifically provided for the two entities to maintain “parallel special relationships” with Bosnia’s neighboring states.

The Croatian population of Bosnia, represented in part by Franjo Tudjman, the president of neighboring Croatia, argued for the two-entity approach to protect the political gains of the substantially smaller Croatian population arising from the earlier creation of the Federation of Bosnia and Herzegovina.

The Bosniaks, the majority population in Bosnia, represented by President Alija Izetbegović, were constrained by the need to maintain the Federation in order to preserve their alliance with Croatia, and the leverage this position provided the Republika Srpska to argue for parity. President Izetbegović therefore sought to limit the devolution of authority to the two entities and maintain a functional national government, with rather limited success.

During the early stages of the war, the Srpska entity established a government structure with a president, prime minister, unicameral national assembly, and judiciary. The Federation was created in the midst of the Bosnian war by the multi-part Washington Agreement in an effort to maintain the fragile and intermittent alliance between the Bosnian and Croatian forces.<sup>27</sup>

The first part of the agreement, the Framework Agreement for the Federation, provided for a government structure of a bicameral parliament with a house of representatives (lower house) and a house of peoples (upper house). The framework also provided for a president and vice president, who alternate positions every year during a four-year term, a prime minister and deputy prime minister each from a different constituent people, and a judiciary. It further provided for the creation of ten cantons, whose boundaries were largely determined along postwar ethnic lines.

Each canton was apportioned a president, cantonal legislature, and judiciary. The cantons were also entitled to establish cantonal councils among cantons that share the same Bosniak-majority or Croat-majority.

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<sup>26</sup> In February 2020, Milorad Dodik, the Serb member of Bosnia’s joint presidency, repeatedly called for a referendum on Republika Srpska independence. Dodik had previously called for an independence referendum and submitted a formal referendum proposal to the Republika Srpska Assembly in April 2011. Dodik withdrew the referendum in exchange for a “Structured Dialogue on Justice” among the institutions of Bosnia and the EU, which would discuss the grievances of Republika Srpska authorities toward the Bosnian judiciary. *See Dodik’s Repeated Calls for Republika Srpska Session Raise Alarm*, AL JAZEERA (Feb. 18, 2020) and Eldin Hadzovic and Drazen Remikovic, *Bosnia: Dodik Agrees to Drop Disputed Referendum*, BALKANINSIGHT (May 13, 2011).

<sup>27</sup> *Washington Agreement* (Washington, DC, 1994).

As a consequence of the horizontal and vertical power-sharing systems implemented in the peace process, Bosnia's national government is now often deadlocked since each of its entities, which have significant political authority, champions competing priorities based on ethnic policies.<sup>28</sup> Further, as political authority is greatly devolved, there is often confusion over which entities are empowered to make which decisions, compounded by a lack of coordination between a multitude of governing entities exercising devolved powers. This contributed to corruption, dysfunction, and the high cost of government.

### *Horizontal Power-Sharing*

Horizontal power-sharing is intended to facilitate the participation of several political constituencies in the decision-making process at the national, and sometimes regional, level. Diverse political participation in a post-conflict state is expected both to constrain the ability of any one political constituency to monopolize state power and to allow previously marginalized minority constituencies to attain and sustain greater access to political power, and accompanying access to economic resources.

Horizontal power-sharing arrangements at the national and regional level nearly always address power-sharing in the executive, legislative, and judicial branches of government. These arrangements may include co-presidents or co-prime ministers; allocation of the position of "first" vice president to a specific constituency; a rotating presidency; the creation of a bicameral legislature with membership in the second chamber based on membership in a designated political constituency; specific set-asides for guaranteed legislative representation; special executive or legislative veto privileges for a minority constituency; and quotas for membership on the constitutional court.<sup>29</sup>

In Yemen, the proposed federal structure provided for substantial asymmetrical rights for the southern provinces. Specifically, they were entitled to an initial 40 percent representation in the House of Representatives. They were also entitled to exercise a vital interest veto in the Federal Council (through the opposition of two-thirds of the representatives of the southern regions). The vital

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<sup>28</sup> James O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in *FRAMING THE STATE IN TIMES OF TRANSITION* 347 (Laurel E. Miller with Louis Aucoin, eds., 2010).

<sup>29</sup> See Benjamin A.T. Graham, Michael K. Miller, and Kaare W. Strøm, *Powersharing and Democratic Survival*, 141 *HIS Political Science Series Working Papers* 6 (2016).



interest veto was applicable to matters such as modification of electoral constituencies, the division of revenue from natural resources, the shape of the federal state, the delineation of boundary regions, and the special status of Aden, and any constitutional amendments that might impact the representation of the south.

The draft constitution created a bicameral legislative body with a House of Representatives elected on a nationwide basis, and a Federal Council with members elected from within the regions and the cities of Sana'a and Aden. All legislation would require an affirmative vote in both bodies. The parties designed the Federal Council to play a prominent role in ensuring adequate representation of the interests of the regions in federal bodies, as well as independent institutions and specialized courts; the confirmation of cabinet appointments and senior civil and military positions; and serving as the forum for the southern provinces to exercise their vital interest veto.

In the case of Bosnia-Herzegovina, the Dayton Accords paired a confederal framework for state structure with a complex system of horizontal power-sharing. This system divides power between entities and according to ethnicity through ethnic quotas within the House of Peoples, House of Representatives, and within the state ministries.<sup>30</sup> A primary component of this horizontal power-sharing system is Bosnia's rotating presidency, an arrangement by which a Bosniak and a Croat are elected from the Federation and a Serb from the Republika Srpska. Whichever president receives a plurality of the vote becomes the chair. The position then rotates every six months.

Additionally, the Dayton Accords provided for a vital interest veto. If a majority of the members of an ethnic group declares a decision "destructive of a vital interest," the chair of the House of Peoples must create a joint commission, with one delegate from each of the three ethnic groups to rule on the matter. A similar veto exists for presidency decisions.<sup>31</sup> This system not only excludes members of the smaller minority groups from holding public office, but also entrenches ethnic-based political decision-making.<sup>32</sup>

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<sup>30</sup> Roland Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21(2) YALE JOURNAL OF INTERNATIONAL LAW 459, 463-464 (1996).

<sup>31</sup> *The General Framework Agreement for Peace in Bosnia and Herzegovina* Annex 4, art. IV(11e, f); art. V(7d) (Dayton, 1995).

<sup>32</sup> Roland Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21(2) YALE JOURNAL OF INTERNATIONAL LAW 459, 463-464 (1996).

The devolution of political authority to so many substate entities in Bosnia created gridlock, confusion, and dysfunction.<sup>33</sup> Though Bosnia has a population of under 4 million, it has 5 presidents, 4 vice presidents, 13 prime ministers, 14 parliaments, 147 ministers, and 700 members of parliament.<sup>34</sup> In the early years of implementation, Bosnia spent nearly 40 percent of its annual GDP to support these structures. Although the state has not suffered a return to conflict under this arrangement, many analysts emphasize that this decentralization framework is unsustainable.<sup>35</sup>

### ***Recommendations***

The case of Macedonia's Ohrid Agreement provides many best practices for negotiating parties seeking to integrate minority protections into a peace agreement.

- Consider implementing capacity when designing structural reforms related to power-sharing and minority rights. Meaningful strategic interventions and modifications to existing structures may contribute more to a durable peace than a complete overhaul to the state structure or governing system.
- Preserving a unitary system of government, but devolving select powers to previously mistreated minority groups can quell secessionist desires and contribute to a project of national unity following conflict.
- When considering a veto power for minority groups, be deliberate with its design and scope to avoid unintended governing dysfunction.

The Yemen case study, though unsuccessful, provides key lessons.

- Creating a highly detailed blueprint for the transition from a unitary to a federal state, though potentially time consuming, ensures thoughtful transition planning that anticipates potential roadblocks to the implementation of a newly created post-conflict federal state.

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<sup>33</sup> *Bosnia and Herzegovina: Background and U.S. Policy* CONGRESSIONAL RESEARCH SERVICE 7 (Apr. 15, 2019).

<sup>34</sup> ConstitutionNet, *Constitutional History of Bosnia and Herzegovina*, INTERNATIONAL IDEA.

<sup>35</sup> *Bosnia and Herzegovina: Background and U.S. Policy* CONGRESSIONAL RESEARCH SERVICE 7 (Apr. 15, 2019).

- No matter how detailed a transition plan may be, pursuing dramatic and rapid changes in state structure can create unmendable rifts between negotiating parties, and potentially result in a return to conflict.
- Plan for a realistic timeline for large transitions. Unrealistically short timelines can lead to inevitable delays as the parties attempt to engage in a multilayered decentralization process, potentially while also implementing a number of other post-conflict mechanisms provided for in a peace agreement.

Though the Dayton Accords brought an end to a deadly conflict, the agreement set the stage for decades of dysfunctional governing, and further atrocities committed in Kosovo. The Dayton Accords provide many lessons for peace agreements seeking to incorporate robust provisions related to minority rights and power-sharing.

- When power-sharing is implemented in a rushed manner, it can create new problems within the very governing structures it sought to reform. The realities of the postconflict context and the capacities of existing institutions can lead to debilitating dysfunction.
- Consider the complexities of confederal systems and the feasibility of implementation in a post-conflict context, including the costs of implementing new governing structures.

### **Non-Discrimination Policies**

States with minority populations often incorporate fundamental minority rights provisions into peace agreements and post-conflict constitutions. Minority rights provisions in peace agreements generally address root causes of conflict and are commonly incorporated into a state's constitution or implementing legislation. By including minority rights protections in their constitutions, states help protect against marginalization and disenfranchisement for minority groups. Protections for minority rights also promote minority participation in the social, cultural, political, and economic aspects of society.

Human rights can be individually enumerated within the language of a post-conflict constitution or peace agreement to avoid ambiguity and include particular rights specific to the context of the conflict. This approach enables the parties to the agreement to set their own specific terms with regard to the protection and insurance of human rights and fundamental freedoms.

South Africa's 1993 interim constitution, which marked the end of apartheid and a transition to a democratic South Africa, included a chapter on fundamental rights. This chapter enshrined principles of equality within its twenty-nine sections, detailing such rights and freedoms as to life, dignity, assembly, association, movement, political participation, justice, economic activity, property, and language.<sup>36</sup> This extensive section in the interim constitution sought fundamentally to distinguish the future of South Africa from its apartheid past, which institutionalized racial discrimination and denied the majority of its population human rights. The drafters of the interim constitution intended to ensure the protection of the rights of all South Africans, including minority populations, through the adoption of these rights and freedoms.

South Africa's 1996 constitution further formalized these human rights in a bill of rights, described in the text of the constitution as "a cornerstone of democracy in South Africa."<sup>37</sup> These rights included: equality before the law; freedom of religion, belief and opinion; freedom of assembly; right to political participation; and access to the justice system.<sup>38</sup> From an economic standpoint, the bill of rights included in the 1996 constitution also included freedom of trade, occupation and profession; rights to fair labor practices; rights to organize in unions; and rights to collective bargaining.<sup>39</sup>

Alternatively, some parties choose to cement to human rights and minority protections in post-conflict constitutions by drawing from international treaties and covenants.

During the condensed, urgent drafting timeline of the Dayton Accords, negotiators decided to include annexes on several human rights issues, including the rights of refugees and the displaced.<sup>40</sup> Annex 6 of the Dayton Accords stipulated that the parties would ensure the internationally recognized human rights

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<sup>36</sup> SOUTH AFRICA CONST. Ch. 3 (1993).

<sup>37</sup> SOUTH AFRICA CONST. Ch. 2 §7(1) (1993).

<sup>38</sup> SOUTH AFRICA CONST. Ch. 2 (1996).

<sup>39</sup> SOUTH AFRICA CONST. Ch. 2(23) (1996).

<sup>40</sup> James O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in FRAMING THE STATE IN TIMES OF TRANSITION 338 (Laurel E. Miller with Louis Aucoin, eds., 2010).

and fundamental freedoms of all within their jurisdiction, listing sixteen international human rights charters and conventions in an appendix to the annex.<sup>41</sup> Notably, given the conflict context, the Dayton Peace Accords included the freedom of religion among the list of protected rights and freedoms.<sup>42</sup>

The issue with implementing this sweeping vision of human rights in Bosnia is the degree to which Bosnian citizens were and are aware of their actual rights. For Bosnia to affirm a suite of treaties in its governing document demonstrates a commitment to human rights, but without enumerating those rights, the populace was less familiar with the precise content of those rights.

Negotiating parties may also choose to incorporate linguistic rights into the peace agreement.

In the Ohrid Agreement, negotiators decided against expressly recognizing Albanian as a second official language. Instead, the Agreement provided that any language spoken by at least 20 percent of Macedonia's population would be an official language.<sup>43</sup> Approximately 25 percent of Macedonia's population is ethnically Albanian, ensuring that Albanian linguistic and cultural rights were protected under the Ohrid Agreement.

South Africa's post-conflict constitution confers official status to 11 of the 25 minority languages spoken in South Africa, including Zulu, the state's most common language.<sup>44</sup> Moreover, the constitution encourages the state to promote the use of especially marginalized languages.<sup>45</sup>

Peace agreements and constitutions that make provisions for specific minority or ethnic groups can prevent members of other minority groups from utilizing the same protections. For this reason, some states name specific groups, but also indicate that these rights can also be claimed by undesignated minority groups. The Iraqi Constitution, for instance, names certain minority groups, including the Armenian, Assyrians, Chaldeans, and Turkomen, as having specific political, cultural, and educational rights, but also indicates these rights extend to the state's "various nationalities."<sup>46</sup>

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<sup>41</sup> *The General Framework for Peace in Bosnia and Herzegovina* Annex 6, Appendix (Dayton, 1995).

<sup>42</sup> *The General Framework for Peace in Bosnia and Herzegovina* Annex 6, art. I(7) (Dayton, 1995).

<sup>43</sup> *The Ohrid Framework Agreement* Annex A (Ohrid, 2001).

<sup>44</sup> *South Africa* (2012), CIA World Factbook.

<sup>45</sup> SOUTH AFRICA CONST. art 6(2) (1996).

<sup>46</sup> The Constitution of Iraq guarantees, "administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians, and all other constituents," and indicates that this shall be regulated by law. IRAQ CONST. art. 125 (2005).

## ***Recommendations***

- Consider enumerating specific minority rights or protections in peace agreements. Though listing a series of agreements to which the signatories of peace agreements will be bound upon the signing of the agreement is useful for ensuring breadth of protections, it may be difficult to track implementation or compliance of provisions.
- If parties to a peace negotiation wish to reference a series of agreements rather than enumerating specific rights, consider implementing complementary public information campaigns or an additional annex enumerating the rights contained within those agreements, to raise public awareness of their rights.
- Remain cautious when opting for more vague language related to the protection of minority groups. While it could provide for an advantageous solution among negotiating parties, implementation may not achieve the fullest protection of minority rights. At the same time, listing specific minority groups who will receive protections creates an opportunity for other groups to be excluded.

## **Independent Commissions**

In addition to mechanisms in the executive or legislative branch, negotiators may provide support for cultural, ethnic, or religious minorities by creating an independent Human Rights Commission or Ombudsperson in the peace agreement. These bodies can provide additional avenues through which these minorities can advocate for their interests or report allegations of discrimination.

South Africa's post-conflict constitution of 1996 establishes the Commission for Gender Equality of South Africa with a broad mandate to promote, protect, develop and attain gender equality.<sup>47</sup> The constitution also provides substantial independence for the Commission and mandates that other government agencies

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<sup>47</sup> SOUTH AFRICA CONST. art. 187 (1996).

assist it in its activities.<sup>48</sup> The Commission's powers are tailored to investigation and reporting,<sup>49</sup> specifically focused on rural Black women and the practical difficulties they face.<sup>50</sup> Due to the Commission's sweeping mandate, as well as the complicated interplay of race, class, and gender in South Africa, the Commission has struggled to define its role.<sup>51</sup> The dispute over the Commission's mandate made it difficult for the commissioners to agree on which strategies and policy objectives to pursue.<sup>52</sup>

Though the Commission's independence is provided for in the constitution, budgetary constraints and waning political support leave the Commission unable to tackle broader, structural, cultural, and societal causes of gender inequality, effectively compromising the Commission's independence.<sup>53</sup> Initially, the Commission received funding from international donors, but now the Commission is wholly dependent on the Government of South Africa for its entire budget.<sup>54</sup> Thus, to maintain its funding, the Commission has to structure its activities in such a way as to maintain political support.<sup>55</sup>

Negotiating parties may also decide to create a committee within the state's legislature to address minority rights and interests. Macedonia's Ohrid Framework Agreement calls for the country's unicameral National Assembly to elect an internal committee composed of members of the Assembly who belong to several ethnic groups. This committee would consider issues of inter-community relations and make proposals for the resolution of disputes.<sup>56</sup>

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<sup>48</sup> SOUTH AFRICA CONST. art. 181 (1996).

<sup>49</sup> SOUTH AFRICA CONST. art. 187 (1996).

<sup>50</sup> Sheila Meintjes, *Gender Equality by Design: The Case of South Africa's Commission on Gender Equality*, 32 POLITIKON 259, 267 (Nov. 2005).

<sup>51</sup> Gay W. Seidman, *Strategic Challenges to Gender Inequality: The South African Gender Commission*, 2(2) ETHNOGRAPHY 219, 221 (2001).

<sup>52</sup> Gay W. Seidman, *Institutional Dilemmas: Representation Versus Mobilization in the South African Gender Commission*, 29 FEMINIST STUDIES 541, 548 (2003); Sheila Meintjes, *Gender Equality by Design: The Case of South Africa's Commission on Gender Equality*, 32 POLITIKON 259, 270 (2005).

<sup>53</sup> Sheila Meintjes, *Gender Equality by Design: The Case of South Africa's Commission on Gender Equality*, 32 POLITIKON 259, 267 (Nov. 2005). Saras Jagwanth and Christina Murray, *Ten Years of Transformation: How Has Gender Equality in South Africa Fared?*, 14 CANADIAN JOURNAL OF WOMEN AND THE LAW 257, 267 (2002).

<sup>54</sup> Gay W. Seidman, *Strategic Challenges to Gender Inequality: The South African Gender Commission*, 2(2) ETHNOGRAPHY 219, 227-228 (2001).

<sup>55</sup> Rashida Manjoo, *Case Study: The Commission of Gender Equality, South Africa*, 14 GRIFFITH LAW REVIEW 268, 271, 276 (2005).

<sup>56</sup> The Framework Agreement of August 13, 2001, calls for a committee composed of members of the Assembly who belong to several ethnic groups, in the following proportions: seven Macedonians, seven Albanians, and five members from among the Turks, Vlachs, Romanians, and two other communities. The Assembly elects the members of the Committee. The Committee considers issues of inter-community relations and makes proposals for their resolution votes of those Representatives claiming to belong to minority communities. Framework Agreement for Macedonia, Articles 69, 77, and 78.

## ***Recommendations***

- When creating a new institution in the text of a peace agreement or implementing legislation that aims to protect minority interests, be clear with the scope of its mandate and structure to prevent future confusion or inefficiencies.

## **Conclusion**

Though each conflict and peace process is unique, these overarching recommendations for incorporating minority protections into peace agreements provide a useful foundation for crafting a more durable peace. Including thoughtful provisions in a peace agreement for the protection of the human rights of minorities, power-sharing, and independent commissions related to cultural, ethnic, or religious minorities builds a stronger foundation for a post-conflict society and contributes to future conflict prevention. As the instances of state practice mentioned previously indicate, peace processes provide rare opportunities to build consensus on more inclusive visions for the future, but could just as easily be manipulated to entrench the drivers of conflict. Parties to a peace process should heed both the challenges and victories for protecting minority rights in peace agreements and adapt best practices to suit their own contextual needs.